

**MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA)
POLICY REGARDING COMPENSATION EARNABLE AND PENSIONABLE
COMPENSATION DETERMINATIONS**

**ADOPTED: December 18, 2012
REVIEWED: December 9, 2015
REVIEWED: December 12, 2018
AMENDED: November 3, 2021**

I. PURPOSE

The Board of Retirement of MCERA ("Board") implements this policy to interpret Government Code section 31461 of the County Employees Retirement Law of 1937 defining "compensation earnable" ("Compensation Earnable"), as amended by Assembly Bill 197 (regular session 2011-2012) and new Government Code section 7522.34 of the Public Employees' Pension Reform Act of 2013 ("PEPRA") defining "pensionable compensation" ("Pensionable Compensation"), enacted by Assembly Bill 340 (regular session 2011-2012), effective January 1, 2013. Compensation Earnable applies to all MCERA members who are not "new members" under Government Code 7522.04(f) of PEPRA ("New Members"). Pensionable Compensation applies to MCERA members for their service rendered on or after January 1, 2013 as New Members.

This Policy identifies items of compensation that the Board presently believes are permitted, or required, to be included in, or excluded from, Compensation Earnable and Pensionable Compensation for purposes of the present effective administration of the retirement system and of collecting retirement contributions on those payments and calculating retirement allowances.

If, however, the Board later concludes that it has identified an item herein as either includable or excludable in a manner that is inconsistent with Board policy as determined by a later Board, or with a subsequent determination by the legislature, a court of competent jurisdiction, or other persuasive administrative legal authority such as the California Attorney General, the Board reserves the right to change its prior determination and to make appropriate adjustments both retroactively and prospectively, as this policy is not intended to, and does not, create any vested rights in members to the past, present, or future determinations set forth herein. Where this policy conflicts with any subsequent Board policy, that subsequent Board policy shall prevail unless it is contradicted by then-current statute.

II. POLICY

Compensation Earnable Definition

Government Code section 31461, subdivision (a), describes Compensation Earnable that is to be included in retirement allowance calculations in accordance with *Ventura County Deputy Sheriffs' Assoc. v. Ventura County* (1997) 16 Cal. 4th 940. By actions taken on February and March 1998, the Board identified the items then included in, and excluded from, Compensation Earnable as then determined by the Board. The passage of the statutory changes referenced above and described in more detail below has prompted the Board to change the current policy effective January 1, 2013.

Government Code section 31461, subdivision (b)(2)-(4), excludes from Compensation Earnable the following items, effective January 1, 2013:

- (1) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
- (2) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
- (3) Payments made at the termination of employment, except those payments that do not exceed what is earnable and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

Government Code section 31461, subdivision (b)(1) provides that any compensation determined by the retirement board to have been “paid to enhance a member’s retirement benefit under that system” also is not to be included in Compensation Earnable. Such additional items “may” include:

- (A) “Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period;”
- (B) “Any one-time or ad hoc payment made to a member, but not all similarly situated members in the member’s grade or class;” and
- (C) “Any payment that is made solely due to the termination of the member’s employment but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid.”

Section 31461(c) states that the new exclusions in subdivision (b) are intended to be consistent with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 (“*Salus*”) and *In re Retirement Cases* (2003) 110 Cal.App. 426 (“*In re Retirement*”).

Consistent with *Salus* and *In re Retirement*, the MCERA Board already adopted its Resolution No. 2008/09-04, which provides that MCERA does not include cash outs of accrued leave in excess of that which the member is permitted to both earn and receive in cash during a single twelve-month period in Compensation Earnable, and its Resolution No. 2011/12-04, which provides that MCERA does not include payments made in connection only with separation in Compensation Earnable. The Board also already adopted its Resolution Nos. 2008/09-05 and 2009/10-04, excluding executive bonuses from Compensation Earnable.

On November 29, 2012, the First District Court of Appeal rendered *City of Pleasanton v. Board of Administration of CalPERS*, 211 Cal. App. 4th 522 (2012), concluding that “standby” or “on call” pay is, by definition, for services rendered, or availability, “*outside of . . . normal working hours.*”

As a result of new subdivision (b)(3) of section 31461, which requires that, on and after January 1, 2013, all payments for “additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise” be excluded from compensation earnable, effective on and after that date, MCERA will no longer collect retirement contributions on, and will exclude from retirement calculations, standby pay, administrative response pay, and any form of call-back even if not paid at overtime rates.

