

## **General Provision to enable sufficient funds to pay PERS**

### **10. Refer to Oregon voters another “Measure 8” Constitutional Amendment and give the Oregon Supreme Court another chance to enable PERS Tier 1 future revisions.**

Measure 8 was a Citizen’s Initiative passed by Oregon voters to reign in the escalating costs of Tier 1 PERS. Measure 8 was subsequently invalidated by the Oregon Supreme Court as a violation of the U. S. Constitution. It has been suggested that the voters should be given another Measure 8 opportunity, with the hope that the current Oregon Supreme Court might overturn the close decision reached by its predecessor Court in 1996. Rather than merely leave the suggestion unconsidered, I went to the lawyers who draft the statutes and bills for the Oregon Legislature to see what they had to say about the proposition.

The following opinion letter from the Legislature’s attorney (Legislative Counsel) states the following:

April 1, 2010

Representative Dennis Richardson  
55 South 5th Street  
Central Point OR 97502

Dear Representative Richardson:

You asked whether an amendment to the Oregon Constitution could limit the ability of public employers to agree to “pick-up” the six percent employee contribution under the Public Employees Retirement System (PERS).

As you noted in your message, Ballot Measure 8 (1994)<sup>1</sup> attempted to prohibit public employers from paying the six percent PERS employee contribution (six percent of gross salary).<sup>2</sup> The Supreme Court found that Ballot Measure 8 was “void” by reason of violating the Contracts Clause of the United States Constitution.<sup>3</sup> Oregon State Police Officers’ Assn. v. State of Oregon (“OSPOA”).<sup>4</sup> Your question is whether Ballot Measure 8 could have been drafted in a manner that would have allowed it to survive

---

<sup>1</sup> The provisions of Ballot Measure 8 are printed as sections 10 to 13, Article IX of the Oregon Constitution.

<sup>2</sup> The statute allowing the employer to agree to pay the employee contribution of Tier 1 and Tier 2 PERS members is ORS 238.205.

<sup>3</sup> Article I, section 10, clause 1, United States Constitution.

<sup>4</sup> 323 Or. 356 (1996).

constitutional challenge (e.g., by limiting the measure's application to contracts entered into after the measure became effective).

With respect to the pick-up, Ballot Measure 8 had two pieces. First, the measure indicated that public employees "must contribute to the system or plan an amount equal to six percent of their salary or gross wage."<sup>5</sup> Second, the measure stated that "[on] and after January 1, 1995, the state and political subdivisions of the state shall not thereafter contract or otherwise agree to make any payment or contribution to a retirement system or plan that would have the effect of relieving an employee, regardless of when that employee was employed, of the obligation (to make the six percent contribution)."<sup>6</sup>

Under the OSPOA decision, public employees cannot be required to make the contribution, and the public employer cannot be prohibited from agreeing to the pick-up, even by means of an amendment to Oregon's Constitution. This does not mean that the employee cannot agree, through the labor negotiation process, to give up the pick-up. Consequently, the pick-up remains one of the issues negotiated in public employee labor contracts. Insofar as we know, no agreement to pick-up the contribution has ever been negotiated away.<sup>7</sup>

With respect to whether the result in OSPOA might have been different if Ballot Measure 8 had been drafted in a different manner, we note that the decision in OSPOA did not rest on the fact that Ballot Measure 8 impacted existing contracts. In fact, as can be seen from the language quoted above, Ballot Measure 8 was only directed toward contracts entered into on or after January 1, 1995.<sup>8</sup>

In addition, the OSPOA decision did not rest on the fact that the measure required represented employees to make the six percent contribution immediately. Unrepresented employees receive the pick-up under the employer's personnel policies. These policies can be changed at any time. Consequently, Ballot Measure 8 would not have been "void" as to those employees.

In general, we believe that if the Supreme Court had meant to say that Ballot Measure 8 was void as applied to existing contracts, the court's opinion in OSPOA would have so indicated.

Based on this analysis, we do not view the OSPOA decision as arising out of any drafting issue with respect to the application of Ballot Measure 8 to existing contracts.

You also asked if we thought that the current Supreme Court members might come to a different conclusion on a new version of Ballot Measure 8. In general, our office would assume that the court will adhere to *stare decisis* absent opinions

---

<sup>5</sup> Section 10 (1), Article IX, Oregon Constitution.

<sup>6</sup> Section 10 (2), Article IX, Oregon Constitution.

<sup>7</sup> From the point of view of a union negotiator, a six percent pay cut would be preferable to loss of the pick-up. If the employee makes the contribution, the amount comes from the employee's net pay (i.e., post-tax). If the employer picks-up the contribution, it is included in the employee's gross wages (i.e., pre-tax). Consequently, we would anticipate that it would be far more likely that a pay cut would be discussed before the pick-up. And, obviously, negotiating any compensation reduction would be difficult.

<sup>8</sup> Some local governments attempted to avoid the impact of Ballot Measure 8 by entering into 10-year contracts for the pick-up before Ballot Measure 8 became effective.

suggesting that the court is considering a change to its previous analysis. At this point, there is no indication in the court's opinions suggesting that it would reverse the OSPOA decision. In reviewing the significant changes made to the PERS statutes in 2003, the court declined to reconsider its longstanding interpretation of the Contracts Clause as applied to PERS benefits (Legislative Assembly may not reduce statutory PERS benefits except for new employees).<sup>9</sup> The court upheld some of the 2003 changes not because the Legislative Assembly had the power to change the terms of the contract, but because the court found that the statutory provisions affected by those changes did not form part of the contract in the first instance.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON  
Legislative Counsel

By  
David Heynderickx  
Special Counsel to the Legislative Counsel

---

<sup>9</sup> *Strunk v. PERB*, 338 Or. 145 (2005).