



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 9, 2024

Representative Paul Holvey  
900 Court Street NE H277  
Salem OR 97301

Re: Payroll reporting requirements of professional employer organizations and their clients

Dear Representative Holvey:

You asked several questions about the statutes governing payroll tax reporting requirements, as applicable to professional employer organizations (or "PEO"s.) These questions arise from discussions of House Bill 4005 and its proposed amendments. Questions and answers are set forth below.

**Question 1.**

Under current statutes can an entity or organization (ie: Professional [Employer] Organizations) legally file the payroll tax reports or forms on behalf of and for a client employer using the tax id numbers of the entity or organization when they do not share direction and control of the employee's work or the manner of the work performed with the client employer (who does have the direction and control or manner of work elements)?

**Answer 1.**

While the answer to this question is likely yes, we find it useful to frame the question differently. The withholding statutes are mandates, so although a PEO may be allowed to file a combined quarterly report including information pertaining to a client employer, we also consider whether the requirements of the withholding statutes as applicable to the client employer are met. As we describe below, we conclude that the use of an identifying number other than that assigned to the client employer in filing that employer's reports and payments is impermissible.

ORS 316.168 to 316.221 are the withholding tax statutes. These provisions direct that any person who, in relation to another person, meets the definition of employer in ORS 316.162 is required, with certain exceptions, to comply with the withholding provisions. This definition is based on the concept of "direction and control" and provides:

- (1) "Employer" means:
  - (a) A person who is in relation to another person such that the person may control the work of that other person and direct the manner in which the work is to be done; or

(b) An officer or employee of a corporation, or a member or employee of a partnership, who as an officer, employee or member is under a duty to perform the acts required of employers by ORS 316.167, 316.182, 316.197, 316.202 and 316.207.

#### ORS 316.162.

These requirements include withholding, at the time of payment of wages, an amount “substantially equivalent” to the employee’s personal income tax liability imposed on the wages. ORS 316.172. The amount withheld is considered part payment of the employee’s personal income tax liability. ORS 316.187. The employer is also required to submit a combined quarterly tax and assessment report, under ORS 316.168. This quarterly report must also contain information implicating various other programs, such as the worker’s compensation and unemployment insurance obligations of the employer. It must be accompanied by payments of taxes or assessments due under all of these provisions along with other withheld tax amounts, such as the statewide transit tax due under ORS 320.550.

The withholding tax statutes are written as requirements. Rather than being *allowed* to file the reports, any person who meets the definition of employer in ORS 316.162 in relation to another is *required* to do so. In the case of a client employer of a PEO or similar entity, nothing in the statutes specifically allows an employer to delegate these responsibilities. Additionally, examination of ORS 316.169 is useful. This statute governs when a “lender, surety or other person who is not an employer with respect to an employee pays wages to an employee” and states that this entity does have withholding and reporting obligations. Except for receiving credit for amounts that are paid in this situation, an employer is not discharged from the need to comply with the withholding statutes. ORS 316.169 (5). Thus, withholding and reporting tasks remain the duties of an employer, even if they are performed by another person, whether contractually or because required by statute.

We address your question about the use, in filing a client employer’s reports, of the Business Identification Number assigned to the PEO.<sup>1</sup> We conclude that an employer, including a client employer, must use its own number for reporting and payment purposes. This would also be the case if the employer contracted with another person to perform these obligations. ORS 316.168 and 316.202 set forth reporting requirements, including those pertaining to the combined quarterly report. These statutes provide for the timing and mechanics of filing reports and submitting accompanying payments to the Department of Revenue. ORS 316.168 also outlines the responsibilities of an employer in preparing and submitting the quarterly report. After receiving the report and payments, the Department of Revenue must credit payments and forward reports to the other affected entities. Concerning account numbers, ORS 316.168 (7) provides:

(7) The Department of Revenue, the Employment Department and the Department of Consumer and Business Services shall develop a system of account numbers and assign to each employer a single account number representing all of the tax and assessment programs included in the combined quarterly tax and assessment report.

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<sup>1</sup> You ask about the use of the tax identification number of the PEO. The combined quarterly reporting is done using the Business Identification Number or BIN of an employer, not the tax identification number. “Business Identification Number” does not appear in the withholding statutes but is used on forms and is clearly the number described in ORS 316.168 (7).

Thus, the same account number, corresponding with an employer, must be used for all of the reporting and payment duties of that employer. As a result, a client employer must make these submissions using its single, assigned number, even if it delegates the actual performance of these duties to another entity. We conclude that a client employer cannot fulfill its requirements under ORS 316.162 to 316.221 if an account number other than the assigned number is used.

**Question 2.**

In terms of Unemployment Insurance portion of the prescribed payroll reports what agency is responsible for enforcement, noting that the Unemployment division does not have direct access to the identity of the client employers of the PEO?

**Answer 2.**

The fact that the Employment Department does not currently have direct access to the identity of a PEO's client employers does not mean that the data does not exist. A Form OQ is filed with the Department of Revenue under ORS 316.168 and the department has robust audit and enforcement powers under ORS chapter 305, including 305.190, 305.192 and 305.195.

**Question 3.**

In the workers compensation space, it is my understanding that the Division by rule is treating PEO's as Worker Leasing Companies even though they do not supply the workers to their clients and have no direction and control or manner of work authority or ownership interests in their clients' business. Perhaps because of WCD's Rules, other agencies by rule also seem to be treating the described PEO's as Worker Leasing Companies without considering the direction and control or manner of work elements as described (specifically the Employment Department and the Department of Revenue). Do these three agencies have the statutory authority to treat PEO's as the employer for compliance to Oregon statutes?

**Answer 3.**

The term "professional employer organization" does not appear in the ORS. We take this to mean that, while a client employer may enter into an agreement with a PEO for services, nothing in statute authorizes the PEO to perform any services for the client employer in which the PEO substitutes its own identity for that of the client employer, except in accordance with law. For instance, a PEO that meets the statutory requirements to act as a common paymaster with a client employer—i.e., the two are related corporations within the meaning of ORS 657.477 and the rules adopted under the statute—is "considered the employer for all wages disbursed to individuals by the common paymaster whether payment was for services performed for the common paymaster or for a related corporation." OAR 471-031-0076 (1).

By contrast, ORS 657.430 provides that "the Director of the Employment Department shall, for each calendar year, determine the tax rates applicable to each employer on the basis of the actual experience of the employing enterprises of the employer with respect to benefits paid

to unemployed individuals on account of wages for services performed in the employ of the employer during the base years of the unemployed individuals.” This statute would be meaningless if a PEO by agreement could substitute its own experience-based tax rate for that of its client employer.

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Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel

A handwritten signature in black ink that reads "Alan S Dale" with a stylized flourish at the end.

By  
Alan S. Dale  
Senior Deputy Legislative Counsel