
OREGON PUBLIC ENTITY EXCESS POOL

EXCESS LIABILITY COVERAGE AGREEMENT

2017-18

This is an Excess Liability Coverage Agreement under which the **named member's** Liability Coverage **Declarations** (hereafter referred to as "**Declarations**") are issued. The Coverage Provisions within the Excess Liability Coverage Agreement set forth the coverages afforded **members** by the Oregon Public Entity Excess Pool (hereafter referred to as "**OPEEP**") pursuant to its Intergovernmental Agreement, Bylaws, and in accordance with ORS 731.036.4 and ORS 30.282. Coverages A, B, and C as described below apply to general liability, automobile liability, **Employment Practices** liability, employee benefits liability, and professional liability exposures.

1. DEFINITIONS

A. "**Administration**" means:

- (1) Giving counsel to employees with respect to the **employee benefit programs**;
- (2) Interpreting the **employee benefit programs**;
- (3) Handling records in connection with **employee benefit programs**;
- (4) Effecting enrollment, termination or cancellation of employees under the **employee benefits programs**;

provided all such acts are authorized by the **named member**.

B. "**Airport**" means any area of land or water that is intended for the landing and takeoff of aircraft, and includes its buildings and related facilities, if any.

C. "**Bodily Injury**" means bodily injury, sickness or disease sustained by a person including death resulting from any of these. **Bodily Injury** includes mental anguish and mental injury.

D. "**Claim**" means any notice or demand to the **named member** by or on behalf of a party seeking **damages** that reasonably communicates to the **named member** the party's intent to seek money **damages** from the **member**.

E. "**Covered Auto**" means any vehicle designed for land transportation, whether or not licensed for highway use, and owned or operated by the **member**.

F. "**Damages**" means all sums recoverable by law from any liability covered under this coverage agreement, including punitive damages if awarded, but not including any sums awarded for plaintiff's attorney fees, or expert fees, under any statute including but not limited to, 42 U.S. Code, 1988, in any case in which monetary damages are not sought or not awarded. Damages do not include:

- (1) Costs necessary to comply with injunctions or declaratory relief.
 - (2) Sums recoverable for breach of contract; express or implied.
 - (3) Sums awarded as compensation due or accruing to the benefit of the employee while still employed by the **named member**.
 - (4) Sums sought or awarded for claims of unjust enrichment, money had and received or replevin.
- G. **"Employee benefit programs"** shall mean group life insurance, group health insurance, profit sharing plans, pension plan, employee stock subscription plans, workers' compensation, unemployment insurance, social security, disability benefits insurance and travel, savings or vacation plans.
- H. **Employment Practices** means **Claims** for **damages** made by an **Employee**, or their heirs, beneficiaries or legal representatives, as a result of the **Wrongful Acts** of the **Named Participant** occurring during the **Coverage Period**.
- I. **Federal Claims** means **Claims** for **Damages** caused by an **Occurrence** and/or **Wrongful Act** pursuant to the following Federal statutes or acts:
- (1) 42 U.S.C. § 1983
 - (2) 42 U.S.C. § 2000(e) et. seq. (Title VII of the Civil Rights Act of 1964)
 - (3) 29 U.S.C. § 621 et. seq. (Age Discrimination in Employment Act of 1967)
 - (4) 42 U.S.C. § 12101, et. seq. (The Americans with Disabilities Act)
 - (5) The Civil Rights Act of 1991
 - (6) 42 U.S.C. § 1981
 - (7) 42 U.S.C. § 3601 et. seq. (The Fair Housing Act)
 - (8) 29 U.S.C. § 2601 et. seq. (The Family and Medical Leave Act) or any law amendatory thereof
 - (9) Federal Admiralty and Maritime law or jurisdiction
- J. **"Fungus or fungi"** includes but is not limited to any form or type of mold, mushroom or mildew.
- K. **"Hazardous properties"** include radioactive, toxic or explosive properties.
- L. **"Hospital" or "nursing home"** means any facility with an organized medical staff, with permanent facilities that include inpatient beds and with medical services, including physician services and continuous nursing services under the supervision of registered nurses, to provide diagnosis and medical or surgical treatment including but not limited to providing treatment for 1) acutely ill patients and accident victims, 2) mentally ill patients or 3) patients in special inpatient care facilities. However, inpatient care facilities incidental to correctional facilities shall not be considered a **hospital** or **nursing home**.
- M. **"Member"** means the entity named on the declarations page and its officers, employees and agents including volunteers, authorized to act on behalf of the **named member**, all acting within the scope of their employment or duties whether arising out of a governmental or proprietary function. The term **member** shall also include **additional members** to the extent coverage is afforded under the definition of **additional member**.
- (1) **"Named member"** means the entity named as such on the Declarations page of the coverage agreement. If the **Named Member** on the Declarations page is a

public entity risk pool, then any Named Members of that risk pool are also **Named Members** pursuant to this Coverage Agreement.

- (2) **"Additional member"** means any party whom a public body covered under this coverage agreement has agreed to hold harmless, indemnify or defend pursuant to a contract or other agreement lawfully entered into by such public body. However, in no event shall coverage under this coverage agreement extend to such party for any claim arising out of an **occurrence** after the expiration of this coverage agreement or the expiration of the contract or agreement entered into by the public body, whichever shall occur first. Further, in no event shall coverage under this coverage agreement extend to such party for any claim, however or whenever asserted, arising out of such party's sole negligence. Except as specified in this paragraph, such party shall have no rights under the **OPEEP IGA**, Bylaws or Rules of **OPEEP**. The term "additional insured" if used on a certificate of coverage, shall be understood to mean the same as **additional member**.

