
Oregon Retirement Savings Plan - Rulemaking Advisory Committee
MEETING MINUTES
August 11, 2016

Rulemaking Advisory Committee (RAC) members present:

Business Owners:

Dave Richardson – Baker & Spice
Saleem Noorani – Cork & Bottle Shoppe

Representatives of Workers:

Dick Schwarz – Retired, Former Executive Director of AFT-Oregon
Matt Swanson – SEIU
Janet Byrd – Neighborhood Partnerships

Rulemaking Expertise:

Mary Williams – Former Deputy Attorney General

State-Sponsored Plan Expertise:

Yvette Elledge-Rhodes – Chief Operations Officer, Oregon Public Employees Retirement System

Pension Attorney:

Vincent Cacciottoli – Garvey Schubert Barer

Board Liaison (Non-voting Member) present:

Cory Streisinger – ORSP Board, Former NEDCO affiliate & DCBS Head

Public/OST Staff present:

Public:

David Genz – Employment Department
Juanita Santana – ORSP Board
Tom Simpson – Standard Insurance Company
Kevin Christiansen – Oregon Bankers Association
Simon Poole – The Standard
Iris Hodge – Main Street Alliance
Stacey Triplett – Formerly Portland Housing Center

OST Staff:

Lisa Massena – OST, ORSP Executive Director
Jen Peet – OST, Director of Legal Affairs
Kristin Dennis – OST, Policy Director
Kim Olson – OST, Policy Analyst
James Sinks – OST, Communications Director
Alex Nelson – OST, ORSP Project Manager

Kathie Garcia – OST, Paralegal

Rulemaking Advisory Committee (RAC) members absent:

Business Owners:

Annette Joly – Capers Café and Joly Restaurant Group

Bruce Polvi – Electronics Superstore

Representatives of Workers:

Greg Warner – Hines Warner Wealth Management

*The Rulemaking Advisory Committee (RAC) meeting was called to order at 1:04pm
by Lisa Massena, Executive Director for the ORSP.*

Agenda Item 1 – Introductions

Lisa Massena kicked off the meeting by thanking everyone for attending the first Rulemaking Advisory Committee (RAC) meeting for the Oregon Retirement Savings Plan (ORSP). It was also mentioned that the membership of both the Rulemaking Advisory Committee and the members of the public joining the meeting represent a group of people with diverse backgrounds and expertise, with the hope being that the different perspectives will lead to beneficial commentary that helps shape the Rulemaking work.

Following were brief introductions by the attendees, both in-person and via conference line, as listed in the attendance portion of the Meeting Minutes above.

Agenda Item 2 – ORSP Progress & Status

Lisa Massena updated all RAC meeting attendees on the current progress and status of the ORSP.

The ORSP Board and Team predominantly spent the first half of 2016 on information generation and information gathering through a few different processes:

- Market analysis developed for Oregon by an independent retirement research group (Boston College Center for Retirement Research)
- Financial feasibility analysis developed for the ORSP by an independent retirement research group (Boston College Center for Retirement Research)
- Counsel and recommendation on a program design and operating model for the ORSP by an independent consultant (Segal in collaboration with Bridgepoint Consulting)
- Assembly of four working groups:
 - The first working group was focused on Plan Design and met five times in order to create the proposed Plan Design documents. Four meetings were focused on the development of the Plan Design and the final meeting focused on the consideration of a combination of Plan Design and Program Design/Operating Model.
 - The second working group was focused on Program Design/Operating Model.
 - The third working group was focused on Financial Literacy and how to consider financial education, knowledge, and capability in relation to the ORSP.
 - The fourth working group is focused on Outreach and is still active. The Outreach Working Group has met a few times with the focus on ensuring Oregonians are well-informed of the ORSP and program leading up to the go-live date (July 1, 2017). There will likely be a few additional Outreach Working Group meetings in the coming months.

Lisa Massena mentioned that the combination of professional involvement and working group sessions allowed the ORSP Team to bring a lot of industry and public voices together to consider a number of the aforementioned topics. The culmination of those efforts allowed the ORSP Team to bring this information to the ORSP Board during the July 19, 2016 ORSP Board meeting, which featured the final reports and presentations from the experts and a discussion of the recommendations on the proposed Plan Design, with the Board voting to approve the basic Plan Design components and the retention of the General Consultant for the ORSP.

