

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

I. Purpose

The purpose of this OAP is to describe the procedure for determining whether an element of pay is pensionable and can be included as Compensation Earnable and/or Pensionable Compensation for inclusion in the Final Average Salary that is used to calculate a member's pension benefit.

II. Authority

This OAP is established pursuant to OCERS Board Policies: Compensation Earnable Policy, Pensionable Compensation Policy, Retirement Enhancement Review Policy and Pay Item Review Policy.

OCERS Board Resolution 98-001 and OCERS Compensation Earnable Policy affirm the OCERS interpretation of the term Compensation Earnable as defined in California Government Code Section 31461.

The Public Employees' Pension Reform Act of 2012 (PEPRA) and AB 197 amended Section 31461 and created the term Pensionable Compensation for members hired on or after January 1, 2013. OCERS Pensionable Compensation Policy explains OCERS interpretation of the term Pensionable Compensation as defined in California Government Code Section 7522.34.

A number of lawsuits were filed shortly after PEPRA became effective. One of these lawsuits was appealed to the Supreme Court, and on July 30, 2020 resulted in a decision of the Court upholding as constitutional AB 197 and PEPRA, including the amendments to Section 31461. (*Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* 9 Cal.5th1032; the Alameda Decision.) The Board has amended this OAP to reflect the holding of the Court in the Alameda Decision.

California Government Code Section 31542 requires the OCERS Board to establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. In keeping with this requirement, the Board adopted the Retirement Enhancement Review Policy and the Pay Item Review Policy, which include policy guidelines for assessing compensation included in the calculation of the member's final average salary to ensure that an element of pay was not paid to enhance a member's retirement benefit.

III. Definitions

Following are definitions of terms that are used throughout this OAP.

Compensation Earnable: See Section V.

Final Average Salary: One of the factors used to calculate a member's monthly retirement allowance. It is a measure of a member's level of earnings based on the member's average salary for a specified period of time (e.g. one-year of 12 consecutive months or three-years of 36 consecutive months). It includes base salary and may also include other pay items that the OCERS Board of Retirement has defined as Compensation Earnable or Pensionable Compensation.

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

Legacy member: Member hired before January 1, 2013.

Non-pensionable: Pay item is not included in Final Average Salary and not subject to pension contributions; no pension contributions are collected from the employee or employer.

Normal Working Hours: Hours that: (i) are required to be worked as part of the employee's regular duties; (ii) are ordinarily worked during the period in question by all other members in same grade/class/rate of pay as the employee; and (iii) are not and cannot be served voluntarily by the employee. "Ordinarily worked" does not include time served on a temporary or emergency basis. Normal Working Hours will be established by the employer, but must meet OCERS and CERR requirements. OCERS will rely upon official County or District approved documentation establishing grades/classes/rates of pay.

Pay Item: Element of compensation.

Pensionable Compensation: See Section V.

Pensionable: Pay item is included in the Final Average Salary and subject to pension contributions; pension contributions are collected from the employee and employer.

PEPRA member: Member hired on or after January 1, 2013.

Publicly Available Pay Schedule: A document that:

- a) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;
- b) Identifies the position title for every employee position;
- c) Shows the pay rate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
- d) Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- e) Does not reference an unavailable document in lieu of disclosing pay rate.

IV. Limitations

This administrative procedure shall be construed consistently with the requirements of the California Government Code Sections 31460, 31461 and 31462 (Compensation Earnable), 7522.32 and 7522.34 (Pensionable Compensation), 31542, and the Ventura Decision, the Alameda Decision, and other interpretations issued thereunder.

V. Compensation Earnable and Pensionable Compensation

Compensation Earnable

Compensation Earnable applies to Legacy members.

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

ITEMS INCLUDED IN COMPENSATION EARNABLE

As set out in Resolution 98-001 and subdivisions (a) and (b) of Section 31461, and further clarified in OCERS' Compensation Earnable Policy, elements included in Compensation Earnable are remuneration that is (i) earned and receivable in cash (under the applicable MOU) by the retiring member, (ii) during the final compensation period (as defined by Sections 31462 and 31482.1 of the Government Code; hereafter Final Compensation Period), and (iii) for services performed during Normal Working Hours including but not limited to the following items of compensation, and others substantially similar to them:

