A Guide for State Agencies on Standard Language for PERS Subject versus Non-subject Salary for Arbitration and Settlement Agreements

Introduction

The following document contains a matrix that provides various arbitration and settlement scenarios, along with language that should be considered when describing any payment of money to the employee or former employee.

Some important points:

- Language in an arbitration, conciliatory or settlement agreement does not override statute. If the language is in conflict with specific statutory requirements, statute will prevail.

- Ultimately, arbitration, conciliatory or settlement agreements are public record. Once the final version is signed and dated, anyone can request a copy through a public records request. The only parts that may not be public records are notes and other exhibits that would be kept in the DOJ file and would be noted as such.

Current supporting PERS Oregon Revised Statute and Administrative Rules can be found under the "Applicable Oregon Revised Statute and Administrative Rules" section of this document.

More About the Matrix

The matrix contains "if' and "then" statements. It is divided into situations and scenarios that are "PERS Subject Salary" and "Non PERS Subject Salary".

The "If" statement is the description of a possible situation. This is how the agency will be handling the particular arbitration, conciliatory or settlement agreement. It sets up how it will impact salary and any PERS contributions.

The "Then" statement is the language or concept that should be inserted into the agreement, to bring about the desired results, based on the "If" statement.

PERS Subject Salary Matrix

"IF" the agreement's intent is for the money being paid to be considered PERS subject salary, requiring Employee (EPPT or "pickup") contributions, employer (match) contributions and any prior year earnings to be paid by the agency, use one of the following:

Note: if the salary is considered PERS subject, the employee will also receive PERS creditable or retirement service credits for the month(s) represented. If the employee or former employee is not returning to state service, and was previously paid up to the termination date and the money being paid are additional payments for pay periods already compensated for, the employee or former employee could receive a higher Final Average Salary for PERS purposes in calculating retirement benefits.

If	Then
Scenario 1 - Return to Work "make whole": The agency is bringing the employee back to work, removing the termination from the system and "making the employee whole".	***_____ agrees to pay _____ back or retroactive salary or wages for the period of _____through_____. This salary amount is considered PERS subject salary.***

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PERS Subject Salary Matrix ***(con't)***

If	Then
Any salary paid for a period that the employee did not work, but is being paid and made whole will be PERS subject salary and will be applied to the period in which they would have been paid had the employee continued to work.	
Scenario 2 - Return to Work "no leave accruals credited": The agency is bringing the employee back to work, removing the termination from the system, but is not making them whole for vacation pay, leave accruals or benefits, etc. Any salary paid for a period that the employee did not work will be PERS subject salary and will be applied to the period in which they would have been paid had the employee continued to work	***_____ agrees to pay _____ back or retroactive salary or wages for the period of _____ through_____. This salary amount is considered PERS subject salary.***
Scenario 3 - Not Returning to Work "termination date unchanged": The agency is not bringing the employee back to work or making them whole, but is paying retroactive or back salary for a period of time that the employee was absent from employment, prior to the termination date on record. (in this case the termination date is remaining as is, the employee may have been placed on administrative leave without pay for a period of months prior to actual termination.) For PERS purposes, the salary will be applied retroactively to prior pay periods, even though the employee was not actually working.	***_____ agrees to pay _____ back or retroactive salary or wages for the period of _____ through_____. This salary amount is considered PERS subject salary.***
Scenario 4 - Not Returning to Work "termination date modified": The agency is not bringing the employee back to work or making them whole, but is paying retroactive or back salary for a period of time that the employee was absent from employment, and the termination date is being changed to accommodate the agreement.	***_____ agrees to pay _____ back or retroactive salary or wages for the period of _____ through_____. This salary amount is considered PERS subject salary.***

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PERS Subject Salary Matrix ***(con't)***

For PERS purposes, the salary will be applied retroactively to prior pay periods, even though the employee was not actually working, and may have already been paid upon termination for all prior months.	

Non PERS Subject Salary Matrix

"IF" the agreement's intent is for the money being paid to **NOT** be considered PERS subject salary, use one of the following:

The following applies to settlements of tort claims under the authority and control of Risk Management:

If	Then
In the desire to settle the dispute timely, providing for any pain and suffering to the employee, an additional payment is being made to the employee. **Note**: Any lump sum payments (e.g. non-wage payments) to resolve tort claims against the state are within Risk's exclusive authority and discretion. ORS 278.405(1)(DAS, through its Risk division, is solely authorized by statute "to direct and manage all insurance programs of state government.").	Do not use such terminology as "back wages", "retroactive wages", or "retroactive pay". ***"This payment is being paid to_____ for pain and suffering (or other terminology) to settle this dispute".*** ***or*** ***This payment is for non economic damages.*** ***or*** ***"The funds are an amount equal/equivalent to ? months of salary."***

