



Oregon

Kate Brown, Governor

Public Employees Retirement System

Headquarters:
11410 S.W. 68th Parkway, Tigard, OR
Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.oregon.gov/pers

January 12, 2021

TO: Interested Parties
FROM: Heather Case, Senior Policy Director
SUBJECT: LC 589 (2021) Summary – Common-Law Employment for PERS Purposes

BACKGROUND

In June 2019, the Oregon Supreme Court decided *Eugene Water and Electric Board v. Public Employees Retirement Board*, 365 Or 59, 442 P.3d 596 (2019) (*EWEB*). The case asked whether a person who works for a PERS-participating employer but is paid by a third party is “in the service of a public employer” for purposes of PERS membership under ORS 238.015(1). Although all parties to the case agreed that the individual in question was a common-law employee of the public employer, the Court determined that being “in the service of a public employer” is limited to employees on the employer’s payroll. The decision reversed PERS’ longstanding administration of ORS Chapter 238, which understood common-law employees to be “employees” for purposes of PERS membership and benefits. As explained below, PERS is concerned that the Court’s decision creates unintended long-term risks for the system.

PROPOSED SOLUTION

The agency-requested Legislative Concept proposes the following changes:

- Amending ORS 238.005(8) to clarify that the definition of “employee” for PERS Tier 1 and Tier 2 purposes includes “persons considered employees of a participating public employer under 26 U.S.C. 3121(d)(2),” the provision of the Internal Revenue Code that defines “employee” to include common-law employees.
- Amending ORS 238A.005(4) to insert the same language into the definition of “eligible employee” for purposes of the OPSRP pension plan.

PERS believes that the Oregon Supreme Court’s decision in *EWEB* creates unintended long-term risks for the system. Specifically, so long as the source of an employee’s payroll is a determinative factor for PERS membership and eligibility, an incentive exists for public employers to hire and pay workers through third-parties as a method for reducing the employer’s PERS liabilities. Any long-term reduction of employer contributions presents a risk to the Public Employees Retirement Fund.

The proposed language is unlikely to affect PERS or employers on a day-to-day basis. Rather, it is a provision that will aid in resolving disputes, such as cases of employee/contractor misclassification, and establish that the source of an employee’s payroll is not determinative to defining “employee.” The proposed language does not restrict an employer’s ability to use independent contractors or the services of third-party entities, such as staffing agencies, and instead allows PERS to apply well-established IRS criteria to the terms “employee” and “eligible employee.”