- Base Salary and Wages
- Bilingual Premium Pay
- Educational Incentive ("POST") Pay
- Aircraft Rescue Firefighting
- Paramedic Pay
- Motorcycle Bonus
- Emergency Dispatch Pay
- Field Training Officer Bonus
- Shift Differential Pay
- Confined Space Pay
- Longevity Incentive
- Automobile Allowance, if paid in cash; and for members whose Final Compensation period includes time before January 1, 2001, also to the extent that the automobile was provided for personal use and declared as income
- Uniform Allowance
- Uniform Maintenance Allowance
- Payoffs of Vacation, Sick and Holiday leave to the extent (i) was earned in each 12-month period of the Final Compensation Period (pro-rated on a monthly basis); (ii) was not taken as time off; and (iii) was permitted to be cashed out during each 12-month period of the Final Compensation Period (prorated on a monthly basis) under the applicable MOU regardless of when actually paid or cashed out
- Employee Contributions to Deferred Compensation Plan (already included in Base Salary and Wages, above)
- "Mandatory or Scheduled Overtime" (including pay items such as On-Call, and Standby) provided that the pay is for services rendered during the employee's Normal Working Hours.

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

- Compensatory Time (excluding “True Overtime” in excess of minimum required reserve)
- "Madera" Pay (see, *Madera Police Officers Association v. City Of Madera* 36 Cal.3d 403)
- Additional Compensation for Scheduled Meal Periods
- Flexible Benefits (“Cafeteria Plan”) paid in cash to members retiring before January 1, 1991

ITEMS EXCLUDED FROM COMPENSATION EARNABLE

As further set out in Resolution 98-001 and subdivisions (a) and (b) of Section 31461, and clarified in the Compensation Earnable Policy, remuneration or other value to the employee that (i) is neither earned nor payable in cash to the employee during the final compensation period; and (ii) is not for services rendered during the employee’s Normal Working Hours will be excluded from Compensation Earnable, including but not limited to the following items, and others substantially similar to them:

- “True Overtime”, including but not limited to On-Call, Standby and similar pay, for additional services rendered outside of Normal Working Hours, whether paid in a lump sum or otherwise.
- Employer Contributions for Deferred Compensation plan or to Retirement System
- Employer “pick up” of Employee Contributions to Retirement System
- Payoffs or cash outs of Vacation and Sick Leave and Holiday Pay, to the extent neither earned nor permitted to be cashed-out under the applicable MOU, during each 12-month period of the Final Compensation Period, regardless of when actually cashed out.
- Flexible Benefits (“Cafeteria Plan”) provided in-kind
- Flexible Benefits paid in cash to the extent paid to members retiring on or after January 1, 1991
- Terminal (“Final”) Pay, unless included in Compensation Earnable under the section above
- Expense Reimbursements
- In-Kind Advantages (e.g. food, lodging, board, laundry, fuel)
- Fees, Licenses, Memberships provided to member by employers
- Automobile Allowance, if the automobile is provided for personal use and the allowance is not paid in cash, whether or not declared as income, for members whose Final Compensation periods **do not** include time before January 1, 2001.

Pensionable Compensation

Pensionable Compensation applies to PEPRA members.

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

ITEMS INCLUDED IN PENSIONABLE COMPENSATION

For PEPPRA members, Pensionable Compensation means (i) the normal monthly rate of pay or base pay of the member; (ii) paid in cash; (iii) to similarly situated members of the same group or class of employment; (iv) for services rendered on a full-time basis; (v) during Normal Working Hours; pursuant to Publicly Available Pay Schedules; and (vi) subject to limitations set forth below.

Pensionable Compensation includes the following items of compensation:

Base Salary and Wages, (which includes any employee contributions to deferred compensation plans) and additional compensation for scheduled meal periods, plus the following skill-based or shift-based premium pay categories, and others substantially similar to them:

- Bilingual Pay
- Educational Pay
- Aircraft Rescue Firefighting Pay
- Paramedic Pay
- Motorcycle Pay
- Emergency Dispatch Pay
- Field Training Officer Pay
- Shift Differential Pay
- Confined Space Pay

ITEMS EXCLUDED FROM PENSIONABLE COMPENSATION

As described in OCERS Board Policy Pensionable Compensation, Pensionable Compensation does not include items explicitly excluded from Pensionable Compensation under Government Code Section 7522.34, including the following items and others substantially similar to them:

