



# Oregon

Tina Kotek, Governor

## Public Employees Retirement System

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November 8, 2023

TIM WOOD, FINANCE DIRECTOR  
CITY OF KEIZER  
PO BOX 21000  
KEIZER OR 97307-1000

ER No. 2279

Re: Staff Determination Regarding Whether Certain Employer Contributions to Employees' 457 Plan and Retirement Health Savings Accounts Are Considered Subject or Non-Subject Salary for PERS Purposes

Dear Mr. Wood:

This letter is provided in response to your request for a formal determination regarding whether employer contributions made by city of Keizer to the 457 plan accounts of its employees, and employer paid VEBA (Voluntary Employee Beneficiary Association) contributions into Retirement Health Savings (RHS) accounts that were not reported to PERS as subject salary were proper. Upon review of the facts and PERS governing authorities, PERS has made the following determinations, which depend on the type of payment, and whether the employee is a member of the PERS Chapter 238 Pension Program (i.e., Tier One and Tier Two Pension Program members), or the PERS Chapter 238A Oregon Public Service Retirement Plan ("OPSRP").

1. Employer Contributions to the 457 plan accounts of Employees Who Are Tier One and Tier Two Members Should Be Reported as Subject Salary

For Tier One and Two members, PERS has determined that all employer and employee contributions made to the 457 deferred compensation plan accounts of Tier One and Tier Two members are subject salary for these members, and should be reported as such. Oregon Revised Statutes (ORS) 238.005(26)(b)(A), applicable to Tier One and Tier Two members of PERS, defines "salary" to include "[p]ayments of employee and employer money into a deferred compensation plan, which are deemed salary paid in each month of deferral." If city of Keizer hasn't been reporting the employer contributions made to a Tier 1 or Tier 2 employee's 457 account as subject salary for prior years, that reporting should be reviewed and corrected.

2. Employer Contributions to the 457 plan accounts of Employees Who Are OPSRP Members May Be Reported as Non-Subject Salary

For members of the Oregon Public Service Retirement Plan (OPSRP), PERS has determined that employer contributions made to the 457 deferred compensation plan accounts of OPSRP members are subject salary for these members, only if the contribution is made at the employee's election. ORS 238A.005(17)(b)(A), applicable to OPSRP members, defines salary to include "[p]ayments of employee and employer money into a deferred compensation plan that are made at the election of the employee." City of Keizer has informed PERS that these elections are not made at the employee's election, therefore, such contributions may be reported as non-subject salary.

### 3. Employer Paid VEBA Contributions to the Retirement Health Savings (RHS) accounts of All Employees May Be Reported as Non-Subject Salary

For all employees, regardless of their plan membership, PERS has determined that whether employer paid VEBA contributions to RHS accounts are subject salary or non-subject salary is an employer determination. The number of possible structures for employer paid cafeteria plans under 26 U.S.C. § 125 make it impossible for PERS to generally categorize employer contributions to a cafeteria plan as subject or non-subject. The employer is in the best position to determine the structure and authority underlying its cafeteria plan, and whether employer contributions to the plan are subject salary. For employer paid VEBA contributions to RHS accounts, ORS 238.005(26) and 238A.005(17) define “salary” for the PERS Chapter 238 Program and OPSRP Pension Program, respectively. Employers should use these resources and consult their legal advisor, if necessary, to make the determination. City of Keizer has informed PERS that it has determined that employer paid VEBA contributions to RHS accounts are non-subject salary, therefore, such contributions may be reported as non-subject salary.

### **Your Appeal Rights as a PERS Employer**

PERS employers may appeal PERS staff actions and determinations. The appeal process may be applied to any staff action or determination affecting you, as an employer, including eligibility determinations and invoices for contributions.

The employer appeal process is described in Oregon Administrative Rule (OAR) 459-001-0032: Review of Staff Actions and Determinations Regarding Public Employers. If you disagree with a staff action or determination, you may request a review (appeal) by sending an email or writing to your PERS employer account representative within 60 days of the date the staff action or determination was sent to you. Your request will be denied if it is received after the 60-day period has expired. Your request for review must include:

1. a description of the action or determination you want reviewed;
2. a short statement describing how and why you think the action or determination is wrong;
3. a statement of facts that you believe show the action or determination is wrong;
4. a list of any statutes, rules, or court decisions that you believe support your position;
5. a statement of the action you seek; and
6. a request for review.

Your request for a review may be denied if it does not contain the required information.

PERS staff will mail a response letter within 45 days after receipt of your request for review.

Sincerely,



Peter Nielsen  
Employer Reporting Operations Analyst  
Employer Service Center