

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers

Authority

Internal Revenue Code (IRC) section 414(d) generally defines the term “governmental plan” as a plan established and maintained for its employees by the government of the United States, the government of any state or political subdivision thereof, or by any of their agencies or instrumentalities. A pension plan that qualifies as a “governmental plan” under IRC section 414(d) is generally treated differently than a private sector pension plan under federal tax laws. To retain the significant benefits afforded governmental plans, such plans must comply with certain requirements of federal tax law, including the requirements of section 414(d).

The Orange County Employees Retirement System (OCERS) is a governmental pension plan within the meaning of IRC section 414(d), and therefore is subject to any regulation or guidance issued by the Internal Revenue Service (IRS) interpreting the requirements of section 414(d). This generally means that OCERS must prohibit the participation in the OCERS plan of any entity that is not “an agency or instrumentality of the state or a political subdivision of a state” as those terms are interpreted by the IRS.

OCERS adopts this Administrative Procedure in order to ensure that only entities that qualify as agencies or instrumentalities of the state or a political subdivision of the state participate in the OCERS plan and to protect and preserve OCERS’ governmental plan status under federal law. OCERS believes the requirements of this Administrative Procedure are consistent with the interpretation by the IRS of the requirements of IRC section 414(d).

Process

1. When OCERS receives a request from an entity that wishes to contract with OCERS to provide pension benefits for the entity’s employees, OCERS staff will collect all of the information required by the Eligibility Determination Worksheet and Determination Analysis, Appendix A to this Administrative Procedure. The information will be collected from the entity directly and from other reliable sources. Until OCERS receives adequate information, it shall be under no obligation to evaluate the entity as described below.
2. After collecting the required information, OCERS staff will evaluate the entity against the following criteria to determine whether to recommend approval of the entity’s request to contract with OCERS for pension benefits:
 - a. **Major Factors**
The major factors for determining whether, and indicating that, an entity is an agency or instrumentality of the State or political subdivision of the State include whether:

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers

- i. **Control:**
 - The entity's governing board or body is controlled by the State or political subdivision of the State;
 - The members of the governing board or body are publicly nominated and elected;
 - ii. **Fiscal Responsibility:**
 - The State or a political subdivision of the State has fiscal responsibility for the general debts and other liabilities of the entity, including funding responsibility for the employee benefits under the entity's plan;
 - iii. **Employee Status:**
 - The entity's employees are treated in the same manner as employees of the State or political subdivision of the State for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection);
 - iv. **Sovereign Powers:**
 - In the case of an entity that is not a political subdivision, the entity is delegated, pursuant to a statute of the State or political subdivision of the State, the authority to exercise sovereign powers of the State or a political subdivision of the State (such as the power of taxation, power of eminent domain, police power).
- b. **Other Factors**
- Other factors for determining whether, and indicating that, an entity is an agency or instrumentality of the State or political subdivision of the State include whether:
- i. **Governmental Purpose:** The entity serves a governmental purpose.
 - ii. **Operational Control:** The entity's operations are controlled by the State or a political subdivision of the State.
 - iii. **Funding Sources:** The entity is directly funded through tax revenues or other public sources; however, this factor is not satisfied if an entity that is not otherwise an agency or instrumentality is paid from public funds under a contract to provide a governmental service or is funded through grants by the state or federal government.
 - iv. **Statutory Creation:** The entity is created by the State government or a political subdivision of the State pursuant to a specific enabling statute that prescribes the purposes, powers, and manners in which the entity is to be established and

Evaluating Potential New Employers

- operated. However, a nonprofit corporation that is incorporated under the State's general corporation law is not created under a specific enabling statute.
- v. **Tax Status:** The entity is treated as a governmental entity for federal employment tax or income tax purposes (such as the authority to issue tax-exempt bonds under section 103(a)) or under other federal laws.
 - vi. **Public Access:** The entity is determined to be an agency or instrumentality of the State or political subdivision of the State for purpose of state laws, for example, the entity is subject to open meetings laws or the requirement to maintain public records that apply only to governmental entities.
 - vii. **Ownership Interests.** The State or a political subdivision of the State has the ownership interest in the entity and no private interests are involved.
3. In evaluating the aforementioned criteria, it is understood that OCERS staff will apply judgment and exercise discretion in weighing the factors. The "Other Factors" will be taken into consideration but will not be given as much weight as the "Major Factors." In addition, within the "Major Factors" more weight will generally be given to the "Control" and "Fiscal Responsibility" factors than to the other "Major Factors."
 4. After conducting the evaluation above, and with the concurrence of OCERS' General Counsel, OCERS staff will make a recommendation to the CEO as to whether the entity's request to contract with OCERS for pension benefits should be approved or denied.
 5. The CEO shall consider OCERS staff's recommendation and make an independent determination of whether to recommend to the Board of Retirement approving or denying the request. The CEO's recommendation will be presented to the Board of Retirement for approval at a regular public meeting of the Board. The requesting entity may address the Board at this meeting. The Board's decision will be final and not appealable.
 6. If the requesting entity's participation in OCERS is approved by the Board, the entity will be required to enter into an Employer Participation Agreement with OCERS, on terms satisfactory to OCERS, before the entity's participation will be effective.



OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

Applicant Contact Information

Official Entity Name: _____
 Mailing Address: _____
 Street Address: _____
 City, State, Zip: _____
 County: _____
 Fed. Tax ID #: _____

Authorized Entity Representative:

Name: _____
 Title: _____
 Telephone: _____
 E-Mail: _____

Alternative Entity Representative:

Name: _____
 Title: _____
 Telephone: _____
 E-Mail: _____

Entity/Employer Demographics

1. Has the Entity/Employer had any name changes? Yes _____ No _____

If yes, please list the previous name(s):

Previous Entity Name	Begin Date	End Date

2. Has the Entity/Employer reorganized, merged with, or assumed the functions of another Entity? Yes _____ No _____

If yes, please provide copies of the relevant documents.

Entity Name (list reorganized/merged with, assumed functions)	Begin Date	End Date



OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

3. Has the Entity/Employer previously participated in the OCERS plan? Yes _____ No _____

If yes, please indicate date ranges and all related Entity names participating in the plan.

Entity/Employer Name	Begin Date	End Date

Entity/Employer Analysis - Public Agency Statutory Qualifications

4. Entity Type. What type of entity is the Employer? If the entity is a County, City, or Town, then no further review is needed, as the entity is generally considered to be a public Entity.

____ City/Town ____ County ____ Joint Powers Authority (JPA) ____ Non-profit Corporation

____ District ____ Agency

____ Public Bank (See, Division 5 of Title 5 of the Government Code)

____ Other Type (describe) :

5. District under CERL. Does the Entity/Employer qualify as a “district” under Government Code section 31468; and if so, under what subdivision of section 31468?

Yes/No/NA	Explanation

6. Public Entity. Is the Entity/Employer a Joint Powers Authority (JPA) as defined in Government Code 6500 *et. seq.*?

Yes/No/NA	Explanation

7. Supporting Documentation. Did the Entity/Employer provide copies of documents of creation?



OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

Yes/No/NA	Explanation

For example, did the entity include:	Yes/No/NA
• Enabling Legislation	
• Local Ordinance creating entity	
• Joint Powers Authority Agreement, with signature(s)	
• Articles of Incorporation, w/each named director's signature	
• Secretary of State filing, Resolutions with signature(s)	
• Charters	
• By-laws, Amendments to By-laws with signature(s)	
• Amendments to Agreements, Articles or By-laws, with signature(s)	
• Memorandums of Understanding	
• Service Agreement with signature(s)	
• Certificates of Corrections or Certificates of Amendments, with signature(s)	
• If the entity is a JPA, any and all agreements or arrangements between the JPA members and/or other related entity related to employees or employee benefits, including funding of such benefits.	
• Other Supporting Documentation: Basic Financial Statements and Independent Auditors Report	

Entity/Employer Analysis – IRS Factors Determination

8. Control. Is the Entity/Employer's governing board or body controlled by the State or a political subdivision of the State or by their respective laws? [Note: Control is demonstrated by the ability to appoint and to remove incumbents; consider the impact of multiple layers of control, if applicable.]

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

Yes/No/NA	Explanation

9. Control. Are the members of the Entity/Employer's governing board or body publicly nominated and elected? (Consider who can remove and elect directors or officials).

Yes/No/NA	Explanation

10. Control: What factors indicate the Joint Powers Authority (JPA) is independent from its creating bodies? What powers do the forming public agencies have over the JPA?

Yes/No/NA	Explanation

For example, does the JPA have	Yes/No/NA
• Fiscal independence from its creating member public agencies?	
• The authority to hire and fire employees?	
• The authority to contract?	
• The authority to sue and be sued?	
• The power to incur debt?	
• The power to borrow money?	
• The power to acquire property?	

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

11. Fiscal Responsibility/Control. Does the State (or political subdivision thereof) have fiscal responsibility for the general debts and other liabilities of the entity (including funding responsibility for the employee benefits under the entity's plan)?

Yes/No/NA	Explanation

12. Employee Status. Are the entity's employees treated in the same manner as employees of the State (or political subdivision thereof) for purposes other than providing employee benefits? For example, are the entity's employees granted civil service protection; or, are the entity's employees subject to public employee collective bargaining laws (Meyers-Milias- Brown Act, 1968)?

