

Deferred Compensation Preliminary Follow-up Report

Washington State Law Enforcement
Officers' and Fire Fighters' Plan 2
Retirement Board

July 26, 2006

Brief Summary

- Employer Participation
- Issues
- Policy Options for Employer Contributions

Plans Impacted

- 2005 Board Employer Survey
 - Of the 368 employers surveyed, 331 offer a 457 deferred compensation program
 - Of the 331 employers, 92 offer some sort of employer contribution match

Issue: Employer Contributions

- Employer contributions as “Salary”
 - Guaranteed contributions are in
 - Matching contributions are out

Policy Options

- **Option 1:** Include employer contributions to a 457 deferred compensation plan as basic salary, except if in lieu of Social Security.

Policy Options

- **Option 2:** Include employer contributions to a 457 deferred compensation plan as basic salary, no exception.

Policy Options

- **Option 3:** Add 401(a) and 401(k) defined contribution plans to the definition of basic salary and include employer contributions from a 457, 401(a) or 401(k) deferred compensation plan as basic salary.

Proposal Summary

- Include all employer contributions to a 457 plan as salary except for plans in lieu of social security
- Include all employer contributions to a 457 plan as salary, no exceptions
- Include all employer contributions to a 457, 401(a), or 401(k) plan as salary, no exceptions

Deferred Compensation Preliminary Report

Questions?

LAW ENFORCEMENT OFFICERS' AND FIRE FIGHTERS' PLAN 2 RETIREMENT BOARD

Deferred Compensation Preliminary Follow-up Report

July 26, 2006

1. Issue

The need for a clear definition of what is included in basic salary with regard to deferred compensation. This definition must clarify member, employer, mandatory and voluntary contributions from deferred salary programs.

2. Staff

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3. Members Impacted

Based on the actuarial data as of September 30, 2004, there were 14,754 active LEOFF Plan 2 members and 432 retirees. Changes to what is included in basic salary could impact both active LEOFF Plan 2 members, and retirees, if the changes are made to a retired member's final average salary retroactively.

4. Current Situation

Under current law, member contributions to the LEOFF Plan 2 defined benefit account are includable in basic salary and are mandatory. Employer contributions are also mandatory, but are not included in basic salary.

Most public employers offer a 457 Deferred Compensation Plan. Member contributions are voluntary and are includable in basic salary. Employers are not required to contribute to the 457 Deferred Compensation Plan, but they can. Under certain circumstances employer contributions to a member's 457 account can be included in basic salary.

5. Background Information and Policy Issues

Background

The LEOFF Plan 2 Retirement Board (Board) heard a report last year on deferred compensation as it relates to inclusion in a member's final average salary. After the Initial Consideration report was presented in October 2005, the Board requested a Preliminary Report outlining the policy issues and options. In December 2005, the Board determined this issue should be studied further and was deferred to 2006.

By way of review, it is important to remember that a member's retirement benefit is calculated using the formula, 2% x final average salary (FAS) x years of service (YOS). Final average salary for plan 2 members is the monthly average of the member's *basic salary* for the highest consecutive sixty service credit months.

It is clear from the statutes that if a member's salary or wages include deferred salary under sections 403(b), 414(h) and 457 of the United States Internal Code, they are part of basic salary. The statutes do not specifically include 401(a) defined contribution plans, nor do they distinguish between member and employer contributions. Through administrative practice, the Department of Retirement Systems (DRS) has in some cases, included employer contributions in basic salary and not in others.

There are two key concepts that are necessary to understand the issue. The first is that in order for salaries or wages to be included in basic salary they must be for *services rendered*. The second key concept to understanding this policy issue is *payments in lieu of*.

Services Rendered

Payment is considered for *services rendered* if the member has an absolute right to receive the payment as part of his or her employment. The concept of *services rendered* becomes especially important when looking at employer-paid contributions.

For example, if an employer offers to make a payment to a 457 Deferred Compensation Plan for any employee, either as a percentage of salary or a specified amount per hour, the employer contributions are included as part of basic salary. Members have an absolute right to receive the contributions as part of his or her employment.

On the other hand, if an employer offers a 457 Deferred Compensation Plan and offers a match, based on whether or not the member contributes, then it is not included in basic salary. The match is not for *services rendered*, since the member does not have an absolute right to receive the additional contribution for performing the duties required of his or her position.

