



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM
FOR PUBLIC RELEASE

DATE: November 14, 2017

TO: TK Keen, Interim Deputy Insurance Commissioner, DCBS
Jean Straight, Interim Director and Insurance Commissioner, DCBS

FROM: Theodore C. Falk, Attorney-in-Charge
Health and Human Services Section

SUBJECT: Collection of HB 2391 Insurance Assessments after Referral Vote
DOJ File 0ES637 ES637

Question: If the voters affirm HB 2391 at the referendum vote on January 23, 2018, will the health insurance assessments be collected retroactively to January 1, 2018?

Answer: Yes.

Analysis

HB 2391 enacted assessments of 1.5% to be collected by DCBS on two forms of health insurance coverage (together, the "health insurance assessments"):¹

1. Assessment on PEBB premium equivalents (Sections 3 and 4)
2. Assessment on health insurance premiums (Section 5 through 8)

Referendum 301 has referred some parts of HB 2391 to the voters. The provisions of the referendum relevant to the health insurance assessments are these referrals:

1. Sections 3(2) and (4) (PEBB assessment),
2. Sections 5(2) and (4) (insurer assessment), and 8(2) (insurer rates).

We will refer to these as the "health insurance assessment referred provisions." As the bill was originally written, the health insurance assessment referred provisions were to become operative on January 1, 2018.² Attached as an Appendix are the provisions of

¹ In this memo, Section numbers without further identification are Sections of Enrolled 2017 HB 2391, Chapter 538 of Oregon Laws 2017. We will refer to premium and premium equivalents collectively as "premiums." A companion memo addressed to OHA considers the parallel issue regarding the OHA assessment on managed care organizations (MCOs), esp. coordinated care organizations (CCOs) (Sections 9 through 12).

² Section 43.

HB 2391 imposing the health insurance assessments, with the health insurance assessment referred provisions highlight.

The referendum election will be held on January 23, 2018.³ If approved by the voters, the health insurance assessment referred provisions will become effective 30 days later, on February 22, 2018.⁴ The remainder of the Act, as relevant to the health insurance assessments, becomes effective on the date HB 2391 specifies,⁵ which is January 1, 2018.

Thus, during the period from January 1 to February 22, 2018, the health insurance assessments may not be collected. If the referendum passes, are the health insurance assessments imposed only on premiums for February 22, 2018 and after, or are they imposed back to the original effective date of January 1, 2018?

Legislative Counsel has considered this question and answered that the health insurance assessments will be retroactive to January 1, 2018:⁶

If prospective Referendum Petition 301 qualifies for the ballot but the people approve the referred provisions, these assessments could not be collected until at least February 22, 2018 (i.e., 30 days after the date of the special election). However, the wording of the relevant sections of chapter 538, Oregon Laws 2017, makes it clear that the assessments would cover, *inter alia*, the entire calendar year of 2018.¹⁶ As a result, the total amount of moneys provided to the Health System Fund during the 2018 calendar year should be the same. In this way, the Act is similar to Ballot Measures 66 and 67 (2010), which were based on bills passed during the 2009 regular session of the Seventy-fifth Legislative Assembly, approved by the people during an election held in January 2010 and still applied to all revenues earned during both the 2009 and 2010 calendar years.¹⁷

¹⁶ See sections 4, 8 (1), 12, 44 (1)(a) and 51, chapter 538, Oregon Laws 2017.

¹⁷ See November 2009 "Legislative Revenue Office Research Report #6-09 Revised" on Ballot Measures 66 and 67, at 1 and 2 <https://www.oregonlegislature.gov/lro/Documents/11-19-09%20RR%206-09%20Measures%2066-67.pdf> (visited August 29, 2017).

We concur with Legislative Counsel. Let us take the PEBB assessment as an example.

Before the referendum, under Section 4, the PEBB assessment applied to premium equivalents "during the period from January 1, 2018 through December 31, 2019." The referendum sent to the voters Section 3(2), the authority for the PEBB assessment. It did

³ 2017 SB 229, Chapter 749 of Oregon Laws 2017, § 55(1)(a)(A).

