



Oregon

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Public Employees Retirement System

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TO: Interested Parties
FROM: Heather Case, Senior Policy Director
SUBJECT: LC 590 (2021) Summary – Prior Year Earnings on IAP Contributions

ISSUE

Currently when employers are late with their PERS IAP contributions, there is no statutory provision that would allow PERS to charge for past earnings on the late contributions.

BACKGROUND

The policy and practice of charging employers for earnings on late IAP contributions had been formally adopted by the PERS board upon staff recommendation back in 2006 while establishing rules for the IAP remediation project. However, that adopted policy and practice were not actually reflected in the two administrative rules that were updated at the time. (OAR 459-009-0200, Employer Remitting of Employee Contributions and OAR 459-080-0200, IAP Account Adjustments for Earnings or Losses).

At the time, the staff made the recommended policy based upon the reasoning that members shouldn't be harmed by the employer's reporting failure and as a matter of practice, employers are accustomed to being billed for earnings after the close of the prior year. Finally, the staff cited OAR 459-070-0110(7) as legal support for the policy recommendation.

PROPOSED SOLUTION

There is no statutory support for the current agency practice of collecting earnings from employers for late IAP contributions. Even though the practice was formally reviewed and adopted by the PERS board in 2006. The only administrative rule provided as support is OAR 459-070-0110(7). Unfortunately, that particular administrative rule is specifically for implementing ORS 238A.705. ORS 238.705(2) provides that "Any public employer delinquent in remitting contributions shall be charged interest on the total amount of contributions due from it at the rate of one percent per month or fraction thereof during which the public employer is delinquent. **Interest so paid shall be deposited in the Public Employees Retirement Fund and shall be used by the board in paying administrative expenses of the system.**" (emphasis added). However, in practice PERS has never actually applied this interest penalty against employers, and even if we did so, it does not solve the problem of missing earnings on the late IAP contributions since the interest penalty can only be used to pay for administrative expenses. They do not go into a member's IAP account.

What if PERS discontinues current agency practice and stops collecting earnings on late IAP contributions?

There is member expectation of timely employer IAP contributions and application of associated earnings. That could be the basis of lawsuits filed by affected members against their employers under contract law and fiduciary theories if PERS does not collect the earnings and make the members whole; and PERS could be joined as a party to such lawsuits.

What if PERS continues current agency practice without statutory support?

The agency is operating outside its statutory authority and if challenged by an employer, we would not be able to enforce an invoice.

Therefore, only an actual statutory change could codify our existing agency practice and provide a strong legal basis for collecting earnings on late IAP contributions.

PERS proposes adding the following language to ORS 238A.330, 238A.335, and 238A.340: “The board may charge a participating public employer accrued earnings for late payment of employee contributions made by a member under this section and remitted to the board by the employer.”