Payment in Lieu of

A *payment in lieu of* occurs when a new payment type is created as a replacement for an existing payment that has the characteristic of the payment it has replaced. Whether or not the payment is includable or not includable in basic salary is not dependent upon what the payment is called, but rather on the nature of the payment.

For example, employer contributions to Social Security are not part of basic salary. Creating a payment type that is, in essence, a substitute for Social Security but with a different name would be a *payment in lieu of* and would not be considered basic salary.

Another example of employer contributions not included in salary is payments to a health care account. If through the bargaining process the employer contributions to health care are exchanged for an increase in salary, the raise might not be considered “salary” for pension purposes.

Statistical Information

According to the 2005 Board survey of the 368 LEOFF Plan 2 employers, 331 (89.9%) offered a 457 deferred compensation plan and 92 (25%) of those offered some sort of contribution match.

Policy Issues

Even though deferred compensation is discussed in both statute and administrative rule, ambiguities still remain.

- Should any employer contributions to a 457 Deferred Compensation Plan be included in basic salary or only those that do not require member contributions?
- Should 401(a) and 401(k) contributions be treated the same as other deferred wages?
- Should *payments in lieu of* restrictions on “salary” be modified with respect to employer contributions to deferred salary accounts?

These policy questions become particularly important as employers and bargaining units try to negotiate total compensation packages. It will be very important to determine whether or not a specific item will or will not be included in a member’s retirement calculation. Although the deferred compensation programs are similar, it is important to note that the employer contributions to a 401(a) plan are less restrictive and may allow an employer to inflate a member’s final average salary (FAS).

6. Options

Option 1: Include employer contributions to a 457 deferred compensation plan as basic salary, unless they are in lieu of Social Security.

Under this option employer contributions to deferred compensation plans would be considered salary, even if:

- 1) Employee contributions are required, or
- 2) They are *in lieu of* non-includable payments, other than Social Security

Option 2: Include employer contributions to a 457 deferred compensation plan as basic salary.

Under this option employer contributions to deferred compensation plans would be considered salary, even if:

- 1) Employee contributions are required, or
- 2) They are *in lieu of* any non-includable payments

This option is similar to option 1, but with a broader scope.

Option 3: Add 401(a) and 401(k) defined contribution plans to the definition of basic salary and include employer contributions from a 457, 401(a) or 401(k) deferred compensation plan as basic salary.

Under this option member and employer contributions to deferred compensation plans (457), 401(a) and 401(k) wage deferral plans, would be included in the definition of basic salary. Contributions would be included even if the plan was negotiated as a replacement for a previously excluded payment, such as Social Security. These plans would be excluded from the “payments in lieu of” restrictions.

This option has the broadest scope of any of the proposals.

7. Supporting Information

Appendix A – Salary RCWs

Appendix B – Basic Salary WACs

Appendix A –Salary RCWs

RCW 41.26.030 Definitions.

(12)(b) "Final average salary" for plan 2 members, means the monthly average of the member's basic salary for the highest consecutive sixty service credit months of service prior to such member's retirement, termination, or death. Periods constituting authorized unpaid leaves of absence may not be used in the calculation of final average salary.

(13)(b) "Basic salary" for plan 2 members, means salaries or wages earned by a member during a payroll period for personal services, including overtime payments, and shall include wages and salaries deferred under provisions established pursuant to sections 403(b), 414(h), and 457 of the United States Internal Revenue Code, but shall exclude lump sum payments for deferred annual sick leave, unused accumulated vacation, unused accumulated annual leave, or any form of severance pay. In any year in which a member serves in the legislature the member shall have the option of having such member's basic salary be the greater of:

(i) The basic salary the member would have received had such member not served in the legislature; or

(ii) Such member's actual basic salary received for nonlegislative public employment and legislative service combined. Any additional contributions to the retirement system required because basic salary under (b)(i) of this subsection is greater than basic salary under (b)(ii) of this subsection shall be paid by the member for both member and employer contributions.

Appendix B – Basic Salary WACs

WAC 415-104-298 Purpose and scope of basic salary rules. WAC [415-104-299](#) through [415-104-405](#) codify the department's existing interpretation of statutes and existing administrative practice regarding classification of payments as basic salary in LEOFF Plan I and LEOFF Plan II. The department has applied and will apply these rules to determine the proper characterization of payments occurring prior to the effective dates of these sections.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#), 97-01-016, § 415-104-298, filed 12/6/96, effective 1/6/97.]

