

**Labor and Employment Law Alert
February 2018**

**VACATION AND SICK PAY USED TO SUPPLEMENT
WORKERS' COMPENSATION BENEFITS IS NOT
REGULAR COMPENSATION**

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On February 13, 2018, the Massachusetts Supreme Judicial Court rejected PERAC's contention that sick or vacation payments, when used to supplement workers' compensation payments, are "regular compensation" as defined in M.G.L. c. 32, § 1.

Under M.G.L. c. 32, § 1, the term "regular compensation" is defined, in relevant part, as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer."

"Regular compensation" is important when calculating retirement benefits, but as is relevant in this case, it also factors into determining the effective date of an employee's accidental disability retirement. For accidental disability retirement, the member's retirement date is the latest of the following:

- the date the injury was sustained;
- the date six months prior to the filing of the written application for such retirement; or
- the date for which he last received regular compensation for his employment in the public service.

The Massachusetts Supreme Judicial Court ("SJC") case is *Public Employee Retirement Administration Commission v. Contributory Retirement Appeal Board, et. al.*, SJC-12331, 2018 WL 830563 (Feb. 13, 2018), and the underlying facts were as follows: Robert Vernava worked for the town of Swampscott from September 30, 1985 to July 7, 2012. On June 13, 2010, Mr. Vernava suffered a work-related injury and began receiving workers' compensation benefits. To supplement his workers' compensation benefits, Mr. Vernava received two hours per week of sick or vacation pay.

On February 1, 2012, the town of Swampscott filed an application for involuntary accidental disability benefits for Mr. Vernava. On June 28, 2012, Swampscott's retirement board voted to grant Mr. Vernava's application and involuntarily retire him. Mr. Vernava continued receiving workers' compensation benefits and supplemental pay until July 7, 2012.

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When making its analysis of the effective date of Mr. Vernava's retirement, PERAC determined that the effective date of his retirement would be July 7, 2012, as he received "regular compensation" in the form of supplemental pay through such date. Mr. Vernava appealed PERAC's determination to the Division of Administrative Law Appeals ("DALA")—and he prevailed. The DALA Magistrate found that supplemental pay was not "regular compensation." The Magistrate determined that the effective date of Mr. Vernava's retirement was August 1, 2011, as he had not received regular compensation since the date of his injury. August 1st was the date six months prior to the filing of Mr. Vernava's application for accidental disability retirement benefits. In other words, it was the latest permissible retirement date under the statute.

The Magistrate's decision was upheld by the Contributory Retirement Appeal Board. After subsequent appeals, the SJC agreed—holding that supplemental sick and vacation pay does *not* constitute "regular compensation" for purposes of determining an individual's effective date of retirement.

In rejecting PERAC's arguments to the contrary, the SJC highlighted the fact that an employee such as Mr. Vernava, who suffered a work-related injury and is out of work on workers' compensation is "inherently unable to provide services to his [] employer" and that "[a]n attribute of both workers' compensation and supplemental pay is that both are earned by providing services to the employer and both are received while the employee is no longer able to provide those services." That being the case, it was not possible for Mr. Vernava to have been receiving "regular compensation" because the supplemental sick and vacation payments made in conjunction with workers' compensation benefits were not received for services performed.

Moving forward, PERAC will follow this decision when making a determination as to an individual's effective date of retirement in circumstances in which an individual received and/or receives workers' compensation benefits with supplemental vacation and/or sick time payments. PERAC is expected to issue guidance in this regard in the near future.

If you have any questions about this issue, please contact Michelle De Oliveira, Brian Fox, Katherine Hesse or the attorney responsible for your account, or call (617) 479-5000.

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