



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (December 2017) (Implements RCW 34.05.360)

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STATE OF WASHINGTON
FILED

DATE: December 01, 2020

TIME: 10:07 AM

WSR 20-24-109

Agency: Department of Retirement Systems

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: To clarify whether certain payments to LEOFF Plan 2 members are considered basic salary for the purpose of calculating retirement benefits, in accordance with RCW 41.26.030 (4)(b).

Citation of rules affected by this order:

New:

Repealed:

Amended: WAC 415-104-360, 415-104-370, and 415-104-401

Suspended:

Statutory authority for adoption: RCW 41.50.050

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 20-21-049 on October 13, 2020 (date).

Describe any changes other than editing from proposed to adopted version: No changes, the text being adopted is identical to the text as proposed.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

Web site:

Other:

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted on the agency's own initiative:

New	___	Amended	<u>3</u>	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	<u>3</u>	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	___	Amended	___	Repealed	___

Date Adopted: December 1, 2020

Name: Tracy Guerin

Title: Director

Signature:



AMENDATORY SECTION (Amending WSR 97-01-016, filed 12/6/96, effective 1/6/97)

WAC 415-104-360 How is basic salary for LEOFF Plan ((H)) 2 determined? (1) **What payments are included in LEOFF Plan ((H)) 2 basic salary?** Other than the specific exclusions listed in WAC 415-104-397 and 415-104-401, a payment that is a salary or wage earned during a calendar month for personal services rendered by a member to an employer qualifies as LEOFF Plan ((H)) 2 basic salary.

(a) Certain payments that are not for personal services rendered also qualify if there is a specific statutory provision identifying those payments as LEOFF Plan ((H)) 2 basic salary. See WAC 415-104-373.

(b) Specific types of payments that qualify as LEOFF Plan ((H)) 2 basic salary include, but are not limited to, the payments described in WAC 415-104-363(1) and 415-104-365 through 415-104-379.

(c) Other payments not specifically listed qualify as basic salary for LEOFF Plan ((H)) 2 only if those payments are a salary or wage for services rendered.

(2) **Basic salary is earned when the service is rendered, rather than when payment is made.**

Example: At the end of a month, a firefighter is paid regular compensation for June, plus overtime compensation for May. When the payment is reported to the department, the payment must be properly distributed between what was earned in May and what was earned in June.

(3) **Salary characterizations are based upon the nature of the payment.** Whether a payment is basic salary depends upon whether the payment is earned as a salary or wage for services rendered. The name given to the payment is not controlling. The department determines whether a payment is basic salary by considering:

(a) What the payment is for; and

(b) Whether the reason for the payment brings it within the statutory definition of basic salary.

AMENDATORY SECTION (Amending WSR 97-01-016, filed 12/6/96, effective 1/6/97)

WAC 415-104-370 Overtime is included in LEOFF Plan ((H)) 2 basic salary. Overtime, additional pay earned for working time in excess of regularly scheduled shift(s), is a salary or wage for services rendered. Overtime payments are considered part of basic salary for LEOFF Plan ((H)) 2. Overtime includes, but is not limited to:

(1) **Additional pay for working on a holiday.** If a member receives an extra payment (~~because he or she worked~~) for working on a scheduled holiday, the payment is overtime. The employer may make the additional payment when the holiday occurs or in a lump sum at some other time. In either case, the payment is considered to be basic salary for LEOFF Plan ((H)) 2;

Examples: A firefighter works on Christmas day. As compensation for working on a holiday, ~~((she))~~ the firefighter is given the option of taking some other day off with pay or ~~((ef))~~ receiving an extra day's pay. If ~~((she))~~ the firefighter opts for the extra day of pay, this payment is overtime and is LEOFF Plan ~~((II))~~ 2 basic salary. If ~~((she))~~ the firefighter opts to take a day off instead, this is paid leave ~~((and))~~ that qualifies as LEOFF Plan ~~((II))~~ 2 basic salary.

Some employers create holiday leave banks for these employees, and it is considered a regular workday if an employee works on the holiday. Later, the employee may use hours from the holiday leave bank to take a day off and/or cash out all or some of the hours in the future. These cashed out days are reportable if the accrued leave was associated with state or federal holidays.

(2) **Callback pay**, which is a special rate of pay some employers provide members for being called back to work after the end of the member's regular shift;

(3) **Court pay**, which is an additional payment for appearing in court or performing other duties outside of a member's regularly scheduled shift.

(4) **Compensatory time (comp time)**, is paid time off given to an employee instead of overtime pay in compensation for extra hours of work. However, if the employee later receives this leave as a paid cash out, that payment is for overtime previously worked and therefore is basic salary. Basic salary is earned when the service is rendered, rather than when the payment is made. If the comp time is used as leave, it is reported as leave when used.

Example: An employee works eight additional hours in March and receives twelve hours of comp time. The employer has a policy that all unused comp time must be paid out at the end of the fiscal year in June. When this cash out is paid to the employee, the compensation and eight hours were earned in March and should be reported as such. If the comp time is used as leave, it is reported as leave whenever it is used.

AMENDATORY SECTION (Amending WSR 97-01-016, filed 12/6/96, effective 1/6/97)

WAC 415-104-401 Cash outs of accrued leave or other forms of severance pay are not LEOFF Plan ~~((II))~~ 2 basic salary. (1) A cash out from an employer for unused accrued leave ~~((7))~~ is a deferred salary or wage for services previously rendered. However, the payment is not basic salary because it is specifically excluded from the definition of basic salary for LEOFF Plan 2 in RCW 41.26.030 ~~((13))~~ ~~((b))~~).

Example 1: "Kelly" days reduce the number of hours an employee works and are commonly used to minimize the need to pay overtime. A firefighter may accrue eleven "Kelly" days based on the shift schedule of the employee. If used as leave and paid at the normal rate of pay, these are basic salary. However, a cash out of this leave is excluded from the definition of basic salary.

Example 2: A police officer may receive a personal or "floating" holiday each year. If used as leave and paid at the normal rate of pay, this holiday pay is basic salary. However, a cash out of this leave is excluded from the definition of basic salary.

Example 3: An administrator may receive a monthly accrual of "executive leave" in lieu of additional salary, in recognition of additional hours of public service such as community meetings, council meetings, and major events. However, a cash out of this leave is excluded from the definition of basic salary.

(2) **Other forms of severance pay are not basic salary.** Any form of severance payment received from an employer upon termination((7)) is not included as basic salary in LEOFF Plan ((11)) 2 because it is excluded from the statutory definition of basic salary.