WAC 415-104-299 Basic salary table. The following table will help you determine whether certain types of payments are basic salary under LEOFF Plan 1 or 2. Be sure to read the referenced rule to ensure that you have correctly identified the payment in question. The department determines basic salary based upon the nature of the payment, not the name applied to it. See WAC 415-104-311 (Plan 1) and WAC 415-104-360 (Plan 2).

Type of Payment	LEOFF 1 Basic Salary?	LEOFF 2 Basic Salary?
Additional Duty Pay	Yes - WAC 415-104-3205	Yes - WAC 415-104-360
Allowances (i.e. uniform)	No - WAC 415-104-3404	No - WAC 415-104-390
Basic Monthly Rate	Yes - WAC 415-104-3200	Yes - WAC 415-104-360
Cafeteria Plans	No - WAC 415-104-3303	Yes - WAC 415-104-367
Deferred Wages Attached to Position	Yes - WAC 415-104-3201(1)	Yes - WAC 415-104-363(1)
Deferred Wages not attached to a Position	No - WAC 415-104-3306	No - WAC 415-104-363(2)
Disability Payments	No - WAC 415-104-340	No - WAC 415-104-380
Education Attainment Pay	No - WAC 415-104-3301	Yes - WAC 415-104-375
Employer taxes/contributions	No - WAC 415-104-3401	No - WAC 415-104-383
Fringe Benefits, including insurance	No - WAC 415-104-3402	No - WAC 415-104-385
Illegal Payments	No - WAC 415-104-3403	No - WAC 415-104-387
Leave Cash Outs/Severance	No - WAC 415-104-3304	No - WAC 415-104-401
Longevity	Yes - WAC 415-104-311	Yes - WAC 415-104-375
Overtime	No - WAC 415-104-3305	Yes - WAC 415-104-370
Paid Leave	Yes - WAC 415-104-3203	Yes - WAC 415-104-373
Payments in Lieu of Excluded Items	No - WAC 415-104-350	No - WAC 415-104-405
Performance Bonuses	No - WAC 415-104-3302	Yes - WAC 415-104-377
Retroactive Salary Increase	Yes - WAC 415-104-3202	Yes - WAC 415-104-365
Reimbursements	No - WAC 415-104-3404	No - WAC 415-104-390
Retirement or Termination Bonuses	No - WAC 415-104-3406	No - WAC 415-104-395
Shift Differential	Yes - WAC 415-104-3204	Yes - WAC 415-104-379
Special Salary or Wages	No - WAC 415-104-330	Yes - WAC 415-104-375
Standby Pay	No - WAC 415-104-3405	No - WAC 415-104-393
Tuition/Fee Reimbursement	No - WAC 415-104-3404	No - WAC 415-104-390
Workers' Compensation	Not Applicable	No - WAC 415-104-380

[Statutory Authority: RCW 41.50.050(5) and chapter 41.26 RCW, 03-06-042, § 415-104-299, filed 2/27/03, effective 4/1/03. Statutory Authority: RCW 41.50.050, 99-16-075, § 415-104-299, filed 8/3/99, effective 9/3/99. Statutory Authority: RCW 41.50.050 and 41.50.055, 97-01-016, § 415-104-299, filed 12/6/96, effective 1/6/97.]

WAC 415-104-301 What is basic salary? (1) **Basic salary is the compensation used to determine LEOFF contributions and LEOFF retirement allowances.** A payment from an employer to a member does not qualify as basic salary unless it meets the statutory definition of basic salary in RCW [41.26.030](#)(13) which is explained in greater detail in WAC [415-104-311](#) through [415-104-405](#).

(2) **The definition of basic salary is different for Plan I and Plan II.** WAC [415-104-311](#) through [415-104-350](#) define basic salary for Plan I. WAC [415-104-360](#) through [415-104-405](#) define basic salary for Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-301, filed 12/6/96, effective 1/6/97.]

WAC 415-104-360 How is basic salary for LEOFF Plan II determined? (1) **What payments are included in LEOFF Plan II 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 II 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 II basic salary. See WAC [415-104-373](#).