- Any item of compensation determined by the Board (i) to have been paid in order to increase a member's retirement benefit (pension spiking) or (ii) to be inconsistent with the requirements of the Pensionable Compensation Policy.
- Overtime other than as defined in Section 207(k) of the Title 29 of the United States Code
- Payments for additional services rendered outside of Normal Working Hours, whether paid in a lump sum or otherwise
- Employer Contribution to deferred compensation plan or retirement system
- Flexible benefits ("Cafeteria Plan") provided in-kind or paid in cash
- Automobile, uniform or other allowances

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

- 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.
- Expense reimbursements and in-kind advantages (e.g. food, lodging, board, laundry, fuel)
- Fees, licenses, or memberships provided to or for a member by employer
- Any bonus paid in addition to the compensation defined as Pensionable Compensation above
- Any ad hoc or one-time pay of any sort including one-time longevity pay
- 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.
- 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.

VI. Process

As pay items are requested, each item must be evaluated by OCERS to determine whether it is Compensation Earnable and/or Pensionable Compensation. Employers are required to submit a request for a new pay item or changes to a pay item for OCERS review and approval in compliance with the Pay Item Request and Approval Procedures for Employers.

The following describes the process of analyzing and determining if a pay item is Compensation Earnable and/or Pensionable Compensation.

1. Upon receiving a pay item request, OCERS staff reviews and analyses the following:
 - a. Pay item description;
 - b. Relevant MOU/contract/side letter or other employer document that establishes the terms or requirements of the pay item;
 - c. Specific provision(s)/section(s) of the MOU/contract, and
 - d. Any other relevant policy or governing code.

Staff will ask the employer for clarification if the descriptions of the pay item or requirements are unclear.

2. OCERS staff reviews the information provided by the employer to determine:
 - a. What job classifications are eligible to receive the pay item
 - b. Whether all members in the same grade/class are eligible for the payment

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

- c. How the pay item is calculated – fixed amount or % of pay
 - d. Type of pay – allowance, reimbursement, bonus, cash-out, etc.
 - e. Frequency of payment – recurring, ad-hoc, one time
 - f. If payment is for work performed during Normal Working Hours
3. Then the following criteria and guidelines are applied to determine if the pay item qualifies for inclusion in Compensation Earnable and/or Pensionable Compensation:

For Legacy members, if the answer to questions 1-4 below is “Yes” and “NO” to questions 5 and 6, the pay item is Compensation Earnable. If the answers to questions 1-4 are “NO” and “Yes” to questions 5 and 6, the pay item is **not** Compensation Earnable.

COMPENSATION EARNABLE CRITERIA – PER GC SECTION 31461		Qualifier	YES	NO	N/A
1.	Compensation at same pay rate as persons in same grade/class	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	
2.	One-time or ad hoc payment paid to all similarly situated	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	Leave/vacation payout earned & payable in 12-month period	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Terminal pay earned & payable in 12-month period	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Compensation previously paid in-kind & now in cash	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Payment for services rendered outside Normal Working Hours	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Compensation Earnable?					

For PEPRAs members, Pensionable Compensation must meet the following qualifying criteria pursuant to Government Code Section 7522.34. If the answers are “YES” to questions 1-4 below, the pay item is determined Pensionable Compensation. If the answer is “NO” to questions 1-4 and/or “YES” to questions 5-10, the pay item is **not** Pensionable Compensation.

PENSIONABLE COMPENSATION CRITERIA – PER GC SECTION 7522.34(a)		Qualifier	YES	NO	N/A
1.	Normal rate of pay or base pay	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Payable to similarly situated	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

PENSIONABLE COMPENSATION CRITERIA – PER GC SECTION 7522.34(a)		<u>Qualifier</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>
3.	Earned for Normal Working Hours	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	In public pay schedule	<u>YES</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Allowance, reimbursement or previously paid in-kind	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Bonus, one-time or ad-hoc	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Severance or terminal pay	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.	Overtime other than Section 207(k) time	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.	Payment for any unused leave	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.	Employer contribution to deferred compensation	<u>NO</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pensionable Compensation?					

4. If the pay item is determined to be Compensation Earnable and/or Pensionable Compensation it will be entered into the pension system as pensionable.¹ OCERS will collect retirement contributions on the approved pay item and include it in retirement benefit calculations.

If the pay item is not Compensation Earnable or Pensionable Compensation, it will be entered into the pension system as non-pensionable. OCERS will not collect retirement contributions on the pay item and will not include it in retirement benefit calculation.