N. **"Nuclear Facility"** means:

- (1) any nuclear reactor;
- (2) any equipment or device designed or used for:
- a. separating the isotopes of uranium or plutonium,
 - b. processing or utilizing **spent fuel**, or
 - c. handling, processing, or packaging **nuclear waste**;
- (3) any equipment or device used for the processing, fabricating or alloying of **special nuclear material** if at any time the total amount of such material in the custody of the **member** at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
- (4) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of **nuclear waste**;

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

O. **"Nuclear material"** means **source material, special nuclear material or by-product material**.

P. **"Nuclear reactor"** means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

Q. **"Nuclear Waste"** means any waste material:

- (1) containing **by-product material** other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore process primarily for its **source material** content, and
- (2) resulting from the operation by any person or organization of any nuclear facility included under the first two paragraphs of the definition of **nuclear facility**.

- R. **“Nursing home”**, see **Hospital**.
- S. **“Occurrence”** means:
- (1) an incident, event, act, error or omission which occurs during the coverage period, or
 - (2) a series of related incidents, events, acts, errors or omissions; or a continuous or repeated exposure to substantially the same general conditions, which occur during the coverage period. If the **occurrence** begins in one coverage period and ends in another, the **occurrence** shall be deemed to have taken place during the last such coverage period. Such incidents, events, acts, errors or omissions, or continuous or repeated exposures to substantially the same conditions shall be deemed to be a single **occurrence** for purposes of determining the “per occurrence” limit of liability and deductible, if any. Only the coverage and limits in effect for the last coverage period shall apply and only one “per occurrence” limit shall be available for each such multi-period **occurrence** regardless of the number of coverages under this coverage agreement which may apply to such **occurrence**.
- T. **“OPEEP” and “OPEEP IGA”** means the Oregon Public Entity Excess Pool created by the Intergovernmental Agreement signed by **members**.
- U. **“Personal Injury”** means false arrest, detention, imprisonment, malicious prosecution, libel, slander, or publication or utterance in violation of the individual's right of privacy, wrongful entry or eviction, or invasion of the right of private occupancy.
- V. **“Pollutants,”** as used in exclusion K., means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkali, and chemicals, bacteria, organisms, and pathogens. However, **pollutants** do not include sewage which through the negligence of the **member** escapes the confines of a municipal sewage treatment system owned or operated by the **member**.
- W. **“Property Damage”** means injury to or destruction of tangible property.
- X. **“Source material,” “special nuclear material,”** or **“by-product material”** have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.
- Y. **“Spent fuel”** means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a **nuclear reactor**.
- Z. **“Spore(s)”** include any reproductive body produced or arising out of any **fungus or fungi**.
- AA. **“Waste”** as used in exclusion K., includes, but is not limited to, materials to be recycled, reconditioned, or reclaimed.
- AB. **Wrongful Acts** means an actual or alleged negligent error, misstatement or misleading statement; an act of negligent omission or neglect, negligence or breach of duty, including misfeasance and nonfeasance by a **named member** rendered in the discharge of their duties. Wrongful act shall also include such acts in the **Administration of Employee Benefits Programs** and wrongful acts arising out of **Employment Practices**.

2. COVERAGES

In accordance with and subject to the Excess Public Entity Liability Coverage Declarations applicable to the **named member** to which this Coverage Agreement applies; the Intergovernmental Agreement establishing the Oregon Public Entity Excess Pool (herein called "**OPEEP**") the Bylaws of **OPEEP**; and the terms, conditions and limitations of this Coverage Agreement, and in consideration of the contribution for which this Coverage Agreement is written, **OPEEP** will pay on behalf of the member whose damages arising out of an occurrence which exceeds the limits of the underlying primary coverage up to the excess limits stated in the Public Entity Liability Coverage Declarations and issued for the coverage period shown on the Public Entity Liability Coverage Declarations, not to exceed the Limits of Liability further described in Section 4. of this Coverage Agreement, because of:

Coverage A: Liability arising under Oregon Revised Statutes 30.260 to 30.300; asserted pursuant to ORS 30.260 to 30.300; and caused by an **occurrence**.

Coverage B: Liability for **Damages** arising out of **Federal Claims**, including **Wrongful Acts** arising from **Employment Practices** and from the **Administration of Employee Benefits Programs**. Coverage for **Employment Practices** liability and **Employee Benefits Programs** liability applies to any **Damage** sustained by a **member**. This coverage applies to liability caused by an **Occurrence** or **Wrongful Act** as defined in this Coverage Agreement.

Coverage C: Tort liability for **Bodily Injury, Personal Injury** and **Property Damage** for which the **member** is legally liable under the laws of any jurisdiction other than the State of Oregon and other than any United States Federal jurisdiction to which this coverage agreement applies caused by an **occurrence**.

3. DEFENSE

No duty to defend shall arise out of this agreement unless and until the member exceeds the member's self-insured retention. However, **OPEEP** retains the right to assist in the defense with respect to claims for **damages** which could possibly exceed the limits of the underlying member's self-insured retention.

The duty to defend any claim or suit shall terminate, except as provided hereafter, when such claim or suit ceases to seek **damages** against the **member**. Provided, however, that the duty to defend any claim or suit shall not terminate so long as the claim or suit includes an allegation of breach of an implied contract arising out of an employment relationship with the **named member**.

OPEEP has no duty to defend until such time as the **member** has provided notice to **OPEEP** and **OPEEP** shall have no obligation to pay any sum for fees, expenses or costs incurred for the defense of a **member** prior to such notice.

A member may use in-house counsel with trial experience when fees are less than the attorney fees authorized by **OPEEP**.