(b) Specific types of payments that qualify as LEOFF Plan II 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 II 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.**

(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.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-360, filed 12/6/96, effective 1/6/97.]

WAC 415-104-363 Deferred wages. (1) **If earned for services rendered, deferred wages are basic salary.** If a member earns salary or wages for services rendered during a payroll period but defers receipt of payment, those earnings are basic salary for LEOFF Plan II. Deferred wages include, but are not limited to:

(a) Member contributions to LEOFF;

(b) Salaries or wages deferred pursuant to sections 401(k), 403(b), 414(h), 457, or other similar sections of the United States Internal Revenue Code.

(2) **Deferred wages that a member does not have an absolute right to in exchange for rendering service to an employer are not basic salary.** If an employer offers additional payment that is conditioned on taking some action in addition to providing services, the payment is based upon the additional action and is not earned for services rendered. The payment does not qualify as basic salary for LEOFF Plan II.

Example: An employer offers to make a contribution to a deferred compensation plan on a member's behalf only if the member elects to defer a portion of his or her salary. Because the member does not have an absolute right to receive the contribution based solely on rendering service, the payment is not basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-363, filed 12/6/96, effective 1/6/97.]

WAC 415-104-365 Retroactive basic salary increases are LEOFF Plan II basic salary. A retroactive salary increase received for a pay period that a member worked is a salary or wage for services rendered and is basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-365, filed 12/6/96, effective 1/6/97.]

WAC 415-104-367 Cafeteria plans. Compensation received in any form under the provisions of a "cafeteria plan," "flexible benefits plan," or similar arrangement pursuant to section 125 of the United States Internal Revenue Code is basic salary for LEOFF Plan II if the member has an absolute right to receive cash or deferred payments in lieu of the fringe benefits offered. In such an instance, the fringe benefits are being provided in lieu of cash and are considered basic salary, just as the cash would be. If there is no cash option, the value of the fringe benefit is not a salary or wage and is not basic salary for LEOFF Plan II. See WAC [415-104-385](#).

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-367, filed 12/6/96, effective 1/6/97.]

WAC 415-104-370 Overtime is LEOFF Plan II 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 basic salary for LEOFF Plan II. 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 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 basic salary for LEOFF Plan II;

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

(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.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-370, filed 12/6/96, effective 1/6/97.]

WAC 415-104-373 Paid leave is LEOFF Plan II basic salary. Payments received from an employer for authorized paid absences from work are basic salary for LEOFF Plan II. These payments may or may not be for services rendered. Paid leave is basic salary only to the extent that it is the equivalent of the basic salary a member would have earned had the member been working. The portion of any payment identified as paid leave that exceeds that amount is not basic salary.

(1) **Leave payments earned for services rendered.** Most LEOFF members earn a certain number of leave hours per month, such as sick leave. The leave hours are earned by rendering service during the month the leave was accumulated. The payment a member receives when he or she uses an earned leave day is a deferred salary or wage for services previously rendered. It is basic salary to the extent that it is equal to the basic salary the member would have earned had he or she been working.

Example: Assume a member accrues eight hours sick leave per month. The accrued leave in the member's sick leave balance is earned for personal services rendered during a payroll period. When the member is absent from work and uses the sick leave, the sick leave payment is basic salary.

(2) **Leave payments not earned for services rendered.** If an employer authorizes a period of paid leave but does not require the use of leave previously earned for services rendered, the payment is not a salary or wage for services rendered. However, RCW [41.26.520](#) authorizes service credit for all periods of paid leave. Because the

periods are creditable, the pay received is considered basic salary to the extent that it is equal to the basic salary the member would have earned had he or she been working.

(3) **Payments upon reinstatement or in lieu of reinstatement are paid leave and therefore qualify as basic salary.** The payment will count as basic salary for the payroll periods when the person would have earned the payment had he or she been working. In order for a payment in lieu of reinstatement to qualify as paid leave, the person's termination date must occur after the payroll period when the payment would have been earned. Because the periods are creditable, the pay received is considered basic salary to the extent that it is equal to the basic salary the member would have earned had he or she been working.

