



American Payroll Association

Government Relations • Washington, DC

December 22, 2016

Mr. Dan McNally
Executive - Project and Services Manager
Oregon State Treasury
350 Winter Street, NE – Suite 100
Salem, OR 97301
dan.mcnally@ost.state.or.us

**Re: Proposed Rules for the Oregon Retirement Savings Plan pursuant to
ORS § 178.215**

Dear Mr. McNally:

Thank you for the opportunity to provide comments on the proposed rules for the Oregon Retirement Savings Plan (ORSP). As one of the first states to develop a state retirement plan mandate for nongovernmental workers, Oregon is establishing a foundation that other states may follow. The American Payroll Association (APA) is submitting comments, concerns, and recommendations on the proposed rules for your consideration.

INTEREST OF THE AMERICAN PAYROLL ASSOCIATION

APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals in the United States. Our primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws.

APA's Government Relations Task Force (GRTF) works with legislative and executive branches of government to educate policymakers about the administrative burdens and other impacts of proposed policy changes on government, employers, and individual workers.

APA and its members recognize the significance of retirement savings coverage and the ability to save regularly through payroll deductions. Our members certainly agree that facilitating retirement savings and improving retirement preparedness for workers are important and laudable goals.

APA's GRTF Subcommittee on Retirement Accounts has engaged in discussions at the federal, state, and local levels concerning retirement savings programs, such as the one under

development by Oregon. Initially, we worked with the U.S. Department of the Treasury to develop and implement the My Retirement Accounts (*myRA*) program. Many APA members participated in the pilot program for *myRA*.

In addition, we are working with a number of states, including Oregon, interested in mandatory retirement savings programs for nongovernmental employees through the State Retirement Plan Administrators Working Group. APA is particularly interested in ensuring effective communication between state plan administrators and employers to ensure that payroll professionals understand the requirements and the steps necessary to ensure smooth implementation at plan startup and ongoing. A primary consideration is minimizing avoidable administrative burdens on employers.

SPECIFIC COMMENTS ON THE PROPOSED RULES

Definition of Employment and Wages

APA supports the proposed definition of “employment” as “any employment subject to ORS Chapter 657 ...” (Employment Department Law). Employers are already very familiar with the definitions in Oregon’s unemployment insurance law, which includes helpful distinctions to resolve what might otherwise be conflicts related to employees who live and/or work in surrounding states or who work for short periods of time in Oregon.

However, the definition of wages may be unnecessarily difficult to administer. Specifically, the reference to “cash compensation” (i.e., “Wages’ means all cash compensation for performance of service by an employee for an employer”) may require employers to keep separate sets of records on wages subject to retirement plan withholding, as distinct from wages subject to unemployment insurance, wages subject to income tax withholding, and wages subject to other employment taxes administered by Oregon. APA appreciates Oregon’s desire to simplify the retirement savings plan rules for employers, but, otherwise, there is no justifiable policy reason for specifying “cash compensation” and not to require withholding from noncash benefits.

In practice, the opposite would occur, creating added burden on employers for maintaining entirely separate sets of records on cash compensation subject to retirement plan withholding. The term “cash compensation” would exclude such compensation as the value of meals provided by an employer, long-term disability premiums, dependent care flexible spending account contributions, and board, lodging, services, facilities, or privileges furnished by an employer, which are included for Oregon unemployment insurance purposes. The proposed definition also would include certain other types of cash compensation, for example, jury duty pay, which is excluded under Oregon’s unemployment insurance law.

To accomplish the goal of simplifying the rules, APA recommends that Oregon adopt the existing definition of wages found in the state’s unemployment insurance law found under ORS §§ 657.105 through 657.140: “wages’ means all remuneration for employment, including cash value, as determined by the Director of the Employment Department under the regulations of the director, of all remuneration paid in any medium other than cash....”

Tracking and Administrative Burden

By including wages as defined in existing laws, the percentage of withholding could mean greater savings for employees and easier administration for employers. However, like Oregon's income tax withholding, the ORSP Board and management system should understand that employer withholding may not be exact. There may be insufficient cash wages from which to withhold the full amount authorized. An employee's wage withholding may include other higher priority deductions from pay, such as child support, tax levies, and creditor garnishments.