4. LIMITS OF LIABILITY

A. The "Per Occurrence Limit" listed in the Coverage Declarations, subject to the provisions of this LIMITS OF LIABILITY section, is the most **OPEEP** will pay as **Damages** on behalf of the **member** with respect to a single **occurrence** regardless of the number of:

- (1) Coverages provided in Section 2. of this Coverage Agreement that apply or might apply to the **occurrence**;
 - (2) **Claims** asserted;
 - (3) Persons or organizations making **claims** arising out of or in connection with that **occurrence**; or
 - (4) Additional or supplemental coverages provided under this Coverage Agreement.
- B. Cost of Defense. **OPEEP's** obligation to pay the cost of defending **claims** or suits to which the Coverage Agreement erodes the applicable limits of liability and the self-insured retention shown in the Coverage Declarations.

5. EXCLUSIONS

The coverage agreement does not apply:

- A. To any liability arising out of:
- (1) ownership, maintenance, operation, use, security, loading or unloading of:
 - a. any aircraft owned, or operated by, or rented, or loaned to **any member**; or
 - b. any other aircraft operated by any person in the course of their employment by the **named member**; or
 - c. any non-owned aircraft.
- B. To any **occurrence** arising out of the ownership, maintenance or use of watercraft in excess of thirty (30) feet in length. This exclusion does not apply to watercraft commandeered by **named member** for emergency operations.
- C. To injury or damage to or destruction of any property owned by the **named member** or any of its departments, agencies, boards or commissions.
- D. To any obligation for which **named member**, or any carrier as its insurer, may be held liable under any workers' compensation, unemployment or disability benefits law, or other similar law, including the Jones Act, the Federal Employers Liability Act, Federal Employee Compensation Act, the Defense Base Act, or the US Longshoremen and Harbor Workers' Compensation Act.
- E. To any obligation imposed by a workers' compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law, including any officer, employee, volunteer, or inmate for whom the **named member** is required to or elects to provide Workers' Compensation coverage under ORS 656.031 or 656.041 et al, arising out of and in the course of the officer, employee, volunteer, or inmate employment or use of their services by the **named member**. For purposes of this exclusion, "employee" means any employee, former employee, prospective employee, person claiming to be an employee, or any person deemed by law to be an employee of the **named member**.

However, **OPEEP** agrees to provide Employers' Liability coverage as follows:

- (1) Employers' Liability coverage applies to **bodily injury** by accident or **bodily injury**

by disease. **Bodily injury** includes resulting death subject to the following:

- a. The **bodily injury** must arise out of and in the course of the injured employee's employment, including any volunteer, by the **named member**.
- b. The employment must be necessary or incidental to the **named member's** work in the State of Oregon.
- c. **Bodily Injury** by accident must occur during the coverage period.
- d. **Bodily injury** by disease must be caused or aggregated by the conditions of the **named member's** employment. The employee's last day of last exposure to the conditions causing or aggravating such **bodily injury** by disease must occur during the coverage period.
- e. If the **named member** is sued, the original suit and any related legal actions for damages for **bodily injury** by accident or by disease must be brought in the United States of America, its territories, or possessions, or Canada.

OPEEP agrees to pay all sums the **named member** legally must pay as damages because of **bodily injury** to the **named member's** employees, including volunteers.

(2) The **damages OPEEP** will pay, where recovery is permitted by law, include **damages**:

- a. for which the **named member** is liable to a third party by reason of a claim or suit against the **named member** by that third party to recover the **damages** claimed against such third party as a result of injury to the **named member's** employee;
- b. for care and loss of services; and
- c. for consequential **bodily injury** to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of **bodily injury** that arises out of and in the course of the injured **employee's** employment by the **named member**; and
- d. because of bodily injury to the **named member's** employee that arises out of and in the course of employment, claimed against the **named member** in a capacity other than as employer.

(3) Employers' Liability coverage does not cover:

- a. liability assumed under a contract. This exclusion does not apply to a warranty that work will be done in a workmanlike manner;
- b. punitive or exemplary damages because of **bodily injury** to an employee employed in violation of law;
- c. **bodily injury** to an employee while employed in violation of law with a **named member's** actual knowledge or the actual knowledge of any of its executive officers;
- d. **bodily injury** intentionally caused or aggravated by the **named member**;

- e. **bodily injury** occurring outside the United States of America, its territories or possessions, and Canada.
- f. **damages** arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions;
- g. **bodily injury** to any person in work subject to the Longshore and Harbor Workers' Compensation Act (33 USC Sections 901-950), the Non-Appropriated Fund Instrumentalities Act (5 USC Sections 8171-8173), the Outer Continental Shelf Lands Act (43 USC Sections 1331-1356), the Defense Base Act (42 USC Sections 1651-1654), the Federal Coal Mine Health and Safety Act of 1969 (30 USC Sections 901-942), any other federal workers or workmen's compensation law or other federal occupational disease law, or any amendments to these laws;
- h. **bodily injury** to any person in work subject to the Federal Employers' Liability Act (45 USC Sections 51-60), any other federal laws obligating an employer to pay damages to an employee due to **bodily injury** arising out of or in the course of employment, or any amendments to those laws;
- i. **bodily injury** to a master or member of the crew of any vessel;
- j. Fines or penalties imposed for violation of federal or state law; and
- k. **damages** payable under the Migrant and Seasonal Agricultural Worker Protection Act (29 USC Sections 1801-1872) and under any other federal law awarding damages for violation of those laws or regulations issued there under, and any amendments to those laws.

OPEEP has the right and duty to defend, at **OPEEP's** expense, any claim, proceeding or suit against a **named member** for damages payable by this Employers' Liability coverage. For claims reaching the excess level, **OPEEP** has the right to investigate and settle these claims, proceedings and suits.

OPEEP has no duty to defend a claim, proceeding or suit that is not covered by this Employers' Liability coverage. **OPEEP** has no duty to defend or continue defending after **OPEEP** has paid the applicable limit of liability under this coverage agreement.