(4) **Union leave.** Periods of authorized leave to serve as an elected official of a labor organization which meet the requirements of RCW [41.26.520](#) qualify for service credit. The salary payments provided by the employer subject to reimbursement from the union qualify as basic salary for LEOFF Plan II to the extent that they do not exceed the highest paid job class covered by the collective bargaining agreement negotiated between the labor organization and the employer. The portion of any payment identified as paid leave in excess of that amount is not basic salary.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-373, filed 12/6/96, effective 1/6/97.]

WAC 415-104-374 LEOFF Plan 2 part-time leave of absence. (1) What are the LEOFF Plan 2 part-time leave rules for law enforcement officers?

- (a) You must be a current LEOFF Plan 2 **law enforcement** member;
- (b) Your employer must authorize you to work part time and go on an unpaid part-time leave of absence;
- (c) While in part-time work/part-time leave status, you cannot do any other work for pay for your employer; and
- (d) When you return to full-time employment, the employment must be with the same employer who granted you the part-time leave.

(2) **May I purchase service credit for periods of part-time leave?** See WAC [415-02-175](#) for information about purchasing service credit for an unpaid authorized leave of absence.

[Statutory Authority: RCW [41.50.050](#)(5). 04-20-005, § 415-104-374, filed 9/23/04, effective 10/24/04. Statutory Authority: RCW [41.50.050](#)(5) and [41.26.520](#). 02-18-047, § 415-104-374, filed 8/28/02, effective 9/1/02.]

WAC 415-104-375 Salary or wages not attached to a position are LEOFF Plan II basic salary. A salary or wage for services rendered to an employer is basic salary for LEOFF Plan II regardless of whether the services are attached to a position.

Example: If an employee receives additional salary based upon his or her education, that additional salary is basic salary for LEOFF Plan II even if his or her position does not require that level of education. The payment of a higher salary based upon educational attainment is part of the total compensation for the services provided by the employee.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-375, filed 12/6/96, effective 1/6/97.]

WAC 415-104-377 Performance bonuses are LEOFF Plan II basic salary. Payments you earn for meeting or exceeding performance goals set by your employer are a salary or wage for services rendered and qualify as basic salary for LEOFF Plan II. In order to qualify as basic salary, a performance bonus must be documented in an employer policy or specific agreement between the employer and member prior to earning the bonus.

Example: An employer offers an annual bonus to a member if he or she meets a certain performance goal, i.e., stays accident free for a year. If the member meets the goal and is paid the bonus, the bonus would be considered basic salary.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-377, filed 12/6/96, effective 1/6/97.]

WAC 415-104-379 Shift differential is LEOFF Plan II basic salary. Additional payments to a member for working swing shift or night shift are a salary or wage for services rendered. Those payments are basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-379, filed 12/6/96, effective 1/6/97.]

WAC 415-104-380 Disability payments. (1) **Disability leave supplement.** Under certain circumstances, LEOFF II members are entitled to a disability leave supplement for periods of disability leave. See RCW [41.04.500](#) through [41.04.550](#).

(a) Employer contributions to the disability leave supplement under RCW [41.04.510](#)(3) are not a salary or wage for services rendered and do not qualify as basic salary. Although the payments are paid leave, they are specifically excluded from basic salary by RCW [41.04.525](#).

(b) The member paid portion of the disability leave supplement is funded through use of the member's accumulated sick or vacation leave. This portion of the disability leave supplement is, therefore, basic salary, see WAC [415-104-373](#). The member will receive only partial service credit for the accumulated leave portion of the disability leave supplement.

(c) A member may apply to receive full service credit for some periods of duty disability under RCW [41.26.470](#)(3).

(2) **Workers' compensation.** Payments made to a member under Title [51](#) RCW are neither a salary or wage for services rendered nor paid leave. The payments are not basic salary for LEOFF II. This is true whether the payments come from the workers' compensation trust fund or from an employers' self-insurance program authorized under Title [51](#) RCW.

(3) **Private insurance.** Some employers provide additional disability insurance as a supplement to workers' compensation. Any payment from a third party insurance company is neither paid leave nor payment for services rendered. It does not qualify as basic salary for LEOFF Plan II.

(4) **Disability leave banks.** If an employer maintains a disability leave bank which may be used to make salary replacement payments for members during periods of disability, such payments are paid leave and qualify as basic salary subject to the provisions of WAC [415-104-373](#): Provided, however, That if the leave provided to an employee is based upon leave earned by another employee then it is a form of shared leave and does not qualify as basic salary.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-380, filed 12/6/96, effective 1/6/97.]