As a result of new subdivision (b)(1)(A) of section 31461, which permits in-kind conversions in the final compensation period to be excluded from final compensation, on and after January 1, 2013, effective on and after that date, MCERA will no longer collect retirement contributions on, and will exclude from retirement calculations, in-kind benefits converted to cash, such as waiver for health insurance cash back and 125 plan revision.

For purposes of implementing this Policy, the new rules set forth herein regarding the definition of Compensation Earnable shall apply only to MCERA members who retire from MCERA on and after January 1, 2013, and only then as to the portion of their final average compensation periods that occur on or after the effective date of the new statutory exclusions, January 1, 2013. A chart stating general pay items that are included in, and excluded from, Compensation Earnable by MCERA effective on and after January 1, 2013 is attached hereto as Attachment A. MCERA’s exclusions set forth in Attachment A were upheld, after legal challenge, in *Marin Assn. of Public Employees v. Marin County Employees’ Retirement Assn.* (2016) 2 Cal.App.5th 674. See also, *Alameda County Deputy Sheriff’s Association v. Alameda County Employees’ Retirement Association* (2020) 9 Cal.5th 1032 [upholding constitutionality of statutory changes to compensation earnable definition].

Pensionable Compensation Definition For New Members

The Pensionable Compensation definition applies to the retirement allowances provided to all New Members as defined by Government Code section 7522.04(f).

Government Code section 7522.34(a) defines Pensionable Compensation as “the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.”

Government Code section 7522.34(c) identifies categories of payments that are not included in Pensionable Compensation, which are enumerated as follows:

- (1) Any compensation determined by the board to have been paid to increase a member’s retirement benefit under that system.
- (2) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member and which was converted to and received by the member in the form of a cash payment.
- (3) Any one-time or ad hoc payments made to a member.

- (4) Severance or any other payment that is granted or awarded to a member in connection with or in anticipation of a separation from employment, but is received by the member while employed.
- (5) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, regardless of when reported or paid.
- (6) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
- (7) Any employer-provided allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms.
- (8) Compensation for overtime work, other than as defined in Section 207(k) of Title 29 of the United States Code.
- (9) Employer contributions to deferred compensation or defined contribution plans.
- (10) Any bonus paid in addition to the compensation described in subdivision (a).
- (11) Any other form of compensation a public retirement board determines is inconsistent with the requirements of subdivision (a).
- (12) Any other form of compensation a public retirement board determines should not be pensionable compensation.

As a result of the foregoing mandatory statutory exclusions, as referenced in the parentheticals below, the following pay types will not be included by MCERA in the calculation of Pensionable Compensation, nor will retirement contributions be collected on those payments for New Members:

- (1) Allowances (e.g., clothing, uniform, automobile, housing) (subdiv. (7)).
- (2) In-kind benefits converted to cash (e.g., waiver for health insurance cash back, 125 plan revision) (subdiv. (2)).
- (3) All leave cash outs, regardless of when paid (e.g., annual, sick, floating holiday, personal, comp time) (subdiv. (5)).
- (4) Reimbursements (e.g., tool, meal, boot, cell phone, license) (subdiv. (7)).
- (5) Overtime (including, without limitation, standby and administrative response pay) (subdiv. (8)), unless it is FLSA premium pay for certain safety members as defined by statute.
- (6) Severance pay, regardless of when or how paid (subdiv. (4)).
- (7) Lump sum payment of comp time at promotion (subdiv. (5)).
- (8) Bonuses that are not part of normal monthly rate of pay of the member that also is

paid to similarly situated members for full-time service during normal working hours pursuant to publicly available pay schedules (e.g., special skills bonus; temporary promotion bonus; productivity bonuses; discretionary or temporary special assignment bonuses (subdiv. (10)).

