



Oregon

Kate Brown, Governor

Public Employees Retirement System

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May 27, 2022

TO: Members of the PERS Board

FROM: Stephanie Vaughn, Manager, Policy Analysis & Compliance Section

SUBJECT: Adoption of Rules to Implement Senate Bill 112 (2021):
OAR 459-005-0020, *Determination of Employee or Non-Employee Status*
OAR 459-010-0030, *Determination of Employee Status (repeal)*
OAR 459-010-0032, *Determination of Independent Contractor Status (repeal)*

OVERVIEW

- Action: Adopt the Senate Bill (SB) 112 rules.
- Reason: Implement 2021 legislation impacting PERS.
- Policy Issue: None identified.

BACKGROUND

Senate Bill (SB) 112 became effective on June 1, 2021. It is a PERS-sponsored bill to establish that common-law employees are included within the definition of “employee” under ORS 238.005(8) and “eligible employee” under ORS 238A.005(4). As promised during legislative committee hearings, PERS convened a workgroup of interested employee and employer stakeholders to address the agency’s implementation of SB 112 and associated rulemaking.

The proposed rule seeks to accomplish three things. First, PERS currently has two administrative rules regarding determination of employee or independent contractor status. The existing rules, OAR 459-010-0030 and 459-010-0032, are part of Division 10, which is generally applicable to the Chapter 238 Programs, and therefore does not explicitly apply to Oregon Public Service Retirement Plan (OPSRP) members. The proposed rulemaking repeals these existing rules and combines them into one new rule in Division 5 (Administration), which covers all programs. The combining of the rules is appropriate because a single legal standard applies to determining whether a person is an employee or independent contractor.

Second, in determining whether an individual is an employee for PERS purposes, PERS uses the current IRS standard for analyzing employment status under common law, but the current rules contain an outdated description of the IRS standard used. The proposed rule updates the categories and factors to be considered in this analysis to align with current IRS standards.

Third, the proposed rule establishes standards for presuming employment status based on public employer tax reporting and establishes a framework for how PERS will review claims of employment misclassification.

PERS initially convened a workgroup of interested stakeholders during the fall of 2021. After a series of workgroup meetings to refine the proposed rule, staff formally began the rulemaking process in December 2021. On December 23, 2021, PERS received public comments from

employee stakeholders expressing concerns about the workgroup process and noting that the proposed rule did not reflect a consensus of the workgroup. Staff then reconvened the workgroup to explore these concerns and further develop the proposed rule. Stakeholders provided additional comments on the proposed rule and the workgroup met during March and April 2022 to discuss additional changes to the rule.

In its current form, the proposed rule, OAR 459-005-0020, reflects a consensus of the workgroup and incorporates stakeholder feedback received throughout the rulemaking process.

SUMMARY OF MODIFICATIONS TO RULES SINCE NOTICE

The proposed rule has been modified since PERS filed a Notice of Rulemaking in December 2021. The most substantial change to the rule involves removal of the defined term “non-employee.” In the original version of the rule that was noticed, the term “non-employee” referred to an individual who did not meet the definition of an “employee” of a public employer, regardless of whether that individual was properly characterized as an independent contractor or an employee of a third-party firm or service provider. After reconvening the workgroup, stakeholders expressed concern that the rule should focus on the individual’s employment relationship with participating public employers and that the term “non-employee” was unnecessary and potentially confusing. The proposed rule has been modified to remove this term and to clarify that PERS’ analysis will focus on an individual’s employment relationship with participating public employers. Several provisions of the rule were modified to reflect the removal of this term and the focus of the rule concerns employment relationships with public employers.

Other changes to the rule include adding specificity to the types of records that an individual may provide to PERS in support of worker misclassification concerns, clarifying that the presumption of worker classification is related to the individual’s employment relationship with a public employer, and inserting language allowing individuals to provide public contracting wage and benefit analysis data to PERS as additional evidence in employment classification disputes.

PUBLIC COMMENT AND HEARING TESTIMONY

No rulemaking hearing was held because the PERS building was closed to the public. The first public comment period ended on December 23, 2021, at 5:00 p.m. In an email dated December 23, 2021, PERS received public comments on behalf of the PERS Coalition. The comments expressed concern about the workgroup process and noted that the proposed rule did not reflect a consensus of the workgroup. As a result, staff reconvened the workgroup to continue development of these rules before adoption by the board. Due to additional rule modifications, the public comment period was extended until March 7, 2022, at 5:00 p.m.

After reconvening the workgroup, PERS received additional written comments from workgroup stakeholders on April 13, April 14, and April 15, 2022. These comments primarily addressed the concern that the proposed rule should focus on an individual’s employment relationship with participating public employers. Additional comments included a suggestion to add specificity to the types of records an individual may provide to PERS as evidence of worker misclassification, and additional language about providing PERS with public contracting wage and benefit analysis data. Staff discussed these comments with stakeholders during workgroup meetings, and the

current version of the proposed rule reflects a consensus of the workgroup participants that the concerns with prior versions of the rule that were expressed in public comment have now been addressed.

LEGAL REVIEW

The attached draft rules were submitted to the Department of Justice for legal review and any comments or changes are incorporated in the rules as presented for adoption.

IMPACT

Mandatory: Yes, changes are necessary to bring the rules in line with changes or additions to statute made by the 2021 legislature.

Benefit: Updates the rules to reflect recent legislative changes and provides clarification on the agency’s administration of the plan.

Cost: There are no discrete costs attributable to the rules.

RULEMAKING TIMELINE

December 1, 2021	Staff began the rulemaking process by filing a Notice of Rulemaking with the Secretary of State.
December 1, 2021	Secretary of State published the Notice in the Oregon Administrative Rules Database. Notice was sent to employers, legislators, and interested parties. Public comment period began.
December 3, 2021	PERS Board notified that staff began the rulemaking process.
December 23, 2021	First public comment period ended at 5:00 p.m.
January 28, 2022	Staff extended the public comment period by filing a second Notice of Rulemaking with the Secretary of State.
January 31, 2022	First reading of the rules.
March 7, 2022	Second public comment period ended at 5:00 p.m.
March 28, 2022	Second reading of the rules.
May 27, 2022	Board may adopt the rule modifications, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The PERS Board may:

1. Pass a motion to “adopt the rules to implement Senate Bill 112, as presented.”
2. Direct staff to make other changes to the rules or explore other options.

STAFF RECOMMENDATION

Staff recommends the PERS Board choose Option #1.

B.4. Attachment 1 - 459-005-0020, *Determination of Employee or Non-Employee Status*

B.4. Attachment 2 - 459-010-0030, *Determination of Employee Status* (repeal)

B.4. Attachment 3 - 459-010-0032, *Determination of Independent Contractor Status* (repeal)

B.4. Attachment 4 - Public Comment Email from PERS Coalition