5. After completing its assessment, OCERS staff will notify the employer of its determination. The employer will implement the pay code for the new pay item with the approved pay item status.

¹ Exceptions may apply. For example, payoff of compensatory time for holidays, sick leave, vacation, and annual leave may be Compensation Earnable but is reported as non-pensionable for salary reporting purposes. The payoff amount may be considered at the time of retirement.



Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

OCERS will add the approved pay item to the master list of approved pay codes. A listing of approved pay items may be found on the Employer Section page of the OCERS website.

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

Reference Guide to Compensation Earnable for Legacy Members and Pensionable Compensation for PEPRA Members

	Compensation Earnable Legacy (GC 31461)	Pensionable Compensation PEPRA (GC 7522.34)
Base Salary and Wages	Yes	Yes
Bilingual Premium Pay	Yes	Yes
Educational Incentive (“POST”) Pay	Yes	Yes
Aircraft Rescue Firefighting	Yes	Yes
Paramedic Pay	Yes	Yes
Motorcycle Pay	Yes	Yes
Emergency Dispatch Pay	Yes	Yes
Field Training Officer Bonus	Yes	Yes
Shift Differential Pay	Yes	Yes
Confined Space Pay	Yes	Yes
Longevity Incentive – that is not one time or ad hoc	Yes	Yes
Employee Contributions to Deferred Compensation Plan	Yes	Yes
Overtime (i) that is required to be worked; and (ii) that is ordinarily worked by all in the same grade/class; and (iii) not voluntary (Normal Working Hours)	Yes	Only Yes, if Section 207k time
“Madera” Pay and additional compensation for scheduled meal periods	Yes	Yes
Automobile Allowance, if paid in cash; and, for members whose “final compensation” period (as defined under Sections 31462 and 31482.1 of the Government Code) includes time before January 1, 2001, also to the extent automobile was provided for personal use and declared as income	Yes	No
Uniform Allowance and Uniform Maintenance Allowance	Yes	No

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

	Compensation Earnable Legacy (GC 31461)	Pensionable Compensation PEPRA (GC 7522.34)
Payoffs and cash outs of Vacation and Sick Leave and Holiday provided that the time (1) was earned (pro-rated on a monthly basis); (ii) was not taken as time off; and (iii) was permitted to be cashed-out (pro-rated on a monthly basis) under the applicable MOU regardless of when actually paid or cashed-out	Yes	No
Compensatory Time (excluding “True-Overtime” in excess of minimum required reserve)	Yes	No
Any compensation determined by the Board to have been paid to increase a member’s retirement benefit	No	No
True Overtime (amounts paid for working outside Normal Working Hours)	No	No
Payments for additional services rendered outside of Normal Working Hours, whether paid in a lump sum or otherwise	No	No
Employer contributions for deferred compensation plan or to retirement system	No	No
Employer “pick up” of employee contributions to retirement system	No	No
Payoffs of vacation and sick leave and holiday pay, to the extent neither earned nor permitted to be cashed-out under the applicable MOU, regardless of when actually cashed out.	No	No
Flexible benefits (“Cafeteria Plan”) provided in-kind	No	No
Flexible benefits paid in cash to the extent paid to members retiring on or after January 1, 1991	No	No
Terminal (“Final”) pay in excess of what is earned in 12-month period	No	No
Expense reimbursements	No	No
In-kind advantages (e.g. food, lodging, board, laundry, fuel)	No	No
Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a	No	No

Compensation Earnable and Pensionable Compensation Analysis & Determination Procedure

	Compensation Earnable Legacy (GC 31461)	Pensionable Compensation PEPRA (GC 7522.34)
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		
Fees, licenses, memberships provided to member by employers	No	No
Automobile allowance to the extent automobile is provided for personal use and not paid in cash, whether or not declared as income, for members whose “final compensation” periods (as defined under Sections 31462 and 31482.1 of the Government Code) do not include time before January 1, 2001.	No	No
Any ad hoc or one-time pay of any sort including one-time longevity pay	Yes - if payment made to all similarly situated members in the member’s grade/class. No – if not paid to all similarly situated members in the member’s grade/class.	No
Any bonus paid in addition to normal monthly rate of pay or base pay	Yes - if payment made to all similarly situated members in the member’s grade/class.	No