- (9) Employer contributions to deferred compensation or defined contribution plans (subdiv. (9)).
- (10) Payments for additional services rendered outside of normal working hours (call-back, standby and administrative response pay) (subdiv. (6)).
- (11) Payments made to enhance a retirement benefit as determined by the Board of Retirement (subdivs. (11) and (12)).

Special assignment payments or differentials, and payments for possessing specified certificates, certifications or licenses (“Special Compensation”), also will not be included unless the assignment is part of a member’s regularly assigned responsibilities on a matter that is an essential function of the job and is not performed solely during the final average compensation period, and is part of the regular assignment of other members in the same group or class. The amounts must also be (i) paid in cash to similarly situated members of the same group or class of employment; (ii) paid for services rendered on a full-time basis; (iii) paid only for services rendered during normal working hours; and (iv) paid pursuant to publicly available pay schedules.

For clarification, the “publicly available pay schedule” requirement means the Employer must publish publicly the amount of the pay item that is to be included in its employees’ pensionable compensation; identifying a percentage increase in salary, in lieu of a dollar amount, does not constitute a “pay schedule”.

If MCERA determines that any Special Compensation meets the above criteria, then MCERA must make such determination affirmatively, and retirement contributions must be taken on all such payments.

Pay types that will be included in Pensionable Compensation under subdivision (a) are as follows:

Remuneration for services or skills that constitute the member’s normal monthly rate of pay or base pay, that are paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours or for time during which the member is paid for regular hours but is excused from work, and that are documented on publicly available pay schedules.

Those items include (a) Regular salary, including scheduled step increases; (b) FLSA premium pay for law enforcement and fire protection as defined in Section 207(k) of Title 29 of the United States Code.

A chart stating general pay items that are included in, and excluded from, Pensionable Compensation by MCERA is attached hereto as Attachment B.

III. IMPLEMENTATION AND RESPONSIBILITIES OF MCERA AND EMPLOYER PLAN SPONSORS

The Retirement Administrator, with assistance of legal counsel, is responsible for implementing the Board's policy decisions related to Compensation Earnable and Pensionable Compensation. The Retirement Administrator will keep the Retirement Board informed regarding significant ongoing Compensation Earnable or Pensionable Compensation implementation challenges, as appropriate.

Employer plan sponsors ("Employers") are responsible for coding of pay code categories consistent with MCERA policy determinations as set forth in Attachments A and B hereto, and subject to MCERA staff review.

Employers are responsible for notifying MCERA staff regarding the facts and circumstances of any pay items they consider may be an exception to the stated presumption in the accompanying Attachments, for review by the MCERA Retirement Administrator. In addition, MCERA staff will code MCERA systems in a way that flags presumption pay codes for ongoing policy review with each payroll transmittal from employers.

Employers are responsible for notifying MCERA staff of new pay codes for compensation earnable and pensionable compensation review by MCERA staff no later than the time of implementation of the codes. MCERA staff will review employer pay code listings for compliance with established policy as part of staff administrative procedures.

MCERA staff will continue the longstanding current practice that includes a detailed pay item review prior to establishing retirement benefits for retiring MCERA members. Consistent with current practice, matters requiring policy review will be flagged by staff for Retirement Administrator review and determination regarding compensation earnable, or pensionable compensation, as appropriate. MCERA members or employers may appeal a determination by the Retirement Administrator to the Retirement Board, through the administrative appeal process as appropriate, in accordance with MCERA's Procedures for Hearings on Matters Other Than Disability Retirement.

When reviewing items of compensation, MCERA staff will audit pay items to identify those that may have a primary purpose to enhance retirement benefits, involve the manipulation of compensation by members or employers to enhance benefits, receipt of ad hoc payments or any other compensation considered to be inconsistent with the pension reform legislation provisions.

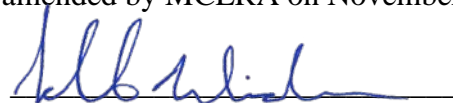
IV. POLICY REVIEW

The Board shall review this Policy at least every three years to ensure that it remains relevant and appropriate. The Policy may be amended at any time by majority vote.

V. RETIREMENT ADMINISTRATOR'S CERTIFICATE

I, Jeff Wickman, the duly appointed Retirement Administrator of the Marin County Employees' Retirement Association, hereby certify that this policy was amended by MCERA on November 3, 2021.