Yes/No/NA	Explanation

13. Sovereign Powers. In the case of an entity that is not a political subdivision, is the entity delegated, pursuant to a statute of the State or political subdivision of the State, the authority to exercise sovereign powers of the State or political subdivision of the State (such as the power of taxation, the power of eminent domain, and the police power)?

Yes/No/NA	Explanation

- If yes, list the entity, cite the authorizing government codes and associated code sections.

Entity Name	Relevant California Code	Code Section

14. Governmental Purpose. Does the entity/employer serve a governmental purpose? Describe.

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

Yes/No/NA	Explanation

15. Operational Control. Are the entity's operations controlled by the State (or political subdivision of the State)?

Yes/No/NA	Explanation

16. Public Funding. Is the entity directly funded through tax revenues or other public sources? (This factor is not satisfied if an entity that is not otherwise an Entity or instrumentality is paid from public funds under a contract to provide a governmental service or is funded through grants by the State or federal government.)

Yes/No/NA	Explanation

17. Statutory Creation. Is the entity is created by the State or a political subdivision of the State pursuant to a specific enabling statute that prescribes the purposes, powers, and manners in which the entity is to be established and operated? (However, a nonprofit corporation that is incorporated under a State's general corporation law is not created under a specific enabling statute.) If yes, cite the authorizing government codes and associated code sections.

Yes/No/NA	Explanation

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

18. Tax Status. Is the entity is treated as a governmental entity for Federal employment tax or income tax purposes (such as the authority to issue tax-exempt bonds under section 103(a) or under other Federal laws)?

Yes/No/NA	Explanation

19. Public Access. Is the entity determined to be an agency or instrumentality of the State (or a political subdivision of the State) for purposes of State laws? For example, is the entity subject to open meetings laws (*Ralph M. Brown Act, GC 54950, et seq.*) the California Public Records Act (GC 6250, et seq.), the California Political Reform Act (GC 87100, et seq.) and FPPC regulations thereunder?

Yes/No/NA	Explanation

20. Court Representation. Has the entity been determined to be an instrumentality of a State (or political subdivision thereof) by a State or Federal court?

Yes/No/NA	Explanation

21. Ownership Interests. Does the State (or political subdivision thereof) have the sole ownership interest in the entity and no private interests are involved? (If a JPA, consider if there are any private members or if agreement allows for private members?).

Yes/No/NA	Explanation

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

Entity Analysis - Financial Risk Determination

22. Fiscal Status. Did the entity's Independent Auditors issue unqualified opinions on the audited financial statements for the previous three years?

Yes/No/NA	Explanation

23. Fiscal Status. Do the entity's audited financial statements and available cash flow projections cause any concern with respect to the ability on the part of the entity to pay the required estimated employer contributions to the Plan now or in the future?

Yes/No/NA	Explanation

24. Fiscal Status. Is there anything in the entity's financial statements that discloses a going concern (e.g., statutory or regulatory changes, consolidations or outsourcing, that could adversely affect the continued financial health or viability of the entity)?

Yes/No/NA	Explanation

Entity Analysis – Common Law Employer Determination

25. Employees. Information regarding the entities employees.

	#Active	# Retired	# Deferred
a. How many employees does the Employer have currently?			

OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

b. How many employees when fully operational?			
c. How many employees are currently reported to OCERS through another entity?			

If needed, explain responses related to question 24, a through c.

Explanation

26. **Employees.** Are the employees currently considered to be employees of the applying entity? If No, then list the name of the other entity that is the employer.

Yes/No/NA	Explanation

For example, is any other entity:	Yes/No/NA (if yes, include name of the entity)
• Is another entity identified as the employer on employees' IRS Form W-2 statements?	
• Is another entity responsible for costs related to the employees, such as payroll costs, employee benefit costs or the like?	
• Is another entity considered a co-employer with the applying entity or a "worksite" employer?	
• Does another entity have responsibility for day-to-day oversight of the employees?	
• Are the employees leased to or from another entity?	

Other Required Documentation

27. The Entity/Employer is required to submit all of the following:



OCERS Administrative Procedure (OAP) Evaluating Potential New Employers Worksheet

- Enabling Legislation
- Local Ordinance creating Entity/Employer
- Demographic information of employees entering Plan
- Reciprocity status of all employees entering Plan
- Last three years' of audited financial statements. **If the Entity/Employer is a JPA, the last three years' of audited financial statements will be required of each and every member of the JPA.**
- Cash flow projections
- Personnel Transition Plan
- Most recent Memorandum of Understanding (MOU) with union(s) for all classifications of employees entering Plan
- Private Letter Ruling regarding Tax Status
- Authorized Signatory List
- Primary Contacts information