APA recommends that ORSP instructions specify the impact of pretax deductions, such as for healthcare benefits, in terms of the priority order of deductions. For employers, a clear understanding of how to determine sufficient wages for purposes of withholding for retirement savings will ensure compliance. For employees, a clear understanding of wage withholding priorities will help them decide on retirement savings contribution levels. Thus, Oregon should offer a clear listing of wage withholding obligations that will take precedence over ORSP amounts, such as current taxes, tax levies, child support, etc.

In addition, ORSP rules should be clear that employers must withhold the specified (or default) percentage to the extent practical, but if the full amount cannot be withheld, further administrative implications should not apply. For example, if the full amount specified could not be withheld, employers should not be obligated to track amounts and adjust withholding from subsequent payments. Employers should not be liable for any amounts that could not be withheld because of insufficient wages or conflicting deductions with greater priority. Employers should not be required to report periodic wage amounts along with any withholding amounts to the ORSP system, or be required to explain why amounts withheld do not match the authorized percentage. This would be unproductive, and there are simply too many reasons for imperfect withholding. Historically, recognizing these types of fluctuations without additional employer tracking works well for income tax administration.

Definition of Open Enrollment Period

APA noticed that the proposed rules are missing a defined annual enrollment process for employees to reconsider enrolling in the ORSP. Instead, employees are invited to opt-in and opt-out "at any time" and "by requesting participation." APA appreciates the 30-day time period that Oregon has included for employers to process these requests, but random enrollment periods for individual employees would be very difficult for employers. Employers would need to process considerably more enrollment/disenrollment transactions than they would otherwise. This also may result in lower participation and less savings.

APA suggests that Oregon establish an annual open enrollment period. This will create a disincentive for employees to opt out when cash flow becomes a problem or new spending emergencies arise because they will know that they would be out of the program until the following year. Enrollment at any time also would invite the very behavior that the automatic-enrollment feature seeks to address: inertia. Faced with the knowledge that they are free to decide anytime, most people will put off until tomorrow any decision to save. Lastly, an annual

open enrollment system will create a natural and recurring opportunity to promote retirement savings. When presented through an annual enrollment period, retirement savings can be promoted and viewed as part of overall employee benefits, which may help to encourage savings. Employers already promote annual open enrollment events for employee benefits. In addition, employees are already attuned to annual open enrollment and recognize the opportunity to make decisions to benefit themselves. In contrast, an “anytime” enrollment approach would get little attention and promotion on an ongoing basis.

Requirements for the Employer Exemption

The “Employer Exemptions” provision of the proposed rules indicates that employers offering a qualified plan to “all” employees may file a Certificate of Exemption from the state’s retirement savings plan. APA suggests that the term “all” is problematic. Under ORS §§ 178.210(b) and 178.215(8), the Board is required to establish a process for exemption based on qualified plans within the Internal Revenue Code, although it is not limited to these plans. This law does not contemplate a conditional exemption nor does it use the word “all” when describing the employers subject to the plan.

Reasonably, employers may not offer retirement benefits to employees who fit into one of the many variations of short-term employment (e.g., one week), thus the reference to the Internal Revenue Code in the ORS. Essentially, this means that with rare exception under the proposed rules all employers conducting business in Oregon will need to file for a conditional exemption and renew that conditional exemption every three years. APA does not believe Oregon intended this significant administrative burden on employers or state administrators.

Although APA understands the interest of Oregon to extend retirement savings opportunities to all workers without exception, the Oregon State Treasury should carefully consider the potential cost implications of including all workers without regard to waiting periods or service requirements that are permitted under the Internal Revenue Code and regulations. These serve to minimize what would otherwise be a high volume of small-dollar “orphan” accounts, which are generally associated with temporary, seasonal, or contingent workers, who may receive one or two paychecks and may not pay attention to the ORSP materials and any amounts withheld, or determine that the amounts in question are too small to warrant further attention, such as requesting that such amounts be transferred and combined with other retirement accounts of the participant. A high volume of these “orphan” accounts could quickly increase ORSP processing costs. They also could increase costs to employers that may feel obligated to eliminate waiting periods or service requirements to meet the ORSP’s exemption criteria for offering a retirement plan to all workers.