- F. To any liability arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, or inverse condemnation, by whatever called, whether such liability accrues directly against the **member** or by virtue of any agreement entered into, by or on behalf of the **named member**. This includes but is not limited to takings and partial takings of private property resulting from the application of land use, zoning, building, subdivision or similar ordinance or regulation. This coverage agreement also does not apply to any claim or action based on, or asserted pursuant to, ORS 197.352 ("Measure 37 Claims") for compensation or damages due to land use regulation.
- G. To liability at any **hospital** or **nursing home** owned or operated by the **named member**, or to any such liability assumed by the **named member** under contract, arising out of or in connection with the care, treatment, rendering of professional services or provision of any associated products or devices to any person admitted on an inpatient or outpatient basis

or to any person entering or brought to such **hospital** or **nursing home** with the intention that care, treatment, professional services or associated products and devices be provided.

- H. To any claim against a Hospital Financing Authority created pursuant to ORS 441.525 to 441.596 arising out of the issuance of, use of proceeds from, repayment or default on financial instruments, bonds or revenue bonds.
- I. To any pollution liability claims for **bodily injury, personal injury, property damage**, or cost, loss or damage arising out of contamination by **pollutants**, including expense incurred or demanded for cleaning, remediating or detoxifying contamination.

This exclusion does not apply to **bodily injury** or **property damage** arising out of heat, smoke or fumes from a hostile fire. As used in the exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

Exclusion I. does not apply to:

- (1) Fuel, lubricants, fluids or exhaust gases that have leaked from a **covered auto** if they are needed for or result from normal electrical hydraulic or mechanical function of an auto and leak from the part of the auto designed by its manufacturer to hold or dispose of them.
 - (2) Damages caused by collision, overturn, or upset of a **covered auto**.
 - (3) Firefighting activities, including training burns, intentional demolition or burns for purpose of limiting a fire, or the discharge of **pollutants** for the purpose of controlling a fire.
 - (4) **Bodily injury** or **property damage** caused by the **named member's** fire department or hazardous response team responding to a contamination caused by a third party unrelated to the **named member**.
 - (5) Municipal potable water provided in accordance with and authorized by the Oregon State Health Division.
- J. To any liability arising directly or indirectly out of, resulting from, caused by or contributed to by:
 - (1) any **fungus, fungi, or spore(s)**;
 - (2) any solid, liquid, vapor, or gas produced by or arising out of any **fungus, fungi, or spore(s)**;
 - (3) any material, product, building component, or building structure that contains, harbors, nurtures or acts as a medium for any **fungus, fungi, or spore(s)**;
 - (4) any intrusion, leakage, or accumulation of water or any other liquid that contains, harbors, nurtures or acts as a medium for **fungus, fungi, or spore(s)**;
 - (5) the actual or threatened abatement, mitigation, removal or disposal of **fungus, fungi, or spore(s)** or any material, product, building component, or building structure that contains, harbors, nurtures or acts as a medium for any **fungus, fungi, or spore(s)**;

- (6) any supervision, instruction, recommendations, warnings or advice given or which should have been given in connection with subparagraphs (1), (2), (3), (4), or (5) above; or
 - (7) any obligation of the **member** to indemnify any party in connection with subparagraphs (1), (2), (3), (4), (5), or (6) above.
- K. To any liability or expense arising from the handling, processing, manufacture, sale, distribution, storage or use of asbestos, asbestos dust, asbestos fibers, asbestos products, and/or products containing asbestos.
- L. To any liability or expense arising directly or indirectly from:
- (1) the toxic pathological properties of lead, lead compounds or lead contained in any materials; or
 - (2) the actual or threatened abatement, mitigation, removal or disposal of lead, lead compounds or materials containing lead; or
 - (3) any supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with parts (1) or (2) above; or
 - (4) any obligation of the member to indemnify any party in connection with subparagraphs (1), (2), or (3) above.
- M. To any liability or expense arising out of any nuclear incident, accident, loss, **occurrence**, claim made or loss discovered; or as the result of the ownership, management, manufacture, design, service, operation, storage, use, existence, handling, processing, sale, distribution, responsibility for, disposal of, or entrustment to others of **nuclear materials**. For purposes of this exclusion, the term "Entrustment to Others" shall include, but not be limited to, involvement of parties other than the **member** pursuant to contracts, licenses, leases, permits, franchises and consignments.
- N. To any liability:
- (1) Of any **member** under this coverage agreement who is an Insured under a nuclear energy liability insurance policy issued by Nuclear Energy Liability Insurance Association, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limits of liability; or
 - (2) Resulting from the **hazardous properties** of **nuclear material** and with respect to which:
 - a. Any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or
 - b. The **member** is, or had this coverage agreement not been issued, would be entitled to indemnity from the United States of America, or any agency thereof, with any person or organization.
 - (3) Resulting from the **hazardous properties** of **nuclear material**, if:
 - a. the **nuclear material**:

- i. is at any nuclear facility owned by, or operated by or on behalf of any **member**; or
 - ii. has been discharged or disposed there from;
 - b. the **nuclear material** is contained in **spent fuel** or **nuclear waste** at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of any **member**; or
 - c. the liability, including liability resulting from all forms of radioactive contamination of property, arising out of the furnishing by a **member** of services, materials, parts, or equipment in connection with the planning, construction, maintenance, operation or use of any **nuclear facility**, but if such facility is located within the United States of America, or its territories or possessions, or Canada, then subparagraph c. applies only to damage to property, including damage resulting from all forms of radioactive contamination of property, to or at such **nuclear facility** and any property there at.
- O. To any liability, however caused, arising, directly or indirectly, out of:
 - (1) war, including undeclared or civil war; or
 - (2) warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
 - (3) insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.
- P. To liability arising out of or connected with the **administration** of an **employee benefits program** except to the extent such coverage is provided under Coverage B, Employee Benefits Liability.
- Q. With respect to Coverage B, Employee Benefits Liability, only this coverage does not apply to any dishonest, fraudulent, criminal or malicious act, libel, slander, discriminations or humiliation; or to **bodily injury** to any person, or to **property damage**, including the loss of use thereof.
- R. Any claim for failure of performance of contract by any Insurer, including failure of any **employee benefit program**.
- S. Any claim based upon the **member's** failure to comply with any law concerning Workers' Compensation, Unemployment Insurance, Social Security or Disability Benefits.
- T. Any claim based upon (1) failure of stock or bond to perform as represented by a **member**, (2) advice given by a **member** to an employee to participate or not to participate in stock subscription plan, (3) the investment or failure to invest, or misappropriation of funds.
- U. Any claims based upon the Employee Retirement Income Security Act of 1974, Public Law 93-406, commonly referred to as the Pension Reform Act of 1974 and amendments thereto, or similar provisions of any Federal, State or Local Statutory Law of Common Law.

- V. To liability or claims arising out of or connected with advice to any employee regarding their retirement benefits, or the implementation, or attempted implementation, of legislatively imposed changes to the Public Employee Retirement System ("PERS"), including, but not limited to, any claim alleging breach of contract, breach of duty of good faith and fair dealing, or liability arising under USC Section 1983.
- W. To the **member's** actual or alleged failure to comply with ORS 243.303 or any other state or federal law requiring the **named member** to make health care insurance coverage available to retired officers and employees, or their spouses or children.
- X. To liability arising out of any operational, security, or maintenance activities associated with the operation of any railroads owned, leased or controlled by the **named member**. For purposes of this exclusion of coverage, operation of a trolley, streetcar or similar urban transit vehicle, rail spur or side track connecting to a main track is not considered to constitute a railroad.

However, this exclusion does not apply to the activities of **named member** advisory boards not directly involved in the operational decisions of the railroad. It also does not apply to the **member's** liability arising from the operation or use of vehicles designed and licensed for use on public highways that would otherwise be included as **covered autos**.
- Y. To liability arising out of the failure of any **member** to adequately supply gas, oil, water, electricity or steam. This exclusion does not apply if the failure to supply results from the sudden and accidental injury to tangible property owned or used by any **member** to procure, produce, process, or transmit the gas, oil, water, electricity or steam.
- Z. To liability arising out of the failure of any **member** to effect, adequately purchase or maintain any insurance, bond, self-insurance fund or employee benefit program.
- AA. To liability arising out of or attributable to:

- (1) the **member** gaining profit, advantage, or remuneration to which the **member** is not entitled; or
- (2) The willful violation of any federal, state, or local statute, ordinance, or regulation by the governing body of the **named member** or any officer, employee, or agent of the **named member** acting with the authority and consent of the **named member**.

The actual or alleged conduct of a **member** shall not be imputed to any other **member** for the application of this exclusion.

5. CONDITIONS

- A. Duties of **Member** in the Event of a Claim or **Occurrence**.
 - (1) Subject to the reporting requirements in the OPEEP Bylaws, In the event of a claim, **occurrence**, suit, tort claim notice, or other communication or circumstance sufficient to reasonably put the **member** on notice of a covered claim or suit against the **member**, notice of such claim or suit in accordance with the Bylaws be provided to **OPEEP** as soon as practicable. Such notice shall include the identity of the **member**, and also reasonably obtainable information as to the time, place, and circumstances of the **occurrence**, and the **member** shall immediately forward to **OPEEP** every demand, notice, summons, or other process received by **member** in accordance with the Bylaws.

- (2) The **member** shall do nothing to prejudice the rights of **OPEEP** with respect to any such claim or **occurrence**, and shall cooperate fully with **OPEEP** in the defense of such claim or **occurrence**, including attending hearings and trials and assisting in securing and providing evidence. The **member** shall not, except at its own cost, voluntarily make any payment, assume any liability or obligation.

B. Action Against **OPEEP**.

As a condition precedent to action against **OPEEP** the **member** shall have fully complied with all the terms of this coverage agreement and the amount of the obligation shall have been finally determined either by judgment after actual trial or by written agreement between the **member**, the claimant and **OPEEP**. No person or organization shall have the right under this coverage agreement to join **OPEEP** as a party. Bankruptcy or insolvency of the **named member** or of the covered estate shall not relieve **OPEEP** of any of its obligations hereunder.

In the event of any dispute of difference arising out of a claim, the **named member** shall appeal decisions to **OPEEP** Board of Directors, Executive Committee. If the dispute is not resolved, the **named member** shall appeal to binding arbitration.

C. Subrogation.

In the event of any payment under this coverage agreement, **OPEEP** shall be subrogated to all the **member's** rights to recovery thereof against any person or organization and the **member** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. This condition shall not apply if the **member** waives subrogation by contract prior to the claim.

D. Changes.

The terms of this coverage agreement shall not be waived or changed, except by an endorsement issued to form a part of this coverage agreement signed by **OPEEP's** authorized representative and delivered to the **member**.

E. Cancellation.

This coverage agreement may be canceled by the **named member** upon such notice as required by **OPEEP IGA/Bylaws**, in which event the end of such notice period shall become the end of coverage period. **OPEEP** agrees to remain on the risk subject to the termination provisions of **OPEEP IGA/Bylaws**. Notice to the **named member** of any action taken pursuant to such provisions shall be sixty (60) days, except in the event of non-payment of any contribution due and owing, in which case notice shall be ten (10) days.

F. Non-Assignable.

The interest of the **member** under this coverage agreement shall not be assignable.