For the second half of 2016, there will be a focus on two tranches of work:

- Marketing, outreach, employer engagement, and enrollment readiness
- Technical/operational components that will help bring the ORSP to life, including:
 - Rulemaking
 - Socializing the proposed Plan Design and Program Design with various industry members to confirm the absence of any potential show-stoppers, that the current assumptions make sense, that the industry is ready to engage with the ORSP, and ultimately that providers will be ready and prepared to submit proposals once the RFP is posted

At this juncture, Matt Swanson (SEIU) asked Lisa Massena to confirm the intent of the engagement(s) with industry experts and providers, looking for clarification on whether the conversations were to help understand what the current industry might be able to handle and/or whether the ORSP might require new products or services from industry providers in order to meet the needs of the program. Lisa Massena responded that the intent is to confirm that the ORSP's unique elements are aligned with what the marketplace is prepared to provide, citing an example that the ORSP will be an IRA account that has more of a traditional retirement plan structure with regards to investments.

Agenda Item 3 – Overview – Rulemaking Process & Your Role

Jen Peet mentioned that everyone in attendance should have a copy (either printed and on-hand at the meeting, or provided via email) of the most updated Rulemaking schedule, the draft rules, the ORS establishing the ORSP, the Plan Design document that has been approved by the ORSP Board and serves as a finalized document, and the proposed rule from the US Department of Labor (USDOL). Jen Peet noted that the ORSP Team is anticipating the final rule from the USDOL any day now, so this will likely be addressed at the next RAC meeting (if the final rule is published prior to the meeting).

Lisa Massena provided a clarifying point regarding the Plan Design document, mentioning that the current document approved by the Board is the basic design that has an "Additional Essential Elements" section with future-state items that the RAC will be considering. As specific examples, Lisa Massena cited that there are definitions in the "Additional Essential Elements" that will need to be worked through with the RAC.

Agenda Item 4 – Overview – Rules

Lisa Massena quickly outlined the structure of the Rulemaking schedule and the general flow, specifically noting that ORSP staff has put together the initial draft of the rules with what is currently known, the RAC will review and comment on the draft rules, ORSP staff will put together a revised draft of the rules based on RAC comments, and the revised draft will be brought to the ORSP Board for review.

Agenda Item 5 – Rules – Detailed Review

Jen Peet led the RAC through a detailed review of the initial draft of the rules.

Rules Discussion:

***Division 1 (Notice Rule for Rulemaking and Model Rules of Procedure)
& Division 2 (Inspection, Certification or Copying Public Records)***

Dick Scwharz (Former Executive Director of AFT-Oregon) asked Jen Peet to confirm which sections of the draft rules were boilerplate and, therefore, the RAC could ignore. In response, Jen Peet mentioned that the RAC could skip the first page of the initial draft of the rules and start on the second page, beginning with the section titled “Division 5 – Administration”. Jen Peet did mention that ORSP staff will use the assigned DOJ legal advisor to help draft the components currently identified on page one of the initial draft of the rules, but would welcome input from the attorneys and members of the RAC with legal expertise.

Lisa Massena quickly outlined the structure of the initial draft of the rules, highlighting each separate division (5-60) and stressed that this version is a draft with several places marked “reserved” that will require elaboration and additional text. Lisa Massena also identified that the goal is to balance the broad nature of the Bill with the specificity that is required for public engagement, without being too specific where any small administrative changes would require changes to rulemaking. Pointing to the Rulemaking schedule, Lisa Massena mentioned that there is a set of steps for a “Permanent Rule” and a separate set of steps for a “Temporary Rule”, and the need for both stems from the idea that we will know enough of the basics in 2016 to prepare a Permanent Rule but will require the Plan Services Provider to inform some of the specificity that will be required as part of an additional Temporary Rule (citing the exact rollout schedule as an example). Following the Temporary Rule would be a Permanent Rule, within the 180 day window provided by statute.

