



OPERS Guide for Ohio Prosecutors on Forfeiture and Restitution Withholding Orders



Table of Contents

Restitution	
Theft in office defined	1
Procedures	2-3
Pension Forfeiture Orders	4
Notice of Felony Charges Filed Against a Member	4
Frequently Asked Questions	5
Sample Notice of Indictment to OPERS	7
Prosecutor’s Notice of Indictment for Theft in Office Form	9
Sample Restitution Withholding Order	10
Sample Forfeiture Order	11

This guide is provided as a quick reference for Ohio’ prosecutors or anyone interested in OPERS accounts and crimes that may result in restitution or pension forfeiture. This guide attempts to present an accurate description of relevant laws and procedures, but it is not legal advice, is not binding on OPERS or any other party, and does not prevail if it conflicts with Ohio law.



RESTITUTION

Theft in office defined

R.C. 2921.41 provides that no public official or party official shall commit any theft offense, as defined in R.C. 2913.01(K) when either of the following applies: the offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense, or the property or service involved in the offense is owned by this state, any other state, the United States, a county, municipal corporation, township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political party. "Theft" includes:

R.C. 2911.01	Aggravated robbery	R.C. 2913.21	Misuse of credit cards
R.C. 2911.02	Robbery	R.C. 2913.31	Forgery; forging identification cards
R.C. 2911.11	Aggravated burglary	R.C. 2913.32	Criminal simulation
R.C. 2911.12	Burglary	R.C. 2913.33	Making or using slugs
R.C. 2911.13	Breaking and entering	R.C. 2913.34	Trademark counterfeiting
R.C. 2911.31	Safecracking	R.C. 2913.40	Medicaid fraud
R.C. 2911.32	Tampering with coin machines	R.C. 2913.42	Tampering with records
R.C. 2913.02	Theft; aggravated theft	R.C. 2913.43	Securing wirings by deception
R.C. 2913.03	Unauthorized use of vehicle	R.C. 2913.44	Personating an officer
R.C. 2913.04	Unauthorized use of computer, cable or telecom property	R.C. 2913.45	Defrauding creditors
R.C. 2913.041	Possession or sale of unauthorized vehicle	R.C. 2913.47	(Former) Insurance fraud
R.C. 2913.05	Telecom fraud	R.C. 2913.48	(Former)
R.C. 2913.06	Unlawful use of telecom device	R.C. 2913.48	(Current) Workers' comp fraud
R.C. 2913.11	Passing bad checks	R.C. 2913.51	Receiving stolen property
		R.C. 2915.05	Cheating
		R.C. 2921.41	Theft in office

Theft in office is a felony of the fifth degree, which may increase based on the value of the property stolen. \$1,000 - \$7,499 = fourth degree felony; \$7,500 or more = third degree felony.

The court can also issue restitution withholding orders against an offender's OPERS account for crime victim restitution when the offender had contact with the victim in the context of the offender's public employment per R.C. 2907.15 or 2921.41 for the following offenses:

R.C. 2907.02	Rape	R.C. 2907.04	Unlawful sexual conduct with minor
R.C. 2907.03	Sexual battery	R.C. 2907.05	Gross sexual imposition

PROCEDURES

Notice to retirement system

OPERS generally learns about pending theft-in-office cases from the member's employer, press coverage or the prosecutor. Upon filing charges for theft in office, the prosecutor assigned to the case must provide written notice to the retirement system, plan or deferred compensation program (R.C. 2921.41(D)). OPERS can freeze a member's account only upon receipt of the notice of indictment from the prosecutor. Notice from other sources does not trigger the statutory mechanism to freeze an OPERS account. OPERS members are eligible for a lump sum refund of their accounts two months after the last date of public employment per R.C. 145.40¹; therefore, indictments should ideally precede the expiration of this deadline to guarantee the OPERS account will be an available option for the payment of restitution. An ongoing investigation is not sufficient to freeze an OPERS account. Direct payment of restitution by OPERS is not available if the account has already been refunded by the member. Survivor and ongoing retirement or disability benefits are not frozen as a result of the prosecutor's notice.

During the case

After OPERS receives the prosecutor's notice that a member has been charged or indicted under R.C. 2921.41, the member's account will be frozen and preserved during the pendency of the criminal proceedings.

