



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 13, 2024

Representative Paul Holvey  
900 Court Street NE H277  
Salem OR 97301

Re: Questions regarding professional employer organizations

Dear Representative Holvey:

You asked the following questions. Our answers appear below.

**Question 1.**

1. Given that a PEO has no direction or control of employees or the manner or work performed, and also no ownership interest in the client [employer's] business, and is not recognized as the employer filing the quarterly payroll tax reports under ORS 316.162[,] can they be considered an employer under [ORS] 657.477 / a common paymaster under that statute?

My understanding is direction and control is established under [ORS] 657.040 and 670.600 in addition to [ORS] 316.162.

**Answer 1.**

As a legal matter, a professional employer organization (PEO) may not act as a common paymaster for itself and its client employers unless they conform to the statutes and rules governing common paymaster relationships. The common paymaster statute, ORS 657.477, provides in full:

For purposes of this chapter, if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual, and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

It thus applies only to “related corporations” and requires that they “concurrently employ” at least one individual.<sup>1</sup>

ORS chapter 657 does not define “related corporations,” but the rules at OAR 471-031-0076 set out seven disjunctive tests that require: common ownership of a majority of stock, subsection (3)(a) to (c); having at least 50 percent of corporate officers in common, subsection (3)(d); having at least 30 percent of employees concurrently employed, subsection (3)(e); or having at least 50 percent of the members of the boards of directors in common or the holders of at least 50 percent of the voting power to select the board members of one corporation concurrently holding a majority of that power for the other corporation, subsection (3)(f)(A) and (B).

As for “concurrently employ,” the *Merriam-Webster Unabridged Dictionary* defines “concurrently” as the adverbial form of “concurrent,” which, as relevant here, is a legal term meaning “joint and equal in authority.”<sup>2</sup> ORS chapter 657 does not define “employ,” but defines “employment” generally to mean “service for an employer . . . performed for remuneration or under any contract of hire, written or oral, express or implied.”<sup>3</sup> In addition, ORS 657.025 defines “employer” in relevant part to mean “any employing unit which employs one or more individuals,” and ORS 657.020 defines “employing unit” in relevant part to mean any organization “who has or had in its employ one or more individuals performing services for it within this state.” Similarly, ORS 657.015 defines “employee” to mean “any person, including aliens and minors, employed for remuneration or under any contract of hire, written or oral, express or implied, by an employer subject to this chapter in an employment subject to this chapter.”

In sum, under ORS chapter 657, one of two or more related corporations may act as a common paymaster if the related corporations have, under joint and equal authority, at least one individual performing services within this state for remuneration, under any contract for hire, for both or all of the corporations. Your question assumes that PEOs’ contractual agreements to perform administrative services for their client employers do not involve common ownership or concurrent employment of individuals. Please note that, as a textual matter, not all the “related corporations” tests are based on ownership. But even if a PEO and a client employer were deemed to be related based on common direction or leadership absent common ownership, the PEO would still be ineligible for common paymaster status if concurrent employment is likewise absent. Thus, PEOs as characterized in your question could not be authorized to act as common paymasters for themselves and their client employers under current law.<sup>4</sup>

ORS 657.040 (1) establishes a presumption that services performed by an individual for remuneration is employment subject to ORS chapter 657 unless the individual shows to the

---

<sup>1</sup> As a matter of process, OAR 471-031-0076 (5) and (6) require the related corporations to file a common paymaster plan with the Employment Department subject to department approval. And if “corporation” is used to mean a C corporation, then the law is that much narrower.

<sup>2</sup> <https://unabridged.merriam-webster.com/unabridged/concurrently> (last visited February 13, 2024).

<sup>3</sup> ORS 657.030 (1).

<sup>4</sup> On its website, the Internal Revenue Service explains the rationale for the federal common paymaster provisions thus: “When two or more members of a group of related corporations employ the same employees concurrently, it is possible that the entire group of related corporations will pay more FICA and FUTA taxes than a single corporation employing the same employees would pay because each of the corporations will apply a separate FICA and FUTA wage base to the employees’ remuneration. This means that the group of related corporations, as a whole, may pay Social Security taxes and FUTA taxes on an employee’s wages at one related corporation’s level and then again at another related corporation’s level for an amount that cumulatively exceeds the Social Security and FUTA wage caps.” Internal Revenue Service, “Common Paymaster,” <https://www.irs.gov/government-entities/common-paymaster> (December 22, 2023).

satisfaction of the Employment Department that he or she is an independent contractor, as that term is defined in ORS 670.600. ORS 670.600 (2) defines “independent contractor” as a corollary status to that of an employee, i.e., being “*free from* direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results” (emphasis added), but it does not define “employee.” And the general definition of “employee” at ORS 657.015 quoted above does not mention direction or control.<sup>5</sup>

By contrast, ORS 316.168 (1) requires every employer subject to ORS chapter 657 to file combined quarterly reports for the amount of employer taxes imposed under ORS chapter 657. In turn, ORS 316.162 (1) defines “employer” for these purposes to mean, in relevant part, 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.” Thus, an employer is obliged to file combined quarterly reports only for those employees over whose work it has direction and control.

Textually, this definition does not apply to determining concurrent employment under ORS 657.477, the common paymaster statute. But because one of the functions of a common paymaster is to file combined quarterly reports, it would not make sense to have different definitions of “employer” for purposes of ORS 316.168 and 657.477 (possibly creating a third category of employee who does not work under the direction and control of an employer but is not an independent contractor, either). We believe therefore that ORS 316.168 and 657.477 can be read together without conflict to mean that the PEO and its client employers concurrently employ employees if they have joint and equal authority to direct and control the employees’ work. And the definition of “independent contractor” used in ORS chapter 657 supports this conclusion by negative implication. Thus, under current law, a PEO as characterized in your question, not having joint and equal authority over any employees with its client employers, is not authorized to act as common paymaster or to file combined quarterly reports for itself and its client employers using the PEO’s own business identification number.

## **Question 2.**

2. [Is] an entity considered a common paymaster . . . allowed to file the quarterly payroll tax report for unemployment insurance purposes?

## **Answer 2.**

Yes. OAR 471-031-0076 (1)(a) and (b) provides:

(a) A common paymaster making disbursements on behalf of related corporations to employed individuals shall be responsible for taxes, interest and penalties imposed by ORS Chapter 657 on all wages disbursed by it;

(b) For purposes of charging benefits paid and mailing notices to base year employers, the common paymaster shall be considered the employer for all wages disbursed to individuals by

---

<sup>5</sup> In ORS chapter 657, direction and control is mentioned only in special applications in ORS 657.035 (1)(b)(A) and (B) and 657.056 (1), in connection with work not localized within Oregon, and in ORS 657.078 in connection with media-related work performed by independent contractors.

the common paymaster whether payment was for services performed for the common paymaster or for a related corporation.

This answer is further supported by OAR 471-031-0076 (8), which provides: "An employing unit may not report the payroll of any other employing unit, except as provided in this rule."

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel



By  
Alan S. Dale  
Senior Deputy Legislative Counsel