

OPINION NO. 97-032**Syllabus:**

1. Pursuant to 10 Ohio Admin. Code 4123-17-14, R.C. 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the Public Employees Retirement System as a "salary reduction" pick up, by reducing the salaries that the employees receive, the amounts picked up by the employer should be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.
2. Pursuant to 10 Ohio Admin. Code 4123-17-14, R.C. 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the Public Employees Retirement System as a "fringe benefit" pick up or "pick up in lieu of salary increase," by assuming payment of the contributions without reducing the employees' salaries, the amounts picked up by the employer should not be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.

To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio
By: Betty D. Montgomery, Attorney General, May 29, 1997

We have received your request for an opinion concerning the manner in which a township's payroll is calculated for purposes of determining the township's premium payments under the workers' compensation system. Your question is whether the Public Employees Retirement System (PERS) "fringe benefit" pick up, paid by the township on behalf of its employees in addition to the employees' regular salary, should be included as part of the township's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.

In order to answer your question, it is helpful to consider the nature of a PERS pick up. In general, township employees are required to be members of the Public Employees Retirement

System. *See, e.g.*, R.C. 145.01(A)-(B); R.C. 145.03. As a public employer, the township is required to pay to PERS a certain percentage of the earnable salary of each employee who is a contributor to PERS, to finance a fund to provide benefits to the employees upon retirement. This payment is referred to as the "employer contribution." R.C. 145.48; *see also* R.C. 145.01(D); R.C. 145.23. In addition, each employee is required to pay to PERS a certain percentage of the employee's earnable salary, known as the "employee contribution." The employee contribution is deducted "from the earnable salary of each contributor on every payroll of such contributor for each payroll period subsequent to the date of coverage." R.C. 145.47. Employee contributions are credited to individual accounts for the various employees. R.C. 145.21; R.C. 145.23. If an employee withdraws from PERS for any reason other than death, disability, or retirement, the employee is entitled to the return of the accumulated "employee" contributions in the employee's account, or those amounts may be paid to the employee's estate or designated beneficiary in the event of death, or to an alternative retirement plan elected under R.C. 3305.05. R.C. 145.23; R.C. 145.40; *see also* R.C. 145.01(J).

A PERS pick up occurs when a public employer assumes and pays, or "picks up," the "employee" contributions, in addition to the "employer" contributions. Because PERS is a qualified pension plan under federal law,¹ the amounts that a public employer "picks up" are treated as employer contributions for purposes of federal law, even though they may continue to be considered "employee" contributions under state law. *See* 26 U.S.C.A. § 414(d), (h)(2) (West Supp. 1997); *see also* 26 U.S.C.A. §§ 401(a), 403, 501(a) (West Supp. 1997). Therefore, the contributions are excludable from the employee's wages for income tax withholding purposes and are excludable from the employee's gross income until they are distributed to the employee. *See* 26 U.S.C.A. §§ 402, 3401(a)(12)(A) (West Supp. 1997); Rev. Rul. 81-36, 1981-1 C.B. 256; Rev. Rul. 81-35, 1981-1 C.B. 255; Rev. Rul. 77-462, 1977-2 C.B. 358; 1986 Op. Att'y Gen. No. 86-025; 1982 Op. Att'y Gen. No. 82-071. A pick up plan is adopted mainly because of the tax benefits to the employee, and federal law must be consulted to make certain that the desired results are achieved. *See, e.g.*, Rev. Rule 81-35, 1981-1 C.B. 255; 1984 Op. Att'y Gen. No. 84-058; 1984 Op. Att'y Gen. No. 84-036. *See generally, e.g., Foil v. Commissioner*, 920 F.2d 1196 (5th Cir. 1990).

A pick up may be carried out in either of two ways — as a "salary reduction" pick up or as a "pick up in lieu of salary increase," also known as a "fringe benefit" pick up. Under the "salary reduction" pick up method, the employer assumes and pays an employee's contribution to PERS and reduces the employee's salary by the amount of that payment, so that there is no increased cost to the employer. The benefit to the employee is that the employee's taxable income is reduced for purposes of calculating the employee's federal income tax liability. *See* 1986 Op. Att'y Gen. No. 86-025; 1984 Op. Att'y Gen. No. 84-058; 1984 Op. Att'y Gen. No. 84-036.

