



To: Chief School Administrators
College and University Presidents
District Contacts
Employer Secure Area Contacts

Administrative Bulletin

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Considerations for Employment Contract Provisions and Agreements

Participating employers exploring ways to reduce costs in the coming year(s) have contacted us with questions about the reportability of such provisions, for pension purposes, in employment contracts and collective bargaining agreements (“CBAs”). The purpose of this bulletin is to reiterate the System’s position regarding the treatment of earnings paid pursuant to such provisions.

Payroll Deferral - Lag Payments

One method some employers have used to reduce expenditures in the near term is withholding a portion of a member’s salary earned during one school year and deferring payment of those earnings to a subsequent school year, or until the member retires or otherwise ceases employment with the district.

In this scenario, payments are pensionable for the school year in which earned, as opposed to the year in which they are or will be paid. However, employer contributions on the earnings will be billed in the school year the payment is posted.

For employer reporting purposes, salary earned in one school year but paid in a subsequent school year should be reported to the System **in the year of payment** as “Retro/Prior Yr Earnings.”

Salary Freezes - Salary Givebacks - Increased Health Insurance Costs

In arrangements such as the following, the payments are not considered employment compensation and they are not pensionable or billable to the district:

- Freezing all or a portion of their employees’ contractual salary increases while allowing increases for members who are retiring.
- Providing salary increases of which all or a portion of the increases are reduced through voluntary or mandatory donations returned or donated back to the district.
- Increasing the employee-paid costs of health insurance or creating surcharges whereby the employee’s health insurance payments to the district exceed the cost of coverage, with the excess retained by the district.

(continued)

Selective Bargaining - MOAs

The System also considers as non-pensionable any payments resulting from provisions that are not in accordance with or outside of the CBA, allowing some members to receive preferential treatment (e.g., selective bargaining), or otherwise manipulating the compensation received by some members. Memorandums of Agreement (MOAs) are reviewed by the System, and salary or service provided by such agreements may not be considered reportable compensation by the System and therefore may not be used in benefit calculations or be billable to the district.

General Rules

In general, CBAs entered into by NYSTRS participating employers cannot be negotiated or modified in ways which could artificially inflate an employee's final average salary (FAS) as such payments are inconsistent with the System's statutory responsibility to ensure the actuarial soundness of the pension fund. The System may determine payments are not reportable in any or all of the following cases:

- When negotiated or made on the eve of retirement or FAS years.
- When not reasonably representative of career earnings.
- When resignation, retirement, or other forms of separation from employment are required as a condition, and/or within a certain window of time.
- When the terms and conditions restrict coverage to only a select group of retirement eligible employees.
- When paid in other circumstances indicating an attempt to inflate a member's final average salary.
- When the employee is denied full use of the salary paid to them, such as when the employee is expected to return a portion of the payment to the employer.

Administrative Bulletin [2008-6](#) (*Court Decisions Upholding the Retirement System's Three-Year Final Average Salary Determinations*), accessible from the Employers Page at [NYSTRS.org](#), cites several rulings supporting the System's position that compensation available only to teachers on the eve of retirement is not reportable compensation. More recent court decisions have reaffirmed this position.

Please keep in mind the System is not bound by any employer's characterization of compensation or by any agreement purporting to make certain monies pensionable. Rather, the System is duty bound to carefully review reported earnings and make its own reasonable determination of a payment's character insofar as its includability for pension purposes.

NYSTRS is obligated by law to vigilantly guard against attempts to artificially inflate members' final average salaries, as well as practices or arrangements which have that effect. Such provisions in any modified or new collective bargaining agreement(s) have no effect on the employer's duty to report and provide accurate information to the System as required by law or the System's regulations, and in conformity with System policy.

As a reminder, Section 5015.3 of the System's Rules and Regulations reads in part:

The responsibility of the employer to make reports and provide information as required by the System is nondelegable and may not be made subject to any agreement with a member, member's representative or third party. Any agreement by an employer with any member, member's representative or third party to make a report or provide information to the System in a particular manner or to withhold information which is required to be reported to the System is contrary to public policy and shall be null and void and of no effect.

Thank you for your cooperation in maintaining the System's integrity. Please contact us at (800) 348-7298, Ext. 6220 if you have any questions in this regard.