

TITLE 34. PUBLIC FINANCE
PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS
CHAPTER 25. MEMBERSHIP CREDIT
SUBCHAPTER B. COMPENSATION

34 TAC §25.21

The Teacher Retirement System of Texas (TRS) proposes to amend §25.21, relating to Compensation Subject to Deposit and Credit, under Subchapter B (relating to Compensation) of Chapter 25 in Part 3 of Title 34 of the Texas Administrative Code.

BACKGROUND AND PURPOSE

TRS is proposing to amend §25.21 in order to conform with legislation passed during the regular session of the 89th Legislature. Specifically, House Bill 2 (HB 2) amended Government Code §822.201 to provide that any increased compensation paid to an employee by a school district using funds received by the district from the teacher retention allotment (TRA) or support staff retention allotment (SSRA) is creditable compensation. HB 2 added these allotments to the Education Code to provide compensation increases for classroom teachers and other employees. In addition, HB 2 amended Section 822.201 to ensure that regardless of how these increases are distributed to teachers and other employees, the increases would qualify as creditable compensation for the purpose of TRS reporting. Based on these changes, TRS proposes to amend §25.21 to similarly provide that any compensation paid by a school district to an employee from the TRA or SSRA is creditable compensation.

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years proposed amended §25.21 will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed amended rule.

PUBLIC COST/BENEFIT

For each year of the first five years proposed amended §25.21 will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting proposed amended §25.21 will be that the rule will conform with recent statutory changes under HB 2 as discussed above.

Mr. Green has also determined that the public will incur no new costs as a result of proposed amended §25.21.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of proposed amended §25.21. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of proposed amended §25.21. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed amended rule is in effect, proposed amended §25.21 will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not create a new regulation; will not repeal or limit an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

Proposed amended §25.21 will expand the scope of the rule but only to the extent necessary for the rule to conform with statute.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by proposed amended §25.21, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to proposed amended §25.21 because it does not impose a cost on regulated persons.

COMMENTS

TRS requests written comments regarding the proposed amended rule. The comments may include information related to the costs, benefits, or effects of the proposed amended rule, including any applicable data, research, or analysis, from any person required to comply with the proposed amended rule or any other interested person.

Comments and information regarding the cost, benefit, and effect of the rule may be submitted in writing to Brian Guthrie, TRS Executive Director, PO Box 149676, Austin, Texas 78714-0185. Written comments and cost/benefit information must be received by TRS no later than 30 days after publication of this notice in the *Texas Register*.

STATUTORY AUTHORITY

Proposed amended §25.21 is proposed under the authority of Section 1.09 of House Bill 2, 89th Legislature, Regular Session; Government Code § 822.201, which provides that increased compensation paid to an employee by a school district using funds received by the district under the teacher retention allotment under Section 48.158, Education Code or support staff retention allotment under Section 48.1581, Education Code qualifies as “salary and wages” for TRS purposes and is, therefore, subject to deposit and credit by TRS; and Government Code §825.102, which authorizes the board of trustees to adopt rules for administration of the funds of the retirement system and eligibility for membership.

CROSS-REFERENCE TO STATUTE

Proposed amended §25.21 affects the following statutes: Government Code §822.201, relating to member compensation.

§25.21. Compensation Subject to Deposit and Credit

(a) The contributions required from a member to the Teacher Retirement System of Texas are generally based upon the member's annual compensation. Benefits paid by the retirement system are also generally based in whole or in part upon the annual compensation credited to a member for certain school years. A member's annual compensation for any particular school year has the meaning given by the law and rules applicable for that year. Beginning with the 1981-1982 school year, and for school years thereafter, annual compensation consists of the salary and wages that are paid or payable to a member for employment which is eligible for membership in the retirement system during that school year.

(b) Some payments made by an employer to a member are not salary or wages, even though the payments may be otherwise considered as compensation under the employment contract or federal tax laws. In general salary and wages creditable and subject to deposit are those types of monetary compensation that are recurring base pay for periods of employment and that:

(1) are earned or accrue proportionally as the work is performed, so that a member terminating employment between pay periods is entitled to a proportional amount of the compensation based on either length of employment or amount of work performed;

(2) are paid or payable at fixed intervals, generally at the end of each pay period; and

(3) are not specifically excluded under subsection (d) of this section.

(c) The following types of monetary compensation are to be included in annual compensation:

(1) amounts deducted from regular pay for the state-deferred compensation program, for a tax-sheltered annuity, or for a deferred compensation arrangement qualifying under the United States Internal Revenue Code, §401(k);

(2) normal payroll deductions which are not tax-exempt or tax-deferred;

(3) additional compensation paid for additional duties, for longevity, for overtime worked as required by law, or for service in a particular location or specialty the employer determines requires additional compensation compared to other employees of that employer, provided that these payments clearly meet the requirements of subsection (b) of this section;

(4) delayed payments of lump-sum amounts which by law or contract should have been paid at fixed intervals and which otherwise meet the requirements of subsection (b) of this section provided the amounts are credited to the payroll period in which they were earned;

(5) amounts withheld from regular pay under a cafeteria plan as provided by §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(6) performance pay provided it meets the requirements of §822.201(b)(4), Government Code and §25.24 of this title (relating to Performance Pay);

(7) compensation received under the relevant parts of the educator excellence awards program under Subchapter O, Chapter 21, Education Code, or a mentoring program under §21.458, Education Code, that authorize compensation for service, and compensation earned under the awards for student achievement program under Subchapter N of Chapter 21, Education Code, prior to the repeal of statutory provisions authorizing that program;

(8) a merit salary increase made under §51.962, Education Code;

(9) amounts deducted from regular pay for a qualified transportation benefit under §659.202, Government Code;

(10) compensation designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code;

(11) workers' compensation paid as temporary wage replacement pay and reported or verified to TRS and with member contributions paid on the amount of workers' compensation, by the end of the school year following the year in which it was paid. Workers' compensation paid as temporary wage replacement pay and not reported or verified to TRS with member contributions paid on the workers' compensation in the time period provided may be verified and purchased as provided in §25.45 of this title (relating to Verification of Unreported Compensation or Service) and §25.43 of this title (relating to Cost for Unreported Service or Compensation) no later than the end of the fifth year following the school year in which it may be reported or verified under this paragraph; and

(12) increased compensation paid by a school district using funds received by the district under:

(A) the teacher incentive allotment under §48.112, Education Code;

(B) the teacher retention allotment under §48.158, Education Code; or

(C) the support staff retention allotment under §48.1581.