Under the "pick up in lieu of salary increase" method, the employer assumes the payment of an employee's PERS contributions without reducing the employee's salary, so that the employee's taxable income remains the same and the employer's expenditures increase. The

¹ Representatives of the Public Employees Retirement System (PERS) have informed us that PERS is considered a qualified pension plan under federal law and that it includes a trust that is exempt from tax under section 501(a). *See* 26 U.S.C.A. §§401, 501(a) (West Supp. 1997).

employer is thus providing the employee with a "fringe benefit," or perquisite, in excess of the salary allotted to that employee. *See* 1986 Op. Att'y Gen. No. 86-025; 1984 Op. Att'y Gen. No. 84-069; 1984 Op. Att'y Gen. No. 84-058.

Under either type of pick up arrangement, "employee" contributions are in fact paid by the employer. The amounts that are picked up, however, continue to be considered "employee" contributions. They are credited to the employees' individual accounts and are available for distribution upon death or withdrawal from PERS. *See* 1984 Op. Att'y Gen. No. 84-036, at 2-111 n.2. The facts you have presented indicate that the township to which your question relates is providing a "fringe benefit" pick up.

Let us now examine the provisions governing workers' compensation to determine why the PERS pick up is relevant to those provisions. The workers' compensation statutes require employers, including townships, to pay premiums to provide a fund for workers' compensation and to maintain a state insurance fund. R.C. 4123.01(B); R.C. 4123.29. The rates of premium are, in general, "based upon the total payroll in each of the classes of occupation or industry," or upon the "expenditure of wages." R.C. 4123.29(A)(2); *see also* 10 Ohio Admin. Code 4123-17-14. Each employer is required to "keep, preserve, and maintain complete records showing in detail all expenditures for payroll and the division of such expenditures into the various divisions and classifications of the employer's business," R.C. 4123.24, and to allow the Bureau of Workers' Compensation access to all books, records, and payrolls "showing or reflecting in any way upon the amount of wage expenditure" of the employer, R.C. 4123.23. *See also* 10 Ohio Admin. Code 4123-17-17. The employer must submit periodic statements of the number of employees employed at each kind of employment and "the aggregate amount of wages paid to such employees." R.C. 4123.26(B); *see also* R.C. 4123.32 (referring to "estimated or actual expenditures of wages" and "actual payroll expenditures"). The issue you have raised is whether the "payroll" or "expenditure of wages" upon which workers' compensation premiums are based, *see* R.C. 4123.29(A)(2), includes amounts of a PERS pick up paid by the township on behalf of its employees.

The terms "payroll" and "wage expenditures" are not defined by statute, but rule 4123-17-14 defines them to "include the entire remuneration allowed by an employer to employees in the employer's service for the applicable period."² "Remuneration" is given the definition it has in

² The relevant portion of rule 4123-17-14 states:

The terms "*payroll*" and "*wage expenditures*" as used in the rules of this chapter of the Administrative Code shall include the entire remuneration allowed by an employer to employees in the employer's service for the applicable period. "*Remuneration*" shall have the same meaning as defined in division (H) of section 4141.01 of the Revised Code as provided by the statutes of the Ohio bureau of employment services, in order that the payroll reporting requirements of the bureau of workers' compensation shall be coordinated with the remuneration reporting requirements of the Ohio bureau of employment services, except as otherwise modified by the rules of this chapter. The definition of remuneration shall apply to all amenable employers who are required or elect to obtain Ohio workers' compensation coverage and who pay premiums based upon payroll under Chapter 4123. of the Revised Code, and shall apply to all persons of such employers

the statutes governing the Ohio Bureau of Employment Services. 10 Ohio Admin. Code 4123-17-14(C). That definition states, in relevant part:

(H)(1) "*Remuneration*" means *all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash*, except that in the case of agricultural or domestic service, "remuneration" includes only cash remuneration. Gratuities customarily received by an individual in the course of the individual's employment from persons other than the individual's employer and which are accounted for by such individual to the individual's employer are taxable wages.