G. Coverage Period/Territory.

This coverage agreement applies to **occurrences** during the coverage period which take place anywhere, provided that resulting claims or suits are asserted within the United States of America, its territories or possessions, or Canada. Unless specifically stated otherwise, the time coverage becomes effective and terminates shall be understood to be 12:01 AM of the date so indicated.

H. Government Instrumentality.

The issuance of this coverage shall not be deemed a waiver of any statutory immunities as to any **member** nor of any statutory limits on the monetary amount of liability applicable to any **member** were this coverage agreement not in effect. **OPEEP** expressly reserves any and all rights to deny liability by reason of such immunity and to assert any limitation provided by law as to amount of liability.

I. Excess Coverage Only.

Coverage under this agreement is provided on an excess basis only. This coverage will not apply until coverage available from all other applicable insurance is exhausted by payment of settlement or judgment. In no event, however, shall the liability hereunder exceed the limit of liability set forth herein.

J. No Stacking of Coverage Limits.

In the event an **occurrence** results in, or is alleged to have resulted in, injury or **damages** that continue in successive coverage years, only one "per occurrence" limit shall apply and there will be no "stacking" of coverage limits from more than one coverage year, and no more than one coverage under Section 2 Coverages.

6. CYBER SECURITY EXPENSE COVERAGE

A. In accordance to the deductible and limits on the **OPEEP** Declaration Page, **OPEEP** will reimburse the **named member** for **cyber security expenses** reasonably incurred by the **named member** which arise from an **occurrence** that qualifies as a **cyber liability event**. For purposes of this coverage, the term **cyber security expense** means:

- (1) Direct Member Cost Notification Costs incurred by the **named member**, with the **OPEEP's** prior consent, resulting from either the **named member's** legal obligation to comply with a **breach notice law** because of a **cyber liability event**, or the **named member's** voluntary election to provide such notification following a **cyber liability event**.
- (2) Third Party Liability Damages which the **member** becomes legally obligated to pay because of:
 - a. the **member's** failure to timely disclose a **cyber liability event** in violation of any **breach notice law**; or
 - b. the **member's** failure to administer an identity theft prevention program or take necessary actions to prevent identity theft required by governmental statute or regulation that results in a **cyber liability event**.
- (3) Penalties Regulatory **penalties** which the **named member** becomes legally obligated to pay through a **regulatory proceeding** because of a **cyber liability event** caused or contributed to by a **members'** violation of a **privacy law**.
- (4) Extortion **Cyber extortion costs** incurred by the **named member**. For purposes of this coverage "**cyber extortion cost**" means the reasonable and necessarily costs

incurred with the **OPEEP's** written consent, to combat a **credible threat**. **Cyber extortion costs** include funds or other property paid by the **named member**, with the written consent of **OPEEP**, to person(s) reasonably believed to be responsible for the credible threat, in response to a specific demand in connection with that **credible threat**, and for the purpose of terminating that **credible threat** and all residual effects.

B. **LIMIT OF LIABILITY** - The most **OPEEP** will pay to or on behalf of a **member** for any one or more **cyber claims** in a single coverage year is in accordance to the **OPEEP** Declaration Page, subject to the following provisions:

(1) The coverage provided under this Section shall be completely extinguished and exhausted, and **OPEEP** shall have no obligation to pay any **loss** or defend any **claim** under this Endorsement, when all **losses** paid by the **OPEEP** arising of out all **cyber liability events**, regardless of the number of coverage years or number of **members** making **claims**, reach an aggregate limit of \$5,000,000 for this coverage program.

C. **ADDITIONAL DEFINITIONS** - As used in this Coverage Part:

(1) "**Breach notice law**" means any state, or federal regulation that requires notice to persons whose **personally identifiable non-public information** was accessed or reasonably may have been accessed by an unauthorized person.

(2) "**Computer security**" means software, computer or network hardware devices, as well as the **named member's** written information security policies and procedures, the function or purpose of which is to prevent **unauthorized access or use**, a **denial of service attack** against **computer systems**, infection of **computer systems** by **malicious code** or transmission of **malicious code** from **computer systems**. **Computer security** includes anti-virus and intrusion detection software, firewalls and electronic systems that provide access control to **computer systems** through the use of passwords, biometric or similar identification of authorized users.

(3) "**Computer systems**" means computers and associated input and output devices, data storage devices, networking equipment, and back up facilities:

- a. operated by and either owned by or leased to the **named member**; or
- b. systems operated by a third party service provider and used for the purpose of providing hosted computer application services to the **named member** or for processing, maintaining, hosting or storing the **named member's** electronic data, pursuant to written contract with the **named member** for such services.

(4) "**Credible threat**" means a criminal threat to:

- a. Damage, destroy, corrupt, alter, delete, or otherwise physically preclude or hinder the **named member's** use of its **computer systems**, or

- b. Release **personally identifiable non-public information** through the **unauthorized access or use** of the **named member's computer systems**, or
- c. Introduce **malicious code** into the **named member computer system**, or
- d. Use **named member's** data to enter into false communications with the **named member's** citizens to obtain personal or confidential information (also known as "pharming" or "phishing").

(5) **"Cyber claim"** means:

- a. a written demand including the service of a suit or institution of a regulatory or arbitration proceeding, received by the **named member** alleging a **cyber liability event** and seeking money or services;
- b. a written threat or initiation of a suit alleging a **cyber liability event** and seeking injunctive relief (meaning a temporary restraining order or a preliminary or permanent injunction); and
- c. with respect to coverage provided under Section 12A(3), institution of a **regulatory proceeding** against the **member**.