Retirement Administrator



ATTACHMENT A

Marin County Employees' Retirement Association

Effective Date: January 1, 2013

Pay Type	Compensation Earnable (Non-PEPRA Tier Under Govt. Code 31461)
Regular Salary and Other Non-Excluded Payments that are Remuneration for Service or Skills	Yes
Temporary Promotion	Yes
Temporary or Special Assignment	Yes
Differentials, Service or Skill Based (e.g. Assignment, Shift, Emergency, Bilingual)	Yes
FLSA Premium Pay for Regularly Scheduled Work Assignment (Fire and Law Enforcement)	Yes
Holiday Pay	Yes
Advisory Pay, Service or Skill Based	Yes
Educational and Training Incentive (e.g. POST, FTO, CPA)	Yes
Accumulated Leave Used In Lieu of Regular Hours	Yes
Allowances (e.g. Clothing, Uniform, Automobile, Housing)	Yes
In Service Vacation Leave Cash Out (Earned and Payable Each Year)	Yes
In-kind Benefits Converted to Cash (e.g., Waiver for Health Insurance Cash Back, 125 Plan Revision)	No
Payments for Additional Services Rendered Outside of Normal Working Hours (e.g., Standby, Administrative Response, and Call Back, whether overtime or not)	No
Reimbursements (e.g. Tool, Meal, Boot, Cell Phone, License)	No
Overtime, Unless FLSA Premium Pay	No
Severance Payments	No
Leave Cash Outs Paid Only at Termination (e.g. Annual, Sick, Floating Holiday, Personal, Comp Time)	No
Lump Sum Payment of Comp Time At Promotion	No
Payments (Not Remuneration for Service or Skills) paid in a Lump Sum or Other Form	No
Executive Bonuses	No
Employer Contributions to Deferred Compensation or Defined Contribution Plans	No

ATTACHMENT B

Marin County Employees' Retirement Association

Effective Date: January 1, 2013

Pay Type	Pensionable Compensation (PEPRA Tier under GC sec. 7522.34)
Regular Salary, Including Step Increases	Yes
FLSA Premium Pay for Regularly Scheduled Work Assignment (Fire and Law Enforcement)	Yes
Accumulated Leave Used In Lieu of Regular Hours	Yes
Special or Temporary Assignment	No*
Differentials, Service or Skill Based	No*
Holiday Pay	No*
Advisory Pay, Service or Skill Based (if part of regular duties, essential functions of job)	No*
Educational and Training Incentive (if minimum job requirement and essential part of job)	No*
Standby, Administrative Response	No
Allowances (e.g. Clothing, Uniform, Automobile, Housing)	No
In-kind Benefits Converted to Cash (e.g., Waiver for Health Insurance Cash Back, 125 Plan Revision)	No
In Service Vacation Leave Cash Out (Earned and Payable Each Year)	No
Call Back	No
Reimbursements (e.g. Tool, Meal, Boot, Cell Phone, License)	No
Overtime, Unless FLSA Premium Pay	No
Severance Payments	No
Leave Cash Outs Paid Only at Termination (e.g. Annual, Sick, Floating Holiday, Personal, Comp Time)	No
Lump Sum Payment of Comp Time At Promotion	No
Payments (Not remuneration for service or skills) Made in Lump Sum or Other Form	No
Bonuses (unless paid for regular, essential duties to similarly situated members in same group or class)	No
Employer Contributions to Deferred Compensation or Defined Contribution Plans	No
Payments for Additional Services Rendered Outside of Normal Working Hours	No
Payments Made to Enhance a Retirement Benefit as Determined by Board of Retirement	No

*Subject to further review under Assembly Bill 340 of 2011-12 regular session; determination depends on breadth of subdivision (a), and limitations of subdivisions (c)(6), (8) and (10). To the extent this pay item may potentially be included, it must meet the following requirements: (i) paid in cash to similarly situated members of the same group or class of employment; thus a minimum job requirement and essential function of the job; (ii) paid for services rendered on a full-time basis; (iii) paid only for services rendered during normal working hours; and (iv) paid pursuant to publicly available pay schedules.