The following scenarios could be used by agencies when they need to provide a payment that is not PERS Subject Salary:

If	Then
The agency does not intend to provide the employee with any further PERS contributions.	Do not use such terminology as "back wages", "retroactive wages", or "retroactive pay". ***"This payment is being made to_____ to settle this dispute".*** ***or*** ***"The funds are an amount equal/equivalent to ? months of salary."***
The agency is paying the employee additional funds, not due to pain and suffering, but to provide an equitable settlement, and the termination date is not being changed.	Do not use such terminology as "back wages", "retroactive wages", or "retroactive pay". ***"This payment is being made to_____ to settle this dispute".*** ***or*** ***"The funds are an amount equal/equivalent to ? months of salary."***

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Other Important Standardize Language to Consider

There are several other situations to consider. You may wish to insert some standardized release information into the agreement to cover the following:

PERS Account has been refunded:

If the employee or former employee has or is in the process of refunding their PERS account, this is information they may not wish to disclose during the agreement negotiations. If they have in fact refunded their PERS account, by the time the agreement has been signed and become final, they are no longer a member of the retirement plan.

If	Then
In the situation where the employee or former employee has refunded their PERS account, though it was determined that they were to be paid retroactive PERS Subject Salary, PERS, by statute, cannot accept contributions.	Include specific language in the agreement to provide guidance in the event that this situation arise. "***Should it be determined that _____'s PERS account has been withdrawn, the agency will agree to pay the equivalent of the 6% directly to _____."***

Standard Hold Harmless Language:

All arbitration, conciliatory or settlement agreements should include standard hold harmless language should the payment be other than what is stated in the agreement.

If	Then
The agency expects the payment to the employee or former employee to be Non PERS Subject Salary, but after the fact finds that the payment is PERS Subject Salary, though their intent was for it not to be.	The agency will be responsible for paying all contributions and earnings to PERS. ***"Should it be determined that the payment is PERS subject, the agency will pay all statutorily required contributions and earnings. If the employee was paid the equivalent of 6% directly, the employee must refund the monies to the State within 10 calendar days of notification this clause is being invoked. If the employee does not refund the monies within the time allotted, the employer, at its option, may exercise its legal rights to obtain reimbursement from the employee for the funds in dispute, in addition to reasonable interest. Operation of this provision does not void other provisions of this agreement."***

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Other Important Standardize Language to consider ***(con't)***

The employee or former employee expects the payment being made to them to be PERS Subject Salary and is informed after-the-fact that the payment was not PERS Subject Salary, due to a withdrawal of their PERS account, or other circumstances and contributions cannot be remitted to PERS on their behalf.	The employee or former employee will hold the agency and all parties involved harmless. In this case, the agency should consider another alternative for compensating the individual, such as paying the 6% directly to the employee or former employee. "S***hould it be determined that _____'s PERS account has been withdrawn, the agency will agree to pay the equivalent of the 6% directly to _____."***

Payment includes Other Paid Leaves:

If	Then
The employee or former employee was an OPSRP member and the agreement includes Lump Sum Pay, which may include vacation, sick leave, compensatory time, etc.	Any lump sum payment for accumulated unused sick leave, vacation leave, compensatory time or other paid leave is Non-PERS Subject salary.
If	**Then**
The employee or former employee was a PERS Tier One or Tier Two member and the agreement includes Lump Sum Vacation Pay.	Lump Sum Vacation Pay and paid leave such as Holiday or compensatory time paid as Lump Sum Pay are PERS Subject Salary. However, accumulated unused sick leave is Non-PERS Subject Salary.

DAS Centralized PERS Team review

All arbitration, conciliatory or settlement agreements should have specific language that directs the agency to forward a copy of the agreement to the DAS Centralized PERS Services Team for review. The Team is responsible for ensuring that all applicable PERS Subject Salary and contributions are reported and remitted to PERS. The Team will review the agreement to verify if the language indicates whether any payment will be PERS Subject or not. The Team will work directly with PERS to get a determination should the language be questionable.

For payments that are PERS Subject Salary, the Team will ensure that all funds are applied to the correct pay periods. The agency needs to provide a breakdown of how the salary by pay period is to be applied. If one is not received, the Team will divide the amount of the payment into equal shares for the number of pay periods, and apply them accordingly. Once the salary is entered on to the PERS system, jClarety/EDX, the agency will receive an invoice to cover any applicable employee (pickup) contribution, employer (match) contributions and prior year earnings that need to be remitted to PERS.

For payments that are **Non-**PERS Subject the Team will follow reporting policies for these types of payments that are currently in place.