The reasonable cash value of compensation paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the administrator, provided that "*remuneration*" does not include:

(a) Payments as provided in divisions (b)(2) to (b)(16) of section 3306 of the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, as amended;

(b) The payment by an employer, without deduction from the remuneration of the individual in the employer's employ, of the tax imposed upon an individual in the employer's employ under section 3101 of the "Internal Revenue Code of 1954 [Federal Insurance Contributions Act (FICA)]," with respect to services performed after October 1, 1941.

(2) "Cash remuneration" means all remuneration paid in cash, including commissions and bonuses, but not including the cash value of all compensation in any medium other than cash.

R.C. 4141.01(H) (emphasis added). The definition of "remuneration" thus generally includes all compensation for personal services, but excludes FICA payments and payments provided in 26 U.S.C.A. § 3306(b)(2) to (b)(16).

considered to be employees under the statutes or rules of the bureau of workers' compensation, regardless of whether the employer is required to report payroll or remuneration to the Ohio bureau of employment services under Chapter 4141. of the Revised Code or whether the employer reports payroll or remuneration to the Ohio bureau of employment services for such persons considered to be employees by the bureau of workers' compensation.

10 Ohio Admin. Code 4123-17-14(C) (emphasis added).

Reasonable rules that are adopted by an administrative body pursuant to statutory authority are part of the law of the state. *See State ex rel. Kildow v. Industrial Commission*, 128 Ohio St. 573, 580, 192 N.E. 873, 876 (1934). The definitions adopted in rule 4123-17-14(C) appear to constitute a reasonable interpretation of the provisions of R.C. Chapter 4123. Further, the use of the term "entire remuneration" has long been part of the administrative construction of the terms "payroll" and "wage expenditures," *see* 1956 Op. Att'y Gen. No. 7540, p. 903, at 908-09, and the General Assembly has taken no action suggesting disagreement with that construction.

In order to determine which payments are excluded from "remuneration," it is necessary to turn to 26 U.S.C.A. § 3306(b). That provision defines the term "wages" for purposes of the Federal Unemployment Tax Act (FUTA). *See* 26 U.S.C.A. § 3301 (West Supp. 1997). For those purposes, "the term 'wages' means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," except that it excludes various specified payments. 26 U.S.C.A. § 3306(b) (West Supp. 1997). Of the payments that are excluded, the payments relevant to your question are the ones listed in 26 U.S.C.A. § 3306(b)(5)(A) — namely, payments made to, or on behalf of, an employee or the employee's beneficiary "from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust." 26 U.S.C.A. § 3306(b)(5)(A) (West Supp. 1997); *see also* 26 C.F.R. § 31.3306(b)(5)-1 (1996).

PERS meets the qualifications described in 26 U.S.C.A. § 3306(b)(5)(A). *See* note 1, *supra*. Therefore, payments made by an employer to PERS on behalf of an employee come within that provision. Under the terms of section 3306(b)(5)(A), all payments to PERS are excluded from "wages" as defined in 26 U.S.C.A. § 3306(b). Under the terms of R.C. 4141.01(H)(1)(a), those payments are also excluded from "remuneration" as defined in R.C. 4141.01(H). The language of R.C. 4141.01(H)(1)(a) and 26 U.S.C.A. § 3306(b)(5)(A) thus appears to exclude all payments to PERS from the "remuneration" on which workers' compensation premiums are calculated.

It must be noted, however, that an exception to the exclusion created by 26 U.S.C.A. § 3306(b)(5) appears in 26 U.S.C.A. § 3306(r), as follows:

Nothing in any paragraph of subsection (b) (other than paragraph (1))³ shall exclude from the term "wages"—

.....