Account information

A prosecutor may need specific account information in order to determine if restitution can be achieved through the OPERS account and to prepare a restitution withholding order. OPERS can provide the prosecutor with account information at any time when the member's written authorization accompanies the request per

R.C. 145.27. *Authorization: Release of Account Information* (Form LL-2) is available on the OPERS website, opers.org. Further, R.C. 145.27(D) provides that upon the written request of the prosecutor, OPERS can provide account information without the member's written authorization when the member is already subject to a crime victims or theft in office restitution withholding order (R.C. 2907.15, 2921.192, 2921.41) or the member was convicted of or pleads guilty to a violation of R.C. 2921.41. A copy of the conviction/sentencing entry should be sent to OPERS along with the prosecutor's written request for account information.

Requesting a restitution withholding order

Per R.C. 2921.41, any entity to which restitution is to be made may file a motion with the sentencing court requesting a restitution withholding order from a specifically named retirement system, plan or deferred compensation program. The motion may be filed at any time subsequent to the conviction of the offender or entry of a guilty plea; however, restitution is available only if an account remains with OPERS at that time. See the section titled "Timing of payment(s)" on page 3 for information on the earliest dates the account can be paid following a theft in office conviction. Notice of the motion to the offender is required and the offender may request a hearing within 30 days of his or her receipt of the notice (R.C. 2921.41(C)(2)(b)(ii)). The prosecutor files the motion for a withholding order on behalf of the victim in cases under R.C. 2907.15 with notice and hearing for the offender proceeding in a similar manner.

¹ OPERS has three retirement plans, the Traditional Pension Plan, the Combined Plan, and the Member-Directed Plan. R.C. 145.40 provides for account refunds from the Traditional Pension Plan. Section 8.04 of the Combined Plan Document and Section 8.01 of the Member-Directed Plan Document address refunds from those plans upon termination of public employment. An OPERS or other retirement system retiree who returns to public employment contributes to a Money Purchase Plan per R.C. 145.38. Distributions from the Money Purchase Plan, including lump sum distributions, are addressed in R.C. 145.384.

PROCEDURES *(continued)*

Execution on restitution withholding order

OPERS can execute on a restitution withholding order from lump sum and monthly benefits. If a member applies for and receives a retirement benefit before a prosecutor notifies OPERS, the restitution order is applied to the monthly benefit when the order is provided to OPERS. A retiree receiving monthly benefits is generally not eligible for any lump sum distributions; therefore, any restitution order issued against a retiree can only be paid on a monthly basis. In the case a partial lump sum option payment is still due to the retiree, OPERS would assist the prosecutor and retiree in determining the lump sum payment and monthly benefit amounts available for restitution. If a member has not retired, a lump sum distribution of the account is available. **The member must submit an application for a refund to trigger payment from the account and OPERS would execute on any restitution order on file.** The refund application can be completed online or by paper application (Form A-4T, CO, MD). Hard copy refund applications can be obtained by calling OPERS at 1-800-222-7377.

Timing of payment(s)

Monthly restitution payments are issued on the same day as pension payments, usually the first business day of the month. Lump sum distributions are issued when permitted by R.C. 145.40 and 145.57:

- The member has applied for the lump sum distribution (hard copy refund application or online application through the member's OPERS account);
- If the person is convicted of or pleads guilty to the charge and no motion for a restitution withholding order has been filed, the OPERS account is available for distribution 30 days after the day on which final disposition of the charge is made;
- If the person is convicted of or pleads guilty to the charge, and a motion for a restitution withholding order has been filed, the OPERS account is available for distribution the day on which the court decides the motion;

- If the charge is dismissed or the person is found not guilty or not guilty by reason of insanity, the OPERS account is available for distribution the day on which final disposition of the charge is made.

Assuming the member is eligible (two months after last date of public employment), applies for a refund, and a restitution withholding order OPERS receives, the refund check usually takes less than a week to process. Other factors, such as the processing of other court withholding orders, may impact processing time.

Since the OPERS account remains frozen until the case concludes, the OPERS account is unavailable to satisfy a restitution withholding order prior to sentencing.

Restitution payable to the clerk of courts

R.C. 145.57 provides that the retirement system shall issue restitution payment(s) only to the clerk of courts. The paper check will include the case number to assist the clerk in allocating the funds correctly. The restitution withholding order may further instruct the clerk on distribution to the injured party(ies). OPERS cannot comply with a restitution withholding order that instructs OPERS to issue payment to the injured party(ies) directly or any entity other than the clerk of courts.