(d) The following are excluded from annual compensation:

(1) allowances, including housing, car, cell phone, and expense allowances;

(2) reimbursements for expenses;

(3) payments for accrued compensatory time for overtime worked or for accrued sick leave or vacation, except that continued payments of normal compensation when vacation, sick, administrative, or emergency leave or compensatory time is actually taken by an employee will be included in annual compensation to the extent otherwise permitted by this section;

(4) benefits, except as provided in subsection (c)(1) of this section, which either are not subject to federal income tax or which will be subject to federal income tax in a future year;

(5) bonus and incentive payments, including signing or retention bonuses that are offered to entice a person to enter into an employment arrangement or to stay for a period of time in an employment arrangement, whether paid under Subchapter O, Chapter 21, the Education Code, or other authority, unless state law expressly provides that a type of bonus or incentive payment is to be considered TRS-creditable compensation;

(6) employer payments for fringe benefits, including direct cash payments in lieu of fringe benefits, except as provided in §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(7) payments, except as provided in subsection (c)(1), (2), (5), and (9) of this section, made to third parties for the benefit of a member;

(8) payments for work as an independent contractor or consultant;

(9) all nonmonetary compensation;

(10) active employee health coverage or compensation supplementation or any other amount received by an employee under former Article 3.50-8, Insurance Code; former Chapter 1580, Insurance Code; Subchapter D, Chapter 22, Education Code, as that subchapter existed on January 1, 2006; or Rider 9, page III-39, Chapter 1330, Acts of the 78th Legislature, Regular Session, 2003 (the General Appropriations Act), regardless of whether the employee receives the amount in cash, uses it for payment of health care coverage, or uses it for any other option available by law;

(11) any other fringe benefit;

(12) payments that an employer intentionally does not include in salary and wages because they are not expected to be permanently recurring in each pay period of employment or because they are not considered base pay and that, for the protection of the actuarial soundness of the retirement system, the type of payment should not be included in the calculation of a lifetime retirement benefit intended to replace a percentage of the member's base pay at retirement;

(13) payments for terminating employment or paid as an incentive to terminate employment. Examples of such payments include payments for contract buy-outs, amounts paid pursuant to an agreement in which the employee agrees to terminate employment or to waive or release rights to future employment, and amounts paid pursuant to early retirement incentive programs or other programs intended to increase the compensation paid to the employee upon receipt of the resignation of the employee or the waiver or release of rights to future employment. Increased compensation paid in the final year of employment prior to retirement that exceeds increases approved by the employer for all employees or classes of employees is presumed to be payment for terminating employment;

(14) payments received under relevant parts of the educator excellence awards program under Subchapter O, Chapter 21, Education Code that do not represent payments for service rendered by the member;

(15) except as provided in §25.28(e) of this title (relating to Payroll Report Dates), amounts paid pursuant to a settlement agreement except that compensation paid to an employee while

on paid leave of any type, including paid administrative or emergency leave under the terms of a settlement agreement is creditable under paragraph (3) of this subsection; and

(16) differential pay that is less than 50% of the compensation for service in a full-time position. Differential pay is pay by an employer to a member who leaves membership eligible employment to serve in the military and the pay represents all or some of the difference between what the member earned in the TRS covered employment and what he or she is earning in the military job. Differential pay that is at least 50% of the compensation for full-time service in the membership eligible position may be reported to TRS and deposits submitted at the discretion of the employer.

(e) The maximum amount of compensation of any member that may be taken into account under the retirement system shall not exceed \$150,000 for plan years commencing on or after September 1, 1996. For plan years commencing on or after January 1, 2002, the maximum amount of compensation shall not exceed the limit contained in the Internal Revenue Code §401(a)(17)(A), 26 United States Code §401(a)(17)(A). For plan years beginning before January 1, 1997, in determining the compensation of any member for any year, the family aggregation rules of the Internal Revenue Code §414(q)(6), 26 United States Code §414(q)(6) shall apply except the term "family" shall include only the spouse of the member and any lineal descendants of the member who have not attained age 19 before the end of the year. The limits set forth in the first two sentences of this subsection shall be increased from time to time, to reflect cost of living increases, in accordance with the Internal Revenue Code §401(a)(17), 26 United States Code §401(a)(17). The dollar limitation prescribed in the first two sentences of this subsection shall not apply to limit the compensation of any person who first becomes a member before September 1, 1996. Furthermore, that limitation shall not apply for any period during which such limitation is repealed or is not enforced by the Internal Revenue Service with regard to governmental plans. In applying the limits described in this section, a plan year is September 1 through August 31.

(f) TRS may rely upon employer certifications in determining creditable compensation or may conduct an investigation to determine whether any ineligible compensation has been reported. At the request of TRS, employers will provide copies of any records or information the retirement system requests. Such records may include, but are not limited to, copies of contracts, work agreements, salary schedules or addenda, board minutes, payroll records, or other materials that will assist the retirement system in making a determination.

CERTIFICATION

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.