



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

April 25, 2023

Representative Julie Fahey  
Chair, House Committee on Rules  
900 Court Street NE H295  
Salem OR 97301

Re: Definition of "Measure" in ORS 260.432

Dear Chair Fahey:

You asked whether Senate Bill 168-A requires an amendment to ensure that legislation before the Legislative Assembly is excluded from the definition of "measure" as that term is used in either the current version of ORS 260.432 or in ORS 260.432, as amended by section 1 of Senate Bill 168-A. The answer is no.

### Analysis

Under current law, ORS 260.432 prohibits nonelected public employees from promoting or opposing a political committee or "the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, **the adoption of a measure** or the recall of a public office holder" while the public employee is "on the job during working hours." (Emphasis added). While Senate Bill 168-A proposes several amendments to ORS 260.432, the bill does not amend the meaning of the word "measure" that is used throughout the section.

The word "measure" is defined in ORS 260.005 (14) for all statutes in ORS chapter 260, including ORS 260.432:

- (14) "Measure" includes any of the following **submitted to the people for their approval or rejection at an election**:
- (a) A proposed law.
  - (b) An Act or part of an Act of the Legislative Assembly.
  - (c) A revision of or amendment to the Oregon Constitution.
  - (d) Local, special or municipal legislation.
  - (e) A proposition or question.

(Emphasis added).

ORS 260.005 (14) thus establishes two requirements for a matter to be considered a "measure" under ORS chapter 260: (1) the matter must qualify under one of the five categories described in ORS 260.005 (14)(a) to (e) (e.g., be "A proposed law" or "An Act . . . of the Legislative Assembly," and (2) the matter must be "submitted to the people for their approval or rejection at an election." Solely meeting one of these two requirements is not sufficient for a matter to be a "measure" as defined in ORS 260.005 (14). For this reason, we believe that the statutory text unambiguously shows that legislation that is

before the Legislative Assembly and that has not been referred to the people for their approval or rejection is not a “measure” as that term is defined in ORS 260.005 (14) or used in ORS 260.432.

Our interpretation is further supported by the context provided by ORS 260.432 and other statutes. ORS 260.432 (5) explicitly states that once legislation that originated in the Legislative Assembly is referred to the people, legislative staffers are permitted to explain why the legislator who employs them voted in a particular manner when the legislation was before the Legislative Assembly. This subsection makes sense only if legislative staffers are permitted to spend public time advocating for or against legislation that is before the Legislative Assembly but not permitted to spend public time advocating for or against the legislation once it has been referred to the ballot and qualifies as a “measure.”

Similarly, in ORS 171.725 to 171.785, the Legislative Assembly has enacted an entirely distinct set of laws that regulate promoting or opposing legislation that is before the Legislative Assembly, with ORS 171.725 (8) defining “lobbying” as:

(8) “Lobbying” means influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the goodwill of legislative officials.

The lobbying regulations set forth in ORS 171.725 to 171.785 make it clear that public employees are permitted to engage in “lobbying” activities with respect to legislation before the Legislative Assembly. While most public employees whose official duties include lobbying (including most legislative directors for state agencies) are required to register as a lobbyist under ORS 171.740 and file statements of lobbying expenditures under ORS 171.745, other public employees are not, including both legislators and legislative staff who are “acting in an official capacity.”<sup>1</sup>

The fact that the lobbying regulations set forth in ORS 171.725 to 171.785 expressly authorize nonelected legislative staff (and other public employees) to engage in lobbying activities on behalf of legislation before the Legislative Assembly is further evidence that ORS 260.432 cannot be interpreted as prohibiting legislative staff or other public employees from engaging in these same activities.

Finally, we believe that even in the unlikely event that a court disagreed with our textual and contextual interpretation of the definition of “measure” in ORS 260.005, a court would likely still refuse to conclude that the term “measure” includes legislation that is before the Legislative Assembly based on the absurd-result maxim, which directs a court to “avoid a literal application of the statutory text if it will produce an absurd result.”<sup>2</sup> This maxim may be used by courts to determine which of two or more plausible meanings the legislature intended, with the court refusing “to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole.”<sup>3</sup>

As detailed above, the definition for “measure” set forth in ORS 260.005 (14) applies to all of ORS chapter 260, not just ORS 260.432. While we have not had sufficient time to conduct a full analysis, it appears that if the term “measure” is interpreted to include bills before the Legislative Assembly, then moneys used to support or oppose legislative bills would likely constitute campaign contributions and expenditures.<sup>4</sup> This would mean that in order to expend moneys lobbying in support of or in opposition to

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<sup>1</sup> ORS 171.735 (2). See also ORS 171.735 (5) (listing additional public employees who are permitted to engage in lobbying activities but are exempt from certain lobbyist filing requirements).

<sup>2</sup> *State v. Vasquez-Rubio*, 323 Or. 275, 282 (1996).

<sup>3</sup> *Id.* at 282-283.

<sup>4</sup> See ORS 260.005 (3) and (8).

legislative bills, an individual or entity would likely first have to form a political committee or petition committee and then make all of the associated filings. As the definition of “measure” has not substantively changed since ORS 260.005 was first enacted into law in 1971,<sup>5</sup> it would also mean that there have been countless instances in which private individuals and entities, public employees and elected officials who acted in accordance with ORS 171.725 to 171.785 have violated provisions of ORS chapter 260. We believe this outcome is contrary to the apparent policy of the Legislative Assembly as a whole and very unlikely to be adopted by a court.

## Conclusion

The Oregon Secretary of State has adopted as an administrative rule a manual detailing the requirements of ORS 260.432 (Manual).<sup>6</sup> On page 15, the Manual states:

Legislative bills are not covered by ORS 260.432. Therefore, it is allowable, under election law, for public employees to lobby governing bodies. Once a measure has been certified to the ballot, political advocacy is restricted by ORS 260.432.

For the reasons detailed above, we believe that this statement accurately describes the express text and context of ORS 260.432, both as the statute is currently written and as the statute would continue to apply if Senate Bill 168-A is enacted into law. Consequently, we do not believe that Senate Bill 168-A needs to be amended to ensure that legislation before the Legislative Assembly is excluded from the definition of “measure” as that term is defined in ORS 260.005 (14) or used in ORS 260.432.

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Very truly yours,

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<sup>5</sup> Under Section 1 (4), chapter 749, Oregon Laws 1971, “measure” is defined as “any proposed law, Act or part of an Act of the Legislative Assembly, revision of or amendment to the Oregon Constitution, local, special or municipal legislation or proposition or ballot question submitted to the people for their approval or rejection at an election.”

<sup>6</sup> *Restrictions on Political Advocacy by Public Employees*, adopted by Oregon Administrative Rule 165-013-0030, <https://sos.oregon.gov/elections/Documents/restrictions.pdf> (revised October 2022).