WAC 415-104-383 Employer taxes and contributions are not LEOFF Plan II basic salary. (1) Any payment by a member's employer of the employer portion of taxes imposed by the Federal Insurance Contribution Act is not a salary or wage and does not qualify as basic salary for LEOFF Plan II.

(2) Employer contributions to LEOFF Plan II are not a salary or wage paid to the member and do not qualify as basic salary.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-383, filed 12/6/96, effective 1/6/97.]

WAC 415-104-385 Fringe benefits are not LEOFF Plan 2 basic salary. Fringe benefits provided by an employer are not a salary or wage and therefore do not qualify as basic salary for LEOFF Plan 2. Fringe benefits include, but are not limited to:

(1) Employer retirement contributions;

(2) Any type of insurance such as medical, dental or life insurance; and any employer contribution to meet the premium or charge for the insurance; or

(3) Any employer payments into a private fund to provide health or welfare benefits for the member (or the member and the member's dependents), with the exception of compensation paid pursuant to a bona fide cafeteria plan, flexible benefit plan or similar arrangement as described in WAC [415-104-367](#).

[Statutory Authority: RCW [41.50.050](#)(5) and chapter [41.26](#) RCW. 03-06-042, § 415-104-385, filed 2/27/03, effective 4/1/03. Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-385, filed 12/6/96, effective 1/6/97.]

WAC 415-104-387 Illegal payments are not LEOFF Plan II basic salary. If an employer disburses a payment that the employer does not have legal authority to make, that payment does not qualify as basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-387, filed 12/6/96, effective 1/6/97.]

WAC 415-104-390 Reimbursements or allowances in lieu of a reimbursement are not LEOFF Plan II basic salary. (1) **Reimbursement.** If an employer reimburses a member for expenses incurred in providing services for the employer, the purpose of the payment is to pay the member back for out-of-pocket expenses. The payment is not compensation. It is not a salary or wage and is not basic salary for LEOFF Plan II.

(2) **Allowance.** An allowance paid in lieu of a specific reimbursement for expenses a member is expected to incur in providing services for the employer is characterized the same as a specific reimbursement. The purpose of the payment is to reimburse the member for out-of-pocket expenses. The payment is not compensation. It is not a salary or wage and does not qualify as basic salary for LEOFF Plan II.

Example: An employer provides an annual stipend for the purchase of a uniform or other clothing required for the performance of a members' duties. The payment is a reimbursement for expenses incurred or expected to be incurred and is not basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-390, filed 12/6/96, effective 1/6/97.]

WAC 415-104-393 Standby pay is not LEOFF Plan II basic salary. Payments to a member for time not actually worked when the member must be available to work if the need arises, are not a salary or wage for services rendered. Any such payment does not qualify as basic salary for LEOFF Plan II.

Example: Some employers provide payments to a member at less than the member's regular hourly rate in exchange for the member being available to come into work after his or her shift if called, although the member may not be called. Such payments, often referred to as "standby pay," are not basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-393, filed 12/6/96, effective 1/6/97.]

WAC 415-104-395 Termination or retirement bonuses are not LEOFF Plan II basic salary. An additional payment based on notification of a member's intent to terminate or retire is in consideration for the notification of intent to retire or terminate. The payment is not a salary or wage for services rendered and is not basic salary for LEOFF Plan II.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-395, filed 12/6/96, effective 1/6/97.]

WAC 415-104-397 Statutorily excluded payments are not LEOFF Plan II basic salary. Payments authorized by a statute that excludes the payment from the calculation of a public retirement allowance do not qualify as basic salary.

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-397, 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 basic salary. (1) A cash out from an employer for unused accrued leave, 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 in RCW [41.26.030](#) (13)(b).

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

[Statutory Authority: RCW [41.50.050](#) and [41.50.055](#). 97-01-016, § 415-104-401, filed 12/6/96, effective 1/6/97.]

WAC 415-104-405 Payments in lieu. A payment or any other transfer in lieu of an item that does not qualify as basic salary, is not basic salary. The only exception is compensation paid pursuant to bona fide cafeteria plan, flexible benefit plan or similar arrangement as described in WAC [415-104-3302](#).

[Statutory Authority: RCW [41.50.050](#)]