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DAS Centralized PERS Team review *(con't)*

If the salary is PERS Subject salary, visit the DAS Centralized PERS Teams webpage, you can find a fillable PDF form with instructions, that can be used to provide the breakdown of how the payment is to be applied by pay period.

Processing the payment through Payroll

If the payment is to be processed through the payroll system, you must use the appropriate code that applies to the payment, whether it is PERS subject or non-subject salary

OSPA Code	PTB2 Description	Detail Description	OT Code
SAD	GRVNC SETTLE	Compensation awarded as a result of labor negotiation or a grievance settlement. Taxable and PERS subject.	N
GSD	GRV SETL PAY	Wage payment to settle an employment dispute as a result of a labor negotiation or settlement agreement. Taxable, non-PERS subject.	N

If the payment is considered PERS subject salary, the payment will be allocated to the pay period(s) it is affective for.

Applicable Oregon Revised Statutes and Administrative Rules *(con't)*

<u>PERS 238 Program</u> (Tier 1 and Tier 2 members)

ORS 238.005 Definitions

21)(a) "Salary" means the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.
(b) "Salary" includes but is not limited to:
(A) Payments of employee and employer money into a deferred compensation plan, which are deemed salary paid in each month of deferral;
(B) The amount of participation in a tax-sheltered or deferred annuity, which is deemed salary paid in each month of participation;
(C) Retroactive payments made to an employee to correct a clerical error or pursuant to an award by a court or by order of or a conciliation agreement with an administration agency charged with enforcing federal or state law protecting the employee's rights to employment or wages, which shall be allocated to and deemed paid in the periods in which the work was done or in which it would have been done; and
(c) "Salary" or "other advantages" does not include:
(D) Any lump sum payment for accumulated unused sick leave;

OAR 459-005-0001 Definitions, Generally

(27) "Salary" has the same meaning as provided in ORS 238.005(21).
(a) "Salary" includes a differential wage payment, as defined in this rule.
(b) For a Tier One member, a lump sum payment for accrued vacation pay is considered salary:
(A) In determining employee and employer contributions.
(B) In determining final average salary for the purpose of calculating PERS benefits.
(c) For a Tier Two member, a lump sum payment for accrued vacation pay:
(A) Is considered salary in determining employee and employer contributions.
(B) Is not considered salary in determining final average salary for the purpose of calculating PERS benefits.

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Applicable Oregon Revised Statutes and Administrative Rules *(con't)*

OAR 459-010-0042 - Retroactive Salary Payments

(1) For the purpose of this rule, "retroactive payment" means a payment of salary attributable to a prior period made pursuant to a court order, administrative order, arbitration award, conciliation agreement, or private settlement agreement that resolves a dispute or claim based upon an employee's rights under employment and wage law or a collective bargaining agreement.
(2) A retroactive payment must be allocated to the period(s) in which the work was done or would have been done and deemed paid as so allocated pursuant to ORS 238.005(21)(b)(C). Payments allocated to any period during which the employee was an active or inactive member must be used in the determination of employee and employer contributions and in the calculation of benefits. Payments allocated to any period of non-membership or retired membership must not be used to determine contributions or calculate benefits.
(3) Except as provided in OAR 459-010-0014(7), an employee who is an active member on the date of a retroactive payment will receive creditable service for those periods of active or inactive membership to which the payment is allocated.
(4) An employee who is terminated from employment, withdraws the member account under ORS 238.265, and is reinstated to employment in connection with a retroactive payment may restore membership and service rights as provided in OAR 459-011-0050 within the time period described in Section (2) of that rule or within one year from the date the employee actually returns to employment, whichever is later.
(5) The provisions of this rule apply to retroactive payments made on or after July 31, 2003.

<u>OPSRP 238A Program</u>

ORS 238A.005 Definitions

(16)(a) "Salary" means the remuneration paid to an active member in return for services to the participating public employer, including remuneration in the form of living quarters, board or other items of value, to the extent the remuneration is includable in the employee's taxable income under Oregon law. Salary includes the additional amounts specified in paragraph (b) of this subsection, but does not include the amounts specified in paragraph (c) of this subsection, regardless of whether those amounts are includable in taxable income.
(b) "Salary" includes the following amounts:
E) Retroactive payments made to an employee to correct a clerical error, pursuant to an award by a court or by order of or pursuant to a conciliation agreement with an administration agency charged with enforcing federal or state law protecting the employee's rights to employment or wages, which shall be allocated to and deemed paid in the periods in which the work was done or in which the work would have been done.
(c) "Salary" does not include the following amounts:
(C) Any lump sum payment for accumulated unused sick leave, vacation leave or other paid leave.

OAR 459-070-0001

(15) "Salary" has the same meaning given the term in ORS 238A.005(16) and includes a differential wage payment, as defined in OAR 459-005-0001.