The proposed filing for a conditional exemption does not change which employers are subject to the plan or that are eligible for the exemption. Likewise, this filing does not change which employees may participate. APA recommends that the Oregon State Treasury consider allowing the exemption based on the qualifications found in the language of the ORS. In other words, the ORSP Board will accept any available retirement plan for purposes of the employer exemption if

that plan is one that complies with the qualification requirements found in Internal Revenue Code §§ 401(a), 403(b), or 457(b), and the associated regulations.

In addition, instead of filing for a conditional Certificate of Exemption, further reporting should only be required if an employer's situation changes (e.g., if an employer no longer offers a qualified plan).

Addressing Tax Treatment

The proposed rules offer very little in explaining the tax treatment of ORSP contributions. The Internal Revenue Code does not offer a mechanism for employers to take deductions from employees' wages on a pretax basis when employers are not sponsoring the retirement plan, such as the ORSP. With employees' authorization, employers may make post-tax wage deductions and employees can then claim those deductions on their income tax return.

This will require that participating employees know the exact amount of their contributions and that they understand that the plan operates as a post-tax deduction, which can only be claimed on their annual income tax returns. Therefore, APA recommends that the ORSP offer specific guidance to employers and employees that the ORSP operates as a post-tax IRA. APA also recommends that Oregon consider whether placing a code in Box 14 of Form W-2 will be useful to employees to reflect that ORSP contributions are deductible.

Under some circumstances (e.g., income limits), an employee's subsequent contributions may become ineligible for treatment as a Roth IRA, which will require further contributions to be treated as a traditional IRA within the same year. Optimally, employers should not be required to separately account for withholding amounts that are considered a traditional IRA versus a Roth IRA, and would not be responsible for enforcing income limits. Employers should only be responsible for enforcing income limits for earnings of which they are directly aware. For example, employers should not be required to ask mid-year new hires about the amounts they earned earlier in the year from other employers and whether they made other IRA contributions.

APA also recommends that Oregon consider whether placing a code in Box 14 of Form W-2 will be useful to employees to reflect that ORSP contributions are deductible. As noted, any Box 14 entry should reflect total ORSP withholdings without regard to whether such amounts are a traditional IRA or Roth IRA.

FUTURE FORMS AND INSTRUCTIONS

APA would appreciate the opportunity to work with the Oregon State Treasury and ORSP Board on draft forms and instructions. Significant details and guidance in the proposed rules were left for forms and instructions and APA believes we can provide expert assistance. Ensuring that payroll professionals and employees understand the forms and the actions they must perform to comply is extremely important. We share an interest with Oregon in ensuring that the plan can be implemented in practice.

APA already sees a potential problem for forms in the listing of information requests in the proposed rules. The information required for registration includes “other information as requested”. This might translate to a request for employees’ personal email addresses and cellphone numbers, for example. While a logical request, employees are very concerned about their privacy and the security of their personal information and prefer not to provide that information to their employers. Employers also should not be required to collect beneficiary information (i.e., heirs).

The proposed rules leave many other important details to be addressed in forms and instructions (e.g., opt-out forms, notices to employers regarding non-election by employees, and notices to employers about changes to an employee’s wage withholding), which would not be subject to the publication and public comment requirements in proposed format under the Oregon Administrative Procedure Act. Yet, such details may determine whether the ORSP is administratively feasible and cost efficient.

Again, thank you for the opportunity to comment on the Oregon State Treasury’s proposed rules concerning the ORSP. The December 20, 2016, press release from James Sinks indicates that the Oregon State Treasury is extending the rulemaking process with a revised draft on January 13. If you have any questions or if we can be of further service to you in developing the ORSP, please contact Alice Jacobsohn at 202-248-3901 or ajacobsohn@americanpayroll.org.

Sincerely,



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