(6) **"Cyber claims expenses"** means:

- a. reasonable and necessary fees charged by an attorney approved by the **OPEEP** and paid by **OPEEP**;
- b. all other legal costs and expenses resulting from the investigation, adjustment, defense and appeal of a **cyber claim**, suit, or proceeding arising in connection therewith, or circumstance which might lead to a **cyber claim**, if incurred by the **OPEEP**, or by the **named member** with the prior written consent of the **OPEEP**; and
- c. the premium cost for appeal bonds for covered judgments or bonds to release property used to secure a legal obligation, if required in any **cyber claim** against a **named member**; provided the **OPEEP** shall have no obligation to appeal or obtain bonds.
- d. **Cyber claims expenses** do not include any salary, overhead, or other charges by the **member** for any time spent in cooperating in the defense and investigation of any **cyber claim** or circumstance that might lead to a **cyber claim** notified under this Endorsement.

(7) **"Cyber liability event"** means:

- a. theft, loss, or **unauthorized disclosure** of **personally identifiable non-public information** that is in the care, custody or control of the **member**, or of an independent contractor that is holding, processing or transferring such information on behalf of the **named member**; that occurs during the coverage period and/or

- b. one or more of the following acts or incidents which occur during the coverage period that directly result from a failure of **computer security** to prevent a **security breach**:
 - i. the alteration, corruption, destruction, deletion, or damage to a **data asset** stored on **computer systems**;
 - ii. the failure to prevent transmission of **malicious code** from **computer systems** to **third party computer systems**; or
 - iii. the participation by the **named member's computer systems** in a **denial of service attack** directed against a **third party computer system**.

- (8) "**Data asset**" means any software or electronic data that exists in **computer systems** and that is subject to regular back up procedures, including computer programs, applications, account information, customer information, private or personal information, marketing information, financial information and any other information maintained by the **named member** in its ordinary course of business.

- (9) "**Denial of service attack**" means an attack intended by the perpetrator to overwhelm the capacity of a **computer system** by sending an excessive volume of electronic data to such **computer system** in order to prevent authorized access to such **computer system**.

- (10) "**Limit of Liability**" means the most the **OPEEP** will pay for a **cyber claim** or loss to which this Endorsement applies, as further set forth in on the OPEEP Declarations Page.

- (11) "**Loss**" means **damages, cyber claims expenses, privacy notification costs, and penalties**.

- (12) "**Malicious code**" means any virus, Trojan horse, worm or any other similar software program, code or script intentionally designed to insert itself into computer memory or onto a computer disk and/or spread itself from one computer to another.

- (13) "**Penalties**" means:
 - a. any civil fine or money penalty payable by the **member** to a governmental entity that is imposed in a regulatory proceeding by any other federal, state, or local governmental entity, in such entity's regulatory or official capacity; amounts which the **member** is legally obligated to **deposit** in a fund as equitable relief for the payment of consumer **claims** due to an adverse judgment or settlement of a **regulatory proceeding**; but shall not include payments to charitable organizations or disposition of funds other than for payment of consumer **claims** for losses caused by a covered **cyber liability event**.

- (14) "**Personally identifiable non-public information**" means:

- a. information protected by **privacy law**.
- b. medical or health care information concerning the individual, including “protected health information” as defined in the Health Insurance Portability and Accountability Act of 1996, as amended, **and regulations issued** pursuant to the Act;
- c. the individual’s drivers license or state identification number; social security number; unpublished telephone numbers; credit, debit or other financial account numbers and associated security codes; access codes, passwords or personal identification numbers that allow access to the individual’s financial account information;

but does not include publicly available information that is lawfully made available to the general public from government records.

(15) **“Privacy law”** means a federal or state statute or regulation requiring the **member** to protect the confidentiality and/or security of **personally identifiable non-public information**.

(16) **“Privacy notification costs”** means the following reasonable and necessary costs incurred by the **named member** within one year of the discovery of the **cyber liability event**:

- a. for services of a computer security expert to determine the existence and cause of any **security breach** resulting in an actual or reasonably suspected theft, loss or **unauthorized disclosure** of **personally identifiable non-public information** and the extent to which such information was accessed by an unauthorized person or persons;
- b. to provide notification in compliance with a **breach notice law**;
- c. for services of a public relations consultant hired for the purpose of averting or mitigating material damage to the **named member’s** reputation as a result of the **cyber liability event**; however, this coverage applies only after the **named member’s** costs for a public relations consultant have reached or exceeded \$5,000. The amount so incurred by the **named member** does not work to reduce any deductible which might otherwise apply to the **loss**; and
- d. in connection with a credit file monitoring program, to be approved in advance by **OPEEP**, consisting of:
 - i. the offering of one year of credit monitoring services to those individuals whose **personally identifiable non-public information** was compromised or reasonably believed to be compromised as a result of the theft or **unauthorized disclosure** of information giving rise to a notification requirement pursuant to a **breach notice law**, or, with **OPEEP’s** prior written agreement, at the **named member’s** voluntary election; and

- ii. mailing and other reasonable third party administrative costs associated with such a program;
- iii. provided, all such costs payable under this subsection (d) must be for the purpose of mitigating potential **damages** resulting from such **cyber liability event**.

Privacy notification costs shall not include any internal salary or overhead, or other related expenses of the **member**.

(17) **“Regulatory proceeding”** means a request for information, civil investigative demand, or civil proceeding commenced by service of a complaint or similar proceeding brought by or on behalf of a federal or state agency with regulatory capacity in connection with a **cyber liability event**.

(18) **“Security breach”** means:

- a. **Unauthorized access or use of computer systems**, including **unauthorized access or use** resulting from the theft of a password from a **computer system** or from any **member**;
- b. **denial of service attack** against **computer systems** or **third party computer systems**; or
- c. infection of **computer systems** by **malicious code** or transmission of **malicious code** from **computer systems**,

whether any of the foregoing is a specifically targeted attack or a generally distributed attack.

(19) **“Third party computer systems”** means any computer systems that: 1) are not owned, operated or controlled by a **member**; and 2) does not include computer systems of a third party on which a **member** performs services. Computer systems include associated input and output devices, data storage devices, networking equipment, and back up facilities.

(20) **“Unauthorized access or use”** means the gaining of access to or use of **computer systems** by an unauthorized person or persons or the use of **computer systems** in an unauthorized manner.

(21) **“Unauthorized disclosure”** means the disclosure of or access to information in a manner that is not authorized by the **named member**.

D. **ADDITIONAL CONDITIONS** - The following additional provisions apply to Defense and Settlement of **cyber claims**:

(1) **Cyber claims expenses** including defense incurred by **OPEEP** in the investigation and defense of any **cyber claim** with respect to a **cyber liability event** which occurs during the coverage period are within the **limit of coverage** and shall reduce such limit.

- (2) The **limit of coverage** available to pay the **loss** shall be reduced and may be completely exhausted by payment of **cyber claims expenses** paid or reimbursed by **OPEEP**.
 - (3) Once the **OPEEP** has exhausted the limit of coverage on the Declaration Page, **OPEEP** may, at its option, withdraw from the defense of any **cyber claim**, and all costs of defense shall thereafter be the responsibility of the **named member**.
- E. **ADDITIONAL EXCLUSIONS** - This Cyber Security Expense Coverage, Coverage I, does not apply to any **cyber claim** or **loss**:
- (1) For, arising out of, or resulting from **bodily injury** or **property damage**;
 - (2) For, arising out of, or resulting from any employer-employee relations, policies, practices, acts or omissions, or any actual or alleged refusal to employ any person, or the **member's** misconduct with respect to employees, whether such **claim** is brought by an employee, former employee, applicant for employment, or relative or domestic partner of such person.
 - (3) For, arising out of, or resulting from any contractual liability or obligation, or arising out of or resulting from breach of contract or agreement either oral or written, provided, however, that this exclusion will not apply to the extent the **member** would have been liable in the absence of such contract or agreement; and further, this exclusion shall not apply to a contractual agreement to indemnify another party to the extent such agreement would be covered but for this exclusion.
 - (4) For, arising out of, or resulting from any actual or alleged antitrust violation, restraint of trade, unfair competition, or false or deceptive or misleading advertising or violation of the Sherman Anti-Trust Act, the Clayton Act, or the Robinson-Patman Act, as amended;
 - (5) For, arising out of or resulting from any actual or alleged false, deceptive or unfair trade practices; however, this exclusion does not apply to any **claim** or **loss** covered under this endorsement that results from a theft, loss or **unauthorized disclosure of personally identifiable non-public information**;
 - (6) For, arising out of or resulting from:
 - a. the actual or alleged unlawful collection or acquisition of **personally identifiable non-public information** by or on behalf of the **member**; or the failure to comply with a legal requirement to provide individuals with the ability to assent to or withhold assent (e.g. opt-in or opt-out) from the collection, disclosure or use of **personally identifiable non-public information**; or
 - b. the distribution of unsolicited email, direct mail, or facsimiles, wiretapping, audio or video recording, or telemarketing, if such distribution, wiretapping or recording is done by or on behalf of the **member**.
 - (7) For, arising out of or resulting from any of the following:

- a. any actual or alleged violation of the Organized Crime Control Act of 1970 (commonly known as the Racketeer Influenced and Corrupt Organizations Act or RICO), as amended, or any regulation promulgated there under or any similar federal law or legislation, or law or legislation of any state, province or other jurisdiction similar to the foregoing, whether such law is statutory, regulatory or common law;
 - b. any actual or alleged violation of any securities law, regulation or legislation, including but not limited to the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Act of 1940, any state or provincial blue sky or securities law, any other federal securities law or legislation, or any other similar law or legislation of any state, province or other jurisdiction, or any amendment to the above laws, or any violation of any order, ruling or regulation issued pursuant to the above laws;
 - c. any actual or alleged violation of the Fair Labor Standards Act of 1938, the National Labor Relations Act, the Worker Adjustment and Retraining Act of 1988, the Certified Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act of 1970, any similar law or legislation of any state, province or other jurisdiction, or any amendment to the above law or legislation, or any violation of any order, ruling or regulation issued pursuant to the above laws or legislation; or
 - d. any actual or alleged discrimination of any kind including but not limited to age, color, race, sex, creed, national origin, marital status, sexual preference, disability or pregnancy;
- (8) For, arising out of, or resulting from any criminal, dishonest, fraudulent, or malicious act, error or omission, any intentional **security breach**, or intentional or knowing violation of the law committed by any **member**.
- (9) For, arising out of or resulting from any actual or alleged:
- a. infringement of patent or patent rights or misuse or abuse of patent; or
 - b. infringement of copyright arising from or related to software code or software products; or
 - c. use or misappropriation of any ideas or trade secrets by a **member**, or on behalf of, or in collusion with a **member**.
- (10) In connection with or resulting from a **cyber claim** brought by or on behalf of any other state, federal, or local governmental entity, in such entity's regulatory or official capacity; provided, this exclusion shall not apply to a **cyber claim** otherwise covered under Coverage 12.A(3).;
- (11) Arising out of or resulting from any of the following:
- a. trading losses, trading liabilities or change in value of accounts; any loss of monies, securities or tangible property of others in the care, custody or control of the **member**;

- b. the monetary value of any electronic fund transfers or transactions by or on behalf of the **member** which is lost, diminished, or damaged during transfer from, into or between accounts; or
 - c. the value of coupons, price discounts, prizes, awards, or any other valuable consideration given in excess of the total contracted or expected amount;
- (12) For damage to, destruction of, corruption of, or any loss of use by any **member** of any **computer systems** or **data asset**, including without limitation any costs or expenses to the **member** to repair or replace any **computer systems** or **data asset**.