

**OPINION  
65-218**

September 14, 1965 (OPINION)

Mr. Martin N. Gronvold

Executive Director

Old Age & Survivor Insurance System

RE: Old Age and Survivors Insurance - State Employees Retirement Plan  
Exception

This is in reply to the letter of September 7, 1965, relative to contributions to the Old Age and Survivor Insurance System.

You note that since July 1, 1957, you have collected contributions from the State departments, political subdivisions and all their departments and instrumentalities. You state you did so by considering the action of the Legislative Assembly of 1957 which had amended section 52-09-09 by adding the following language: "From and after July 1, 1957 the tax upon each employer shall be equal to four percent of the wages paid to each employee. After June 30, 1957, there shall be no tax hereunder upon the employee." At the time the 1957 Legislature enacted this provision it was also enacting legislation to enable OASIS to pay contributions to the Federal Social Security Administration for employers and employees pursuant to Chapter 306 of the North Dakota Session Laws of 1955. You further state:

"It was our opinion that the action taken by the Legislature indicated that the taxes imposed by Chapter 52-09 were to continue upon the employer until all obligations of the system were liquidated even though the definition of employer as found in 52-09-20, subsection C(1) included the following language: 'excepting only those whose employees are now or may hereafter be covered by a retirement plan in which event such political subdivision may by election come under the provisions of this chapter in accordance with the regulations prescribed by the bureau.'

"A question has been raised as to our authority to continue the OASIS tax upon the 'employer' when the employees of such 'employer' may be covered by a retirement plan. Question: If the employees of a State department elect as a whole to be covered by the retirement plan established by the newly created State Employee's Retirement Association, does such coverage exempt the employer from liability for the taxes imposed by Chapter 52-09 of the North Dakota Century Code?

"The same question could be raised on the coverage obtained for public employees under the provisions of the federal Social Security Act. We note that in an opinion issued to the State

Wheat Commission (a copy attached) on September 21, 1959, it was held that the OASIS was: 'It is a continuing program and applies to new employers in the same manner as it applies to wages paid to new employees under a position which was formerly covered under OASIS or would have been under State OASIS.'

We ask your opinion on whether the State departments (and all other political subdivisions) are liable for the payment of the taxes imposed by Chapter 52-09 if part or all of their employees are covered by another retirement system."

As you have noted in your letter the OASIS was replaced by federal Social Security. However, in order to meet the obligations which had already been incurred by OASIS it was necessary to continue a tax upon the employing agencies although the contribution from the employees was eliminated. The rate of contribution from the employer has been decreased over the past few legislative sessions. See Section 52-09-09 of the North Dakota Century Code, as amended.

Section 52-09-09 was a portion of the original OASIS act. The wording thereof has not been altered except for the added provisions which modified the rate of contribution required from an employer and employee. We realize that the definition of employer as contained in section 52-09-20(C)(1), and which has not been substantially amended since its original enactment, would appear to exclude any State department which might be covered by a retirement plan. However, we also recognize that the definition of employer was adopted for the purpose of the OASIS act and contemplated a continuing OASIS program. As we have noted above, this is not the situation. The purpose of employer contributions to OASIS is only to meet the obligations which had incurred under the system and not to fund any further obligations. In this respect the Legislature has consistently appropriated funds to State departments to meet the required OASIS contributions for employers.

If the definition of employer as contained in section 52-09-20(C)(1) were to be construed to exempt any State department which has a retirement plan from making contributions to OASIS, there would be few if any State departments making OASIS contributions since the State departments either have their own retirement plan or are covered by federal Social Security. It was the obvious intent of the Legislature that the State departments continue to make the employer contributions to OASIS in the prescribed percentages set forth in section 52-09-09, as amended. Thus the communication of this office dated September 21, 1959, to which you refer in your letter, holds that all State departments (among others) are required to make the contribution even though the instrumentality did not exist at the time the act was enacted. "It is a continuing program and applies to new employers in the same manner as it applies to wages paid to new employees under a position which was formerly covered under OASIS or would have been under State OASIS."

In direct reply to your questions:

1. It is our opinion that if employees of a State department elect as a whole to be covered by the retirement plan established by the newly created State Employee's

Retirement Association such coverage does not exempt the employer from liability for the taxes imposed by Chapter 52-09 of the North Dakota Century Code, as amended. We do not believe the Legislature, by the enactment of the State Employee's Retirement System, intended to relieve the State departments from OASIS contributions.

2. It is our further opinion that the State departments are liable for the payment of the taxes imposed by Chapter 52-09, as amended, if part or all of their employees are covered by another retirement system.

HELGI JOHANNESON

Attorney General