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

26 U.S.C.A. § 3306(r)(1) (West Supp. 1997) (footnote added). 26 U.S.C.A. § 414(h)(2) pertains to pick ups by governmental employers. The quoted language thus directs that the provisions of 26 U.S.C.A. § 3306(b) excluding PERS contributions from wages do not extend to a salary reduction pick up. Rather, when an employer pays an employee's PERS contribution under the salary reduction pick up method and the employee receives income tax benefits, the amount of the

³ Paragraph (1) of 26 U.S.C.A. § 3306(b) sets forth limits on the amount of wages subject to FUTA payments. 26 U.S.C.A. § 3306(b)(1) (West Supp. 1997).

pick up is included in the employee's wages for purposes of computing the employer's contribution under FUTA. *See also* 26 U.S.C.A. § 3307 (West 1989).⁴

Because the directive set forth in 26 U.S.C.A. § 3306(r) concerns the construction of 26 U.S.C.A. § 3306(b), it is appropriate to consider this provision in construing R.C. 4141.01(H)(1), even though that Revised Code provision does not expressly reference 26 U.S.C.A. § 3306(r). Reading the state and federal law together in this manner leads to the conclusion that the "remuneration" on which workers' compensation premiums are computed excludes payments made to PERS except payments made pursuant to a "salary reduction" pick up plan. Therefore, pursuant to 10 Ohio Admin. Code 4123-17-14, R.C. 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the Public Employees Retirement System as a "salary reduction" pick up, by reducing the salaries that the employees receive, the amounts picked up by the employer should be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29. Under the same provisions, when a township or other public employer "picks up" employees' contributions to the Public Employee Retirement System as a "fringe benefit" pick up or "pick up in lieu of salary increase," by assuming payment of the contributions without reducing the employees' salaries, the amounts picked up by the employer should not be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.

The result of this conclusion is that a public employer's decision to pick up an employee's PERS contribution under the salary reduction pick up method does not reduce the amount upon which workers' compensation premiums are computed.⁵ If, on the other hand, a public employer

⁴ 26 U.S.C.A. § 3307 states:

Whenever under this chapter or any act of Congress, or under the law of any State, an employer is required or permitted to deduct any amount from the remuneration of an employee and to pay the amount deducted to the United States, a State, or any political subdivision thereof, then for purposes of this chapter the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.

26 U.S.C.A. § 3307 (West 1989); *see also* 26 C.F.R. § 31.3307-1 (1996).

⁵ Opinions of two of my predecessors concluded that amounts paid by an employer into a welfare fund or pension fund could not be included as part of total payroll or wage expenditures for purpose of paying workers' compensation premiums. *See* 1956 Op. Att'y Gen. No. 7540, p. 903; 1946 Op. Att'y Gen. No. 1106, p. 538. In those situations, the relevant rules used the word "remuneration" to describe payroll and wage expenditures, but there was no applicable federal definition including as "remuneration" any payments to a pension fund. Further, the employer was not "picking up" amounts required to be paid by the employees and the payments were not obtained by reducing the employees' salaries. *Id.* Therefore, those opinions are readily distinguishable from the situation here at issue.

picks up the employee's PERS contribution as a fringe benefit in addition to the employee's regular salary, there is no increase in the amount upon which workers' compensation premiums are computed.

A stated reason for linking the definition of "remuneration" used in rule 4123-17-14 to that appearing in R.C. 4141.01(H)(1) is to coordinate the payroll reporting requirements of the Bureau of Workers' Compensation with the remuneration reporting requirements of the Ohio Bureau of Employment Services. 10 Ohio Admin. Code 4123-17-14; *see* note 2, *supra*. To attain this goal, it is necessary to construe the various provisions of law in a consistent manner. The analysis set forth above seeks to accomplish this purpose and to make state law consistent with provisions of federal law governing FICA and FUTA. *See In re Jones*, No. B94-03398-0000 (State of Ohio Unemployment Compensation Board of Review Feb. 7, 1995). *See generally, e.g., Oscar Mayer & Co. v. United States*, 623 F.2d 1223 (7th Cir. 1980); *STA of Baltimore—ILA Container Royalty Fund v. United States*, 621 F. Supp. 1567 (D. Md. 1985), *aff'd*, 804 F.2d 296 (4th Cir. 1986).

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to 10 Ohio Admin. Code 4123-17-14, R.C. 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the Public Employees Retirement System as a "salary reduction" pick up, by reducing the salaries that the employees receive, the amounts picked up by the employer should be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.
2. Pursuant to 10 Ohio Admin. Code 4123-17-14, R.C. 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the Public Employees Retirement System as a "fringe benefit" pick up or "pick up in lieu of salary increase," by assuming payment of the contributions without reducing the employees' salaries, the amounts picked up by the employer should not be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to R.C. 4123.29.