Tax withholding and other court orders

All payments issued to the member or retiree and restitution payments are taxable to the individual. OPERS reports distributions on the Form 1099-R at the end of the tax year. OPERS is required to withhold 20% federal taxes from all lump sum distributions, so 20% of any account refund will not be available for restitution. OPERS accounts are also subject to other types of orders, such as support withholding orders, division of property orders and federal tax levies, that may take precedence over a restitution payment. OPERS will determine the priority of other existing orders at the time of distribution and issue the payments accordingly.

PENSION FORFEITURE ORDERS

The court is required to issue pension forfeiture orders against the future benefit or ongoing disability benefit of a member under R.C. 2929.192 and 2929.193 for felony violations of the below offenses that are committed on or after May 13, 2008, by those serving in a position of honor, trust or profit:

- R.C. 2921.02 Bribery
- R.C. 2923.32 Pattern of corrupt activity
- R.C. 2921.41 Theft in office (third degree)
- A violation of existing or former municipal ordinance or law of this or any other state or federal law that is substantially equivalent to bribery, pattern of corrupt activity, or theft in office
- Conspiracy to commit, attempt to commit, or complicity in committing the above violations

“Position of honor, trust or profit” is defined at R.C. 2929.192(F)(1)(b) as a person: holding elective office; on a board or commission of the state that is appointed by the Governor or Attorney General; a public official or employee who is required to file an ethics disclosure statement under R.C. 102.02; a prosecutor or peace officer

as defined in R.C. 2935.01; or a State Highway Patrol superintendent or trooper. For offenses committed on and after July 29, 2011, this definition also includes a position in which, in the course of public employment, an employee has control over the expenditure of public funds of \$100,000 or more annually.

May 13, 2008, was the effective date of these statutes. Offenses of engaging in a pattern of corrupt activity are treated as committed on or after this date if the course of conduct continues, one or more of the multiple acts occurs, or if the person’s accountability for the course of conduct or for one or more acts continues after this date.

If the individual was granted a disability benefit by the retirement system, the court must also hold a hearing regarding the condition for which the individual was granted the disability benefit and determine whether the condition arose from the commission of the felony as described in R.C. 2929.193.

Restitution withholding orders may also be issued against the lump sum distribution of the member’s accumulated contributions when the member pleads or is found guilty of theft in office, the only type of payment to the member that follows a forfeiture order.

NOTICE OF FELONY CHARGES FILED AGAINST A MEMBER

R.C. 2901.431 provides, on the filing of charges against a person who is a member of OPERS alleging the person committed a felony on or after Jan. 7, 2013, the prosecutor

assigned to the case shall send written notice to OPERS that the charges have been filed. The notice shall specifically identify the person.

FREQUENTLY ASKED QUESTIONS

Q: How does a prosecutor find out if an individual is an OPERS member?

A: Nearly all state and local government employees are mandatory participants in OPERS. You can call OPERS Legal Services at 614-222-0050 and we can confirm whether the individual is:

- Member = still has an account on file
- Not a member = no account on file
- Benefit recipient = monthly benefits ongoing for retirement, disability or re-employed retiree annuity (Money Purchase Annuity).

Q: Can a member be subject to both pension forfeiture and restitution withholding orders?

A: Yes. If the member pleads or is found guilty of theft in office (R.C. 2921.41) and the elements of pension forfeiture are present (R.C. 2929.192), the court must order pension forfeiture and restitution may also be ordered from the member's remaining accumulated contributions. OPERS would execute on the restitution withholding order when the member applies for a lump sum distribution of the accumulated contributions. The employer contributions are forfeited and cannot be issued to any party for a benefit or restitution.

Q: If the member is already receiving an age and service retirement benefit, can the benefit be subject to forfeiture or restitution?

A: The benefits would not be subject to forfeiture. Pension benefits vest when granted per R.C. 145.561 and are not subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws except for purposes of marital property division, child or spousal support withholding orders, and restitution withholding orders (R.C. 145.56). Although the retirement benefit

cannot be forfeited after the benefit commences, the benefit remains available for monthly restitution payments. Active and inactive member accounts and some disability benefits are subject to forfeiture orders.

Q: Are disability benefits subject to forfeiture orders?