Yvette Elledge-Rhodes (Chief Operations Officer, Oregon Public Employees Retirement System) asked Lisa Massena whether ORSP staff had considered including a separate division or a subsection inside of Divisions 1 or 5 for appeals and/or disputes to clarify how to handle them and who is responsible for handling them (whether it’s the plan services provider or OST). Lisa Massena responded that we will need to think more about the potential inclusion of an appeals/disputes section. Dick Schwarz asked whether the numbering system of the divisions in increments of 5 (e.g. 5, 10, 15, 20, etc.) was intentional to leave space for future developments and Jen Peet responded that the numbers were completely arbitrary to help provide a starting point and would be updated in later drafts.

Matt Swanson asked whether there was an intended sequence or appropriate prioritization for the RAC to follow as they help shape the rules, citing that there appears to be three sets of work to be accomplished:

- What is needed in rules in order to do the work of finding a plan services provider
- What things we need to define so that employers and employees know how they fit
- What is needed in rules to make sure this rolls out and operates the way it should

Lisa Massena responded that we are focused on the experience of employers and employees and making sure that the plan is operating within the law. Establishing the correct definitions of “Employer”, “Employee” and “Employment” seems to be a good starting point to identify who we are talking about and whether there are any populations that are inadvertently being excluded. Lisa Massena mentioned that some of the rulemaking will inform the plan services provider conversation, but it doesn’t appear to be a critical dependency. Matt Swanson had an additional question regarding the process an employer would take to file a “Certificate of Exemption” and whether it would sync up with other processes that

employers already take to file with the State. Lisa Massena responded that this topic will be an agenda item for the next meeting to review and discuss further.

Rules Discussion:

Division 5 (Administration)

Jen Peet transitioned the RAC back to Division 5, specifically identifying the need for assistance with the definitions of “Employee”, “Employer”, and “Wages”. Lisa Massena helped set the stage by outlining that there are several other states with legislation for state-sponsored retirement plans that have slightly different perspectives on the included employees. House Bill 2960 was much more inclusive, identifying that anyone without a retirement plan available to them through work would be eligible for the ORSP. To try and interpret the broad definitions provided by the Bill regarding “Employer” and “Employee” and provide clarity, ORSP staff and the ORSP Board created an interagency working group with the Bureau of Labor & Industry (BOLI), Department of Consumer & Business Services (DCBS), the Employment Department (OED), Department of Revenue (DOR), and the Secretary of State (SOS) to determine what their definitions are.

Lisa Massena mentioned that ORSP staff and the ORSP Board have circled back to the definition of “Employer” and “Employee” as part of the Employment Department’s “Unemployment Insurance” definition for a few reasons:

- Unemployment Insurance definitions are very similar from state-to-state
- The Unemployment Insurance definitions appear to be the most inclusive, while excluding some incidental income circumstances

Lisa Massena also commented that the advice provided by employers and agencies that work with employers is that it will be better to use an existing definition of “Employer” and “Employee”, instead of creating new definitions.

At this point, Lisa Massena read the definitions of “Employer” under the “Unemployment Insurance” definition. Dick Schwarz asked whether previous case law decisions regarding “Unemployment Insurance” definitions would apply to the rule, if the rule incorporates the “Unemployment Insurance” definition. Mary Williams (Former Deputy Attorney General) commented that you’d largely inherit case law, unless context suggests otherwise. Mary Williams mentioned that how the rule is crafted is part of that context. Dick Schwarz clarified his question by asking if, instead of specifically referencing the definition of “Employer” in “Unemployment Insurance” to ORS 657.025, the definition incorporated the rule but contained slightly modified text, would the case law decisions still carry over. Vincent Cacciottoli (Garvey Schubert Barer) responded to the question by saying that the key language in the rules for the definitions of “Employer” and “Employee” is the “subject to ORS Chapter 657”. Vincent Cacciottoli identified that the current problem with the draft definition of “Employee” in the rules is that it doesn’t include the “subject to ORS Chapter 657” from the “Unemployment Insurance” definition, and would therefore include independent contractors. Vincent Cacciottoli mentioned that you would need to have a qualifier in order to exclude a specific group of people (e.g. independent contractors). Lisa Massena commented that there will be a difference between the definition of “Employee” and who may be excluded by that definition, and a person that is eligible for the Plan. Matt Swanson weighed in, asking Vincent Cacciottoli if the necessary revision would be to add the “subject to ORS Chapter 657” in the definition of “Employee”. Vincent Cacciottoli responded that this clarification was correct.