⁴ Article IV, Section 1(4)(d) of the Oregon Constitution provides: "**** an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon."

⁵ Article IV, Section 1(4)(d) of the Oregon Constitution provides: "A referendum ordered by petition on a part of an Act does not delay the remainder of the Act from becoming effective."

⁶ Legislative Counsel Opinion "Re: Questions Relating to Prospective Referendum on House Bill 2391 (2017)," addressed to Senator Richard Devlin (August 31, 2017).

not refer to the voters Section 4, which specifies the effective date of the PEBB assessment. If the referendum is approved, the PEBB assessment will apply to premium equivalents effective on the date originally specified by Section 4, i.e. during the period from January, 2018 through December 31, 2019.

Similarly, the referral did not include the effective date provision of the assessments on health insurance premiums.⁷ Thus if the referral passes, all the health insurance assessments are to be collected for effective dates starting January 1, 2018.

This analysis is consistent with constitutional limitations on retroactive taxes. Retroactive taxes are generally constitutional as long as they do not violate the Due Process Clause. The referendum produces a very short period of retroactivity, less than two months, which is almost certainly not a due process violation. US Supreme Court decisions on retroactive taxes have often approved “a modest period of retroactivity.”⁸ In fact the Court has considered retroactive tax law changes that applied much further back than this one (i.e. for multiple years) and that were held not to violate due process. Some of the reasoning of the Court for this is based on its principle that no one has a vested or property interest in the tax laws.

This memo is intended for reliance by state officers only.⁹

⁷ Section 8(1).

⁸ *United States v. Carlton*, 512 U.S. 26, 32 (1994).

⁹ ORS 180.060(3).

APPENDIX

HB 2391 Insurance Assessments, with Referred Provisions Highlight

79th OREGON LEGISLATIVE ASSEMBLY--2017 Regular Session

Enrolled
House Bill 2391

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Health Care)

CHAPTER [538, Oregon Laws 2017]

AN ACT

Relating to access to health care; creating new provisions; *** prescribing an effective date; and providing for revenue raising that requires approval by a three-fifths majority.

Be It Enacted by the People of the State of Oregon:

HEALTH INSURANCE PREMIUM *** ASSESSMENT

SECTION 1. Sections 2 to 8 of this 2017 Act are added to and made a part of the Insurance Code.

SECTION 2. (1) The Health System Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Health System Fund shall be credited to the fund.

(2) Amounts in the Health System Fund are continuously appropriated to the Department of Consumer and Business Services for the purposes of:

(a) Administering the Oregon Reinsurance Program established in section 18 of this 2017 Act; and

(b) Transferring moneys to the Oregon Health Authority to:

(A) Provide medical assistance and other health services under ORS chapter 414.

(B) Pay refunds due under section 11 of this 2017 Act.

(C) Pay administrative costs incurred by the authority to administer the assessment described in section 9 of this 2017 Act.

SECTION 3. (1) As used in this section:

(a) "Insured" means an eligible employee or family member, as defined in ORS 243.105, who is enrolled in a self-insured health benefit plan under ORS 243.105 to 243.285.

(b) "Premium equivalent" means a claim for reimbursement of the cost of a health care item or service provided to an eligible employee or family member, other than a dental or vision care item or service, and the administrative costs associated with the claim.

(2) No later than 45 days following the end of a calendar quarter, the Public Employees' Benefit Board shall pay an assessment at the rate of 1.5 percent on the gross amount of premium equivalents received during the calendar quarter.

(3) The assessment shall be paid to the Department of Consumer and Business Services and shall be accompanied by a verified report, on a form prescribed by the department, together with any information required by the department.

(4) The assessment imposed under this section is in addition to and not in lieu of any tax, surcharge or other assessment imposed on the board.

(5) If the department determines that the assessment paid by the board under this section is incorrect, the department shall charge or credit to the board the difference between the correct amount of the assessment and the amount paid by the board.

