

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

459-005-0020

Determination of Employee Status

(1) Definitions. For purposes of this rule:

(a) “Employee” means:

(A) For a Tier One or Tier Two member, an individual who meets the definition of “employee” provided in ORS 238.005 and OAR 459-005-0001(14), and includes an individual who has the status of a common-law employee of a public employer, under the usual common law rules applicable in determining the employee/employer relationship.

(B) For an OPSRP member, an individual who meets the definition of “eligible employee” provided in ORS 238A.005, and includes an individual who has the status of a common-law employee of a public employer, under the usual common-law rules applicable in determining the employee/employer relationship.

(b) “Independent contractor” means an individual or business entity providing services to a public employer where the public employer has the right to control or direct only the result of the labor or service, and not the means and manner of providing the labor or service, under the usual common-law rules applicable in determining the employee/employer relationship.

(c) “Third-party firm or service provider” means a business that provides individuals to a public employer who provide services to the public employer as part of a service contract.

(2) Reporting Requirement. Public employers shall report all employees to PERS as required under OAR 459-070-0100.

(3) Determination of whether an individual is an employee of a public employer eligible for PERS benefits is made under common-law rules.

(a) An individual is presumed to be an employee of a public employer if the public employer reports the individual’s wage and tax information to the Internal Revenue Service via Form W-2.

(b) An individual is presumed to be an independent contractor of a public employer if the public employer reports payments for the individual’s or business entity’s services to the Internal Revenue Service via Form 1099.

(4) PERS will rely on a public employer’s worker classification of an individual based upon sections (2) and (3) of this rule. However, if a claim of worker misclassification is raised in a dispute under ORS 238.285, a dispute under ORS 238.450, an appeal by an individual under OAR 459-001-0030, or an appeal by an employer under OAR 459-001-0032, a public employer, or the individual who provided services to a public employer, may rebut the presumption of employee or independent contractor status in section (3) of this rule by providing to PERS the following documentary evidence:

(a) A judgment, court order, Internal Revenue Service Form SS-8 determination, or other Internal Revenue Service ruling that concludes that the appropriate classification for the individual who provided services to a public employer differs from the presumptions in section (3) of this rule;

(b) Other records satisfactory to PERS that establish that the appropriate classification for the individual who provided services to a public employer differs from the presumptions in section (3) of this rule, including, but not limited to the following:

(A) Paycheck stubs or earnings statements;

(B) A signed employment verification letter completed by the employer that provides the following information:

- (i) Employer's business name and address;
- (ii) The location of the employment, if different from the employer's place of business;
- (iii) The employee's job title;
- (iv) The dates of employment;
- (v) The employee's work hours;
- (vi) The employee's duties and responsibilities;
- (vii) The employee's salary; and
- (viii) Contact information for the person who prepared the letter;

(C) An executed contract or employment agreement that provides the following information:

- (i) The employee's full name;
- (ii) The date of hire;
- (iii) The salary or rate of pay;
- (iv) The employee's manager or supervisor; and
- (v) The nature of the employment (seasonal, time-bound or fixed term, at-will);

(D) A written contract between the individual and the public employer that provides the terms of the engagement for independent contractor;

(E) Records showing the extent to which the public employer directed or controlled the work performed by the individual related to any of the factors outlined in subsection (6) below; or

(F) Any public contracting analysis data performed by the public employer under ORS 279B.030-279B.036.

(5) If a public employer, or the individual who provided services to a public employer, submits documentary evidence to rebut the presumption of employee or independent contractor status as required under section (4) of this rule, PERS shall evaluate such evidence to determine whether an individual is an employee of the public employer or independent contractor under common-law rules.

(6) To determine an individual's worker classification, PERS shall follow the three-category common-law analysis, in accordance with standards established by the Internal Revenue Service. The three categories that provide evidence of the degree of control or independence are:

(a) Behavioral control. This category examines facts that show whether a public employer has a right to direct and control the work performed by the individual, even if that right is not exercised. Facts to be considered in evaluating behavioral control include, but are not limited to:

(A) Instructions. This includes the type, degree, and frequency of instructions given to the individual concerning when, where, and how the work is performed. Relevant factors may include, but are not limited to:

- (i) Setting hours of work;
- (ii) Requiring full-time work;
- (iii) Setting the order or sequence of work;
- (iv) Requiring that the work be performed on the public employer's premises; and
- (v) Requiring the services to be rendered personally by the individual, and restricting the individual's ability to hire, supervise, or pay assistants to complete the work.