Moving on, Lisa Massena read the definitions of “Employee” under the “Unemployment Insurance” definition. Lisa Massena asked David Genz (Employment Department) whether there was a priority order for the definitions of “Employer” and “Employee”. David Genz commented that by statute, the

definition of “Employee” comes first and “Employer” second. Lisa Massena had a follow-on question, asking if this would mean that the definition of “Employee” would be more inclusive and the additional definition of “Employer” would be more exclusive. David Genz confirmed that this would be correct, also adding comment to an earlier reference by Vincent Cacciottoli that the Employment Department would likely have an issue with an exclusion of independent contractors. Cory Streisinger (ORSP Board, Former NEDCO affiliate & DCBS Head) commented that as a later enhancement, the Board may want to allow independent contractors to voluntarily opt-in, but they wouldn’t be subject to the employer mandate. Cory Streisinger elaborated by saying that “Employees” and “Employers”, as they are defined in the rules, would be subject to the mandate and from the work performed by the work group to draft the current definitions in the draft rules, the consensus is that it wouldn’t be ideal to try to draft new litigation around the definitions of “Employer” and “Employee”. Matt Swanson agreed that there is strong reasoning behind going with an existing definition, particularly because of the existing litigation and clarifications available. Matt Swanson mentioned that he does have some questions about how this would affect certain unique employment situations (e.g. joint employer, homecare workers), but moving forward with one offers the opportunity to generate that feedback. Saleem Noorani commented that if, as a small business owner, he is subject to “Unemployment Insurance”, then he is an employer. And if he is paying “Unemployment Insurance”, he would only be doing that if he is generating a payroll. If he has a payroll, then he has employees, and thus, the “Unemployment Insurance” definition would work in this instance.

To review the exceptions to the definition of “Employee”, Lisa Massena pointed everyone to the “Exceptions” document that was provided. As Lisa Massena reviewed the framework for the document, she commented that the main thing to consider is whether we are leaving out people who should be considered. In particular, Lisa Massena pointed out that one exception that gets flagged, because it represents a large population, are the seasonal employees under “agricultural labor for a small farm”. They often work for an employer for a short period of time, but move from employer to employer because of the seasonal nature of their work. Lisa Massena also noted “translators”, “child care for a person on public assistance”, “non-US citizens on US vessels outside of the US”, “railroad”, and “government service” as buckets that may need to be reviewed more closely. Matt Swanson responded that it might be beneficial to touch base with DHS, but that child care workers would often be paid in vouchers and would need to be examined further. Dick Schwarz commented that “students working in an internship” could be included in “students working for the school” with roles such as graduate assistants, teaching assistants, and research assistants. Lisa Massena highlighted that there are also several exceptions that relate to commissions, but that they’re worth looking at because it doesn’t necessarily mean a person isn’t an employee.

As a question to the board, Lisa Massena asked if the list of exceptions included in the definitions of “Employee” and “Employer” under “Unemployment Insurance” should be accepted, or if there needs to be a modified definition because certain exception groups should actually be included for the Plan. Yvette Elledge-Rhodes asked whether state government employees that aren’t eligible for a plan provided by their employer would be eligible for the ORSP. Lisa Massena responded that these employees would be eligible, likely an opt-in basis, and further clarified that there are three buckets of employees/employers in the state:

- Employee works for an employer that doesn’t offer any kind of retirement plan
- Employee works for an employer that offers a plan, but not to that employee (200,000 people)
- Independent contract or self-employed

Cory Streisinger mentioned that this question of opt-in or opt-out for the second bucket of employees likely won’t be decided at rollout of the Plan (opt-in would be done individually, opt-out through the

employer). Kristin Dennis commented that for the purpose of rulemaking, they would not be covered. If the employer offers a plan to some employees but not others, they would still be exempt. Cory Streisinger added a follow-on comment that this notion will be reviewed later in the process under “Exempt” and “Conditionally Exempt”.