A: Sometimes. Per R.C. 2929.193, when an offender is being sentenced for an offense that would cause forfeiture of the benefit per R.C. 2929.192(D) and the offender was granted a disability benefit prior to the final disposition of the case, the court shall hold a hearing to determine whether the offender's disabling condition was caused by the commission of the offense for which he or she was convicted. OPERS is required to submit a copy of the offender's disability file to the court. If the court determines the disability arose out of the commission of the offense, the disability benefit shall be terminated and benefits already paid may be recovered by OPERS. If the court determines that a disabling condition was not caused by the felony, the benefit is not terminated. Restitution from the monthly benefit remains available regardless of the circumstances under which the disability occurred.

Q: How much is available for a lump sum restitution payment?

A: The net lump sum distribution to the member is available for restitution, which follows mandatory 20% federal withholding and any other court orders that may have priority. If the member's account exceeds the orders impacting the account, the remaining amount is paid to the member. The member may rollover the amount to a qualified retirement plan. Amounts paid for restitution and received directly by the member are also subject to a 10% additional income tax on early distributions if the member is under the age of 59 ½. Additional tax information on lump sum distributions is available at www.opers.org.

FREQUENTLY ASKED QUESTIONS

Q: How much is available for restitution from a monthly disability or retirement benefit?

A: The entire benefit, unless the benefit is subject to another court order that may have priority. The restitution is taxable income to the member and the member is responsible for all federal, state or local taxes reported on the Form 1099-R from OPERS.

Q: Can OPERS issue a restitution payment if the elements of theft in office are present but the offender was not charged under R.C. 2921.41?

A: No. A member must be convicted of or plead guilty under R.C. 2921.41 in order to make the OPERS account available for restitution.

Q: Can an individual return to public employment following a conviction or guilty plea under R.C. 2921.41?

A: No. A public official or party official who pleads or is found guilty of theft in office is forever disqualified from holding any public office, employment or position of trust in Ohio.

Q: Is a court required to order restitution when imposing a sentence for theft in office?

A: Generally, yes, but it depends on the nature of the violation. R.C. 2921.41 provides that violations of theft of property owned by the public body shall require the court to issue a restitution withholding order in addition to imprisonment and any fine imposed. A court that imposes a sentence against an offender who used his or her office in the aid of committing the offense shall issue a restitution withholding order following a trial determination that the public body suffered actual loss as a result of the offense (R.C. 2921.41(C)(2)(a)).

Q: Is OPERS the only retirement system account available for restitution or forfeiture?

A: No. R.C. 2921.41 provides that restitution is available when, at the time of the offense or any other times, the offender was a member of any of the five Ohio public pension funds (OPERS, OP&F, STRS, SERS, HPRS); was participating in an Alternative Retirement Plan (ARP) as an employee of public institution of higher education (R.C. 3305.01); was a participating employee or continuing member in the Ohio Public Employees Deferred Compensation Program (R.C. 148.01) or its municipal or governmental unit equivalent (R.C. 148.06).

A restitution withholding order should specify the exact amount to be withheld from each individual Ohio public pension fund, Alternative Retirement Plan, or Ohio Public Employees Deferred Compensation Program account in order for each retirement system, ARP or OPEDCP to administer the order against its respective member.

SAMPLE NOTICES OF INDICTMENT TO OPERS

OPERS does not require a specific form or letter to accept a prosecutor's notice of indictment under R.C. 2929.192 or 2921.41. The following sample letter and form are provided to assist the prosecutor and expedite notice to the system. The notice form on the next page can be copied and completed by hand or printed from this guide on OPERS' website, www.opers.org. OPERS can

receive the notice by mail or facsimile at (614) 294-9462. Following receipt of the prosecutor's notice, OPERS will respond with an acknowledgment letter that asks the prosecutor to keep our office informed at the conclusion of the criminal matter and provide copies of any restitution or forfeiture orders issued.

Ohio Public Employees Retirement System
Attn: Legal Services
277 East Town Street
Columbus, OH 43215

Re: State of Ohio vs. _____

Case No: _____

SSN: xxx-xx- _____

To Whom It May Concern:

This letter serves as notice that the above referenced individual was charged with an offense that may impact his/her OPERS account. The individual was charged or indicted under R.C. _____ . A copy of the indictment is enclosed.

[If other than yourself, indicate the person in your office whom OPERS should contact with questions.]

Sincerely,
Prosecutor



PROSECUTOR'S NOTICE OF INDICTMENT FOR THEFT IN OFFICE

Instructions: The prosecutor assigned to a case shall send written notice to the Ohio Public Employees Retirement System when filing charges against a person who is a member of OPERS alleging any of the following offenses:

- Theft in office (R.C. 2921.41)
- Felony bribery, engaging in a pattern of corrupt activity, theft in office, or attempt or conspiracy to commit the same, committed by person in a position of honor, trust or profit May 13, 2008 (R.C. 2921.02, 2921.41, 2923.32, 2929.192)
- Any felony on or after Jan. 7, 2013 (R.C. 2901.431)

Filing this form with OPERS will meet the prosecutor's duty to notify OPERS of the charges per R.C. 2904.43, 2901.431, and 2921.41. Please attach a copy of the indictment, if available.

The following individual has been charged with an offense that may impact his or her OPERS account.

Name of OPERS Member: _____

Date of Birth: _____

Last 4 SSN: xxx-xx- _____

Case No: _____

Sections of the Ohio Revised Code under which indicted/charged: _____

Are the charges related to the Member's public employment? Yes No

Date(s) offense allegedly committed: _____

The following prosecutor submitted this notice to OPERS:

Name: _____

Address: _____

Tel: _____

Fax: _____

Please mail or fax this form to: OPERS, Attn: Legal Services, 277 East Town Street, Columbus, OH 43215, Fax: 614-224-9462

SAMPLE RESTITUTION WITHHOLDING ORDER

(Prosecutor may incorporate relevant provisions into a sentencing entry)

IN THE COURT OF COMMON PLEAS, _____ COUNTY, OHIO

State of Ohio

Plaintiff

_____ ,

Case No.: _____ ,

Judge: _____ ,

vs.

Restitution Withholding Order

Pursuant to R.C. 2921.41(C)(2)

[or R.C. 2907.15]

Defendant

_____ ,

The State of Ohio has filed a motion for withholding order pursuant to Ohio Revised Code Section 2921.41(C)(2)(b)(i) and (ii) [or R.C. 2907.15 for crime victims] directing the Ohio Public Employees Retirement System (hereinafter “OPERS”) to withhold funds from defendant’s account and to apply those funds to restitution owed in the amount of \$ _____. Defendant has not requested a hearing on this matter.

[Alternative: On the date of his/her plea or sentencing hearing, Defendant waived both the filing of a written motion for a withholding order and also notice of any additional hearings on the issue. The parties to this action agree that there is good cause for the withholding order to be issued and Defendant has consented to this entry.]

If not already completed, Defendant is ordered to complete and submit to OPERS all necessary documents required by OPERS to process and issue a refund of Defendant’s account.

OPERS is ordered to withhold from Defendant’s refund an amount up to \$ _____ and to issue this amount to the _____ County Clerk of Courts, (address), to be applied as restitution in this matter.

[Optional: The Court directs the Clerk of Courts to distribute the restitution funds in the following manner: _____.]
The Clerk shall provide a copy of this Order to the public retirement system named above.

IT IS SO ORDERED.

Judge

SAMPLE PENSION FORFEITURE ORDER

(Prosecutor may incorporate relevant provisions into a sentencing entry)

IN THE COURT OF COMMON PLEAS, _____ COUNTY, OHIO

State of Ohio

Plaintiff

_____ ,

Case No.: _____ ,

Judge: _____ ,

vs.

Forfeiture [and Restitution] Order

Pursuant to R.C. 2929.192(A)

[and R.C. 2921.41(C)(2)]

Defendant

_____ ,

[If hearing is offered and waived:] Defendant has waived the right to a hearing on forfeiture [and the filing of a written motion for a withholding order and also notice of any additional hearings on the issue]. The Court finds that there is good cause for the forfeiture [and restitution] order(s) to be issued.

Having determined that Defendant has met the elements requiring pension forfeiture under Ohio Revised Code Section 2929.192 [or R.C. 2929.193 for termination of a disability benefit related to the offense], the Defendant's right to a retirement allowance, pension, disability benefit, or other right or benefit, other than payment of the accumulated contributions in the Ohio Public Employees Retirement System (hereinafter "OPERS"), is forfeited.

OPERS shall execute upon this order at the time Defendant applies for a refund of accumulated contributions.

[If restitution is also ordered, include: If not already completed, Defendant is ordered to complete and submit to OPERS all necessary documents required by OPERS to process and issue a refund of Defendant's account.

OPERS is ordered to withhold from Defendant's accumulated contributