



American Payroll Association

Government Relations • Washington, DC

Written Statement
Hearing of the Oregon State Treasury
Proposed Rules for the Oregon Retirement Savings Plan
February 15, 2017

Thank you for the opportunity to provide comments on the Notice Rule for Rulemaking and Model Rules of Procedure, draft of January 12, 2017, regarding the Oregon Retirement Savings Plan (ORSP). As one of the first states to develop a state retirement plan mandate, Oregon is establishing a precedent that other states will likely follow. The American Payroll Association (APA) offers a number of points for your consideration.

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 importance of retirement savings opportunities 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. We have been working with a number of states, including Oregon, interested in similar retirement savings plan mandates to minimize avoidable administrative burdens on both employers and state administrators.

In December 2016, APA submitted written comments on Oregon's proposed retirement savings plan rules. We are pleased that the proposed revised rules reflect careful consideration of our comments with reasonable accommodations and adjustments made accordingly. For example, the revised definition of wages is much improved and easier to administer and, thus, no longer necessitates separate sets of records for wages subject to retirement plan withholding as distinct from wages subject to unemployment insurance, wages subject to income tax withholding, and other wage withholding requirements.

SPECIFIC COMMENTS ON THE REVISED PROPOSED RULES

Requirements for the Employer Exemption

APA's greatest remaining concern is about the conditional employer exemptions. Very few employers that offer a qualified retirement plan will satisfy the requirement to offer such plans to "all" employees within 90 days of hire in every circumstance. For example, part-time, temporary, per-diem, and contingent employees may be hired without a realistic expectation of permanent employment. In particular, the conditional certificate of exemption leaves unresolved significant potential compliance concerns for large multistate employers.

Although APA understands the state's interest in extending retirement savings opportunities to all workers without exception, we emphasize here APA's comments from our letter in December:

[T]he 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....

A high volume of these "orphan" accounts could quickly increase employer costs for retirement plan administration. Employers 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. Workers may be inconvenienced as well. They may recognize that establishing retirement savings payroll deductions with their employers with which they only have a limited engagement would be inappropriate. Those that fail to opt out may be inconvenienced by having to request refunds after the fact.

APA recommends that the Oregon State Treasury consider allowing the employer exemption based on the qualifications found in the language of Oregon Revised Statutes (ORS). In other words, the ORSP Board will accept any available retirement plan for purposes of a permanent employer exemption if the plan complies with the qualification requirements found in Internal Revenue Code §§ 401(a), 403(b), or 457(b), and the associated regulations. Of course, employers could be invited and encouraged to broaden such qualifications.

If policymakers are concerned about coverage, we would recommend a study of employer practices on the initial qualifications for inclusion in retirement plans and the cost-effective implications to both employers and Oregon's plan if all workers will be included. There may

be an optimal point at which workers should be engaged and automatically enrolled in retirement savings programs.

Tax Treatment

APA appreciates the clarity added to the revised proposed rule to explain that the tax treatment of ORSP contributions is the same as that of a Roth IRA, and we agree with this approach. This clarity should be extended to specify that employee communications disclose the same information: “the Plan provides a Roth IRA, and that employees with income in excess of the Roth IRA limits should opt out of the Plan.”

Employers may offer helpful advice to employees about where to obtain tax information, but should not be held responsible for enforcing income limits, particularly because employers may not be aware of employees’ full earnings (e.g., new hires, earnings of spouses).

Division 10 Employer Registration and Enrollment

The revised proposed rule provides, “for each Participating Employee, the Participating Employer shall provide information including:

- (1) Full legal name;
- (2) Social security number or taxpayer ID number;” (emphasis added).

We recommend eliminating the reference to the “taxpayer identification number” in item (2). Individuals who are authorized to work in the United States are eligible for and required to obtain a social security number. In addition, employers are generally required to collect a social security number from each employee in order to report wages on Internal Revenue Service Form W-2. Oregon specifically requires employers to obtain a social security number from each employee:

Payroll Records

You are expected to keep adequate payroll records as an employer or third party administrator. This includes

- Social security numbers for each employee

(www.oregon.gov/EMPLOY/Businesses/Tax/Pages/Record-Keeping.aspx)

In addition, ORSP may experience difficulties in enrolling workers with Individual Taxpayer Identification Numbers, which can be obtained by persons who are not eligible for social security numbers but who have United States tax reporting obligations (e.g., nonresident aliens who are not employed in the United States but need to file a tax return). Because financial institutions will need to verify names and social security numbers of enrollees under federal banking and anti-money-laundering laws, Oregon could reduce the possibility of system rejections and related costs by requiring a social security number for each enrollee.

Definitions and Duplicative Coverage

APA agrees with the revised proposed definitions of employer, employee, and employment, which are based on Oregon Unemployment Insurance (UI) laws and regulations. Oregon's UI laws (and virtually all other states' UI laws) contain provisions that serve to clarify that only one state's UI law applies to any particular employee and employer, which is helpful in determining how to treat employees who live and work in different states, or who work for short periods in different states. However, APA brings to your attention a potential complication in that duplicative coverage of the same employee could occur if other states (or cities and counties) enact similar laws with definitions that are not the same.

Further Guidance on Forms and Instructions

We appreciate the sensitivity to registration requirements that include “other information as reasonably required” (emphasis added). Employers and employees are concerned about any requirement for the employer to gather and convey employees' personal email addresses, personal cellphone numbers, and beneficiary information (i.e., heirs).

Several sections refer to requirements to use “a standard form as provided by the Plan.” Large employers and service providers may prefer to administer substantially similar forms of their own design, which may be made part of other existing information packages (such as new hire introductory materials), or one form that could be used to comply with several similar state-run plans. Wherever the proposed rule notes that employers must use a “standard form as provided by the Plan,” APA asks that substantially similar forms be permitted. For example, the rule could be changed to read: “standard form as provided by the Plan, or any substantially similar form that provides the same information and serves the function intended by the standard form.”

Similarly, we appreciate the provision permitting employers to “provide such informational materials either directly, or by supplying the Employee with the Internet location where the information may be found, along with Plan-provided instructions about how to obtain the information if the Employee does not have Internet access.”

Several sections of the proposed rule appear to have been drafted with paper-based forms and materials in mind. Therefore, it may be helpful to include a broad statement to the effect that forms, information, acknowledgements, and transactions may be conducted electronically as long as electronic versions provide the same information and serve the functions intended by the corresponding paper forms. Paper formats should be made available to those employees who are not able to access the information electronically.

For example, the following section may be viewed as prohibiting employers from applying routine electronic acknowledgement systems that are widely used to track and confirm that employees have accessed necessary employment-related information. This typically happens automatically and does not pose a hardship to the employee. The process is merely designed

to help employers consistently administer the various employee communications required by law. APA recommends the language added below:

Division 50, Distribution of Materials to Employees

(6) The Employer shall document that the informational materials were given to the Employee, which may consist of a notation in the Employer's records identifying the Employee and the date the materials were distributed. The Employer may request that the Employee acknowledge receipt of the informational materials but shall not request or require that the Employee take any additional steps, including returning any forms to the Employer (emphasis added).

Division 20 Joint Employment Circumstances (Reserved)

APA is aware of the December 22, 2016, comments from the National Association of Professional Employer Organizations (NAPEO), and concurs with their recommendation that the responsibility for compliance with any employer requirements and employee size limitations must be applied to the clients of professional employer organizations (PEOs), and not to the PEO directly.

As explained in NAPEO's letter, client employers will be responsible for continuing compliance if their relationship with a PEO changes. Clients move in and out of PEO relationships over time, and recognizing a PEO as a new employer of an employee may be disruptive (e.g., potentially requiring new enrollment).

Ongoing Interest of APA

Finally, APA would appreciate the opportunity to work with the Board on draft forms and instructions. Significant details and guidance will be established through forms, instructions, and system implementations. We may be able to provide helpful recommendations. APA shares your interest in ensuring that Oregon's plan can be implemented efficiently.

Again, we appreciate the opportunity to comment on the Oregon State Treasury's proposed rules concerning the ORSP.

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