(B) Evaluation systems. This includes the type, degree, and frequency of evaluations. Relevant factors may include, but are not limited to:

- (i) Requiring the individual to submit regular oral or written reports to the public employer;

- (ii) Whether evaluation systems are used to measure how the work is done, or only the final work product (without regard to how the work is done); and
- (iii) Whether the public employer or a third-party is performing the evaluation.
- (C) Training. This includes the type, degree, and frequency of training an individual receives from the public employer. Relevant factors may include, but are not limited to:
 - (i) Providing training on how to do the job, or other training opportunities;
 - (ii) Frequency of training opportunities;
 - (iii) Whether the public employer or a third-party is providing the training; and
 - (iv) The source of funding for the training.
- (b) Financial control. This category examines facts that show whether a public employer has the right to control the economic aspects of the individual's labor or services. Facts to be considered in evaluating financial control include, but are not limited to:
 - (A) Whether the public employer furnishes the tools and equipment used to perform the work;
 - (B) Whether the public employer is responsible for obtaining all assumed business registrations, professional occupation licenses, or certificates required by state or local government ordinances for the individual to conduct business;
 - (C) Whether the individual is reimbursed for business and/or travel expenses;
 - (D) The extent to which the individual can realize a personal profit or loss;
 - (E) Whether the individual's services are available to the public;
 - (F) Whether the individual may provide labor or services to more than one employer at a time; and
 - (G) Whether the public employer pays the individual wages on a regular schedule, upon completion of a job, on a lump-sum or straight commission basis, or on an annual or periodic retainer basis.
- (c) Relationship of the parties. This category examines facts that show how the individual and public employer perceive their relationship to each other. Facts to be considered in evaluating the relationship of the parties include, but are not limited to:
 - (A) The terms of any written contracts that describe whether the employer has the legal right to control both the method and the result of the labor or service. Other important factors include who can modify the contracts, and how modifications are made to such contracts;
 - (B) Whether the public employer provides employee benefits to the individual;
 - (C) Whether the individual provides services on an ongoing basis, or whether the relationship ends once the labor or services are completed;
 - (D) The extent to which the individual is integrated into the public employer's business activities;
 - (E) Whether the individual's services are a key activity of the public employer's business; and
 - (F) Whether the public employer or the individual have the right to discipline, discharge, or terminate the relationship before services are completed, and the consequences of discipline, discharge, or termination.
- (7) Other important considerations.
 - (a) Standard of review. The determination that the individual is a public employee or an independent contractor will be based upon the totality of the circumstances. The degree and importance of each factor will vary depending on the labor or services to be performed, and the context in which the labor or services are performed.
 - (b) If, under the common-law rules, PERS determines that there is an employee/employer relationship, it is immaterial how the relationship is described by the parties. The substance of

the relationship, not the label, governs the individual's status for PERS purposes. PERS will disregard any contractual designation of the individual as an "independent contractor" or that designates that the individual is not an employee if the facts demonstrate an employee/employer relationship.

(c) An individual who provides services to a public employer shall be reported to PERS as a common-law employee of the public employer if an analysis under this rule results in the finding of an employee/employer relationship between the individual and the public employer.

(A) If an employee of a third-party firm or service provider is determined to be a common-law employee of a public employer, the third-party firm or service provider shall disclose all information regarding an employee's wages that is reasonably necessary to enable a public employer to make PERS contributions.

(B) If a public employer is not able to obtain information regarding the employee's wages from the third-party firm or service provider, the employee shall submit to the board any payroll and tax records relating to the services provided to the public employer. The employee may also submit any public contracting wage and benefits analysis data performed by the public employer under ORS 279B.030-279B.036. Upon review of the submission, the board shall fix a wage which shall be the basis for computing the amounts of the contributions. If the employee provided services to multiple employers, adjustments will be made to reflect the actual hours of service provided to the public employer responsible for the PERS contributions.

(d) For purposes of determining whether an individual provides services as an independent contractor, the creation or use of a business entity, such as a corporation or limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor. When the individual provides services through a business entity, such as a corporation or a limited liability company, services as an independent contractor may be satisfied by the individual or the business entity.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.005