To bring the group back together, Lisa Massena commented that the task is really to determine whether we’re okay with the exceptions listed under the definition of “Unemployment Insurance”, or if there are buckets of people that should be pulled out. Matt Swanson asked for clarification around the “commission sales positions” because some of these positions offer both commission and a wage, where unemployment insurance would likely be involved. David Genz responded that there can be confusion in this scenario and that the Employment Department would investigate, often because there was an unemployment insurance claim with the employer not reporting any wages. David Genz referred to the “Exceptions” document, noting that this specific group of “commission sales positions” refers to people performing in-person sales of consumer goods in the home (i.e. tupperware parties, Scentsy). Lisa Massena commented that based on this understanding, the income should be moved from “livelihood” to “1099/owner”. **(Consensus: move Commission Sales Positions 657.087(2) income from “livelihood” to “1099/owner”.)**

David Genz mentioned that one of the largest groups that would need to be looked at is the “agricultural labor for a small farm”. Citing data from a 2012 USDA Census of Agriculture, David Genz mentioned that in 2012 there were 10,768 farms with hired labor in Oregon but only 2,148 (approximately 20%) of these farms reported employees that were covered by unemployment insurance. In terms of farmers, this represented 99,305 farmers and only 60% were covered by unemployment insurance by their employers. Lisa Massena asked if the 40% of farmers not covered by unemployment insurance are because they fit the exception requirements or if there are other reasons. David Genz responded that the Employment Department wouldn’t be able to say either way with 100% certainty, but that it would likely be a combination of employers that the Employment Department isn’t aware of as well as employers that are excluded by the provisions under the definition of “Unemployment Insurance”. David Genz also noted that it is sometimes a case of educating farmers of the requirement to provide unemployment insurance to their employees and isn’t always an intentional violation of the law. Lisa Massena asked if David Genz could send along the report to share with the RAC. David Genz responded that he would follow-up and send it via email.

Dick Schwarz asked a clarifying question of whether, in a situation where a farmer hires a labor contractor who then hires farmers, the labor contractor would be considered an employer and the farmers as employees. David Genz responded that as long as the labor contractor, by statute, was considered an employer, then the notion above would be correct and the farmers would be the labor contractors’ employees. Matt Swanson mentioned that it might be beneficial to reach out to the Oregon Farm Bureau and the Oregon Association of Nurseries to gain more insight.

To realign on the list of exceptions that need a further look, Lisa Massena noted these as “students working for the school”, “students working in an internship”, “agricultural labor for a small farm”, “child care for a person on public assistance”, “government service”, and “railroads”. Matt Swanson mentioned that he would do some research regarding “child care for a person on public assistance”. Lisa Massena suggested that any exceptions that the RAC desires to remove from the exception list in the “Unemployment Insurance” definition should represent a large enough population to warrant the change. As an add-on to this comment, Cory mentioned that some of these exceptions could be carried into the plan via opt-in later on in order to reduce the opportunity for creating too much complexity by

removing exceptions on certain buckets and not others. Matt Swanson commented that this seems like the best approach, with the acknowledgement that any groups of employees falling under the exceptions list that felt differently would likely have advocates that could provide the input needed to make the necessary changes. Stacey Triplett (Formerly Portland Housing Center) asked whether there would be a disparate impact analysis performed due to the fact that some of the groups may not have the adequate organization to provide unified feedback. Lisa Massena responded that it may be a good idea to put together an analysis of how many employers and employees some of these buckets represent with the assistance of the Employment Department.

Agenda Item 6 – Recap & Next Steps

To wrap up the meeting, Lisa Massena noted that the next RAC meeting was tentatively scheduled for September 8th but the hope is that this date could be moved to accommodate travel for Lisa Massena. Lisa Massena mentioned that Missy Simpson would reach out after the meeting to check schedules and see if another date would work for the second RAC meeting. Lisa Massena also noted that there would likely need to be another RAC meeting or two, in addition to the second RAC meeting, to accomplish all of the necessary work.

PUBLIC COMMENT

Kevin Christiansen (Oregon Bankers Association) asked whether some of the larger employer groups were invited to sit-in on the RAC. Lisa Massena responded that there was intent to bring in employers of multiple sizes, noting there are a couple employers on the RAC with less than 50 employees and one with more than 100 employees. Tom Simpson (Standard Insurance Company) asked if the Oregon Farm Bureau had been invited and Lisa Massena responded that they had not been individually invited yet, but their input would be welcomed if anyone has their contact information. Lisa Massena did mention that the ORSP staff maintain a ListServ (around 300) that sends out meeting notifications and materials and they could be added to this ListServ distribution list.

The Rulemaking Advisory Committee (RAC) meeting ADJOURNED at 2:33pm.