(6) The board is entitled to notice and an opportunity for a contested case hearing under ORS chapter 183 to contest an action of the department taken pursuant to subsection (5) of this section.

(7) Moneys received by the department under this section shall be paid into the State Treasury and credited to the Health System Fund established under section 2 of this 2017 Act.

SECTION 4. Section 3 of this 2017 Act applies to premium equivalents received by the Public Employees' Benefit Board, or a third party administrator that contracts with the board to administer a self-insured health benefit plan, during the period from January 1, 2018, through December 31, 2019.

SECTION 5. (1) As used in this section:

(a) "Gross amount of premiums" has the meaning given that term in ORS 731.808.

(b) "Health benefit plan" has the meaning given that term in ORS 743B.005.

(2) No later than 45 days following the end of a calendar quarter, an insurer shall pay an assessment at the rate of 1.5 percent of the gross amount of premiums earned by the insurer during that calendar quarter that were derived from health benefit plans delivered or issued for delivery in Oregon.

(3) The assessment shall be paid to the Department of Consumer and Business Services and shall be accompanied by a verified form prescribed by the department together with any information required by the department, that reports:

(a) All health benefit plans issued or renewed by the insurer during the calendar quarter for which the assessment is paid; and

(b) The gross amount of premiums by line of insurance, derived by the insurer from all health benefit plans issued or renewed by the insurer during the calendar quarter for which the assessment is paid.

(4) The assessment imposed under this section is in addition to and not in lieu of any tax, surcharge or other assessment imposed on an insurer.

(5) Any rate filed for the department's approval may include amounts paid by the insurer under this section as a valid element of administrative expense or retention.

(6) Moneys received by the department under this section shall be paid into the State Treasury and credited to the Health System Fund established under section 2 of this 2017 Act.

SECTION 6. (1) If the Public Employees' Benefit Board or an insurer fails to timely file a verified form or to pay an assessment required under section 3 or 5 of this 2017 Act, the Department of Consumer and Business Services shall impose a penalty on the board or insurer of up to \$500 per day of delinquency. The total amount of penalties imposed under this section for a calendar quarter may not exceed five percent of the assessment due for that calendar quarter.

(2) Any penalty imposed under this section is in addition to and not in lieu of the assessment imposed under sections 3 and 5 of this 2017 Act.

SECTION 7. (1) If the Department of Consumer and Business Services determines that the assessment paid by the insurer under section 5 of this 2017 Act is incorrect, the department shall charge or credit to the insurer the difference between the correct amount of the assessment and the amount paid by the insurer.

(2) An insurer that is aggrieved by an action of the department taken pursuant to subsection (1) of this section shall be entitled to notice and an opportunity for a contested case hearing under ORS chapter 183.

SECTION 8. (1) Section 5 of this 2017 Act applies to premiums earned by an insurer for a period of eight calendar quarters beginning on the date, on or after January 1, 2018, that the policy or certificate for which the premiums are paid is issued or renewed.

(2) Notwithstanding any provision of contract or statute, including ORS 743B.013 and 743.022, insurers may increase their premium rate on policies or certificates that are subject to the assessment under section 5 of this 2017 Act by 1.5 percent. If an insurer increases its rates under this subsection, the insurer may include in its billings for health benefit plans a notice, as prescribed by the Department of Consumer and Business Services, explaining that the increase is due to the assessment under section 5 of this 2017 Act.

OPERATIVE DATES [AND] EFFECTIVE DATES ***

SECTION 43. Sections 3 to 12 of this 2017 Act *** become operative on January 1, 2018 [except that, due to Referendum 301, the provisions highlit above are effective February 22, 2018].

SECTION 49. The Department of Consumer and Business Services may take any action before the operative date specified in section[] 43 *** of this 2017 Act for sections 2 to 12 *** of this 2017 Act *** that is necessary for the department to carry out sections 2 to 12 *** of this 2017 Act *** on the operative date specified in section[] 43 *** of this 2017 Act.

SECTION 51. This 2017 Act takes effect on the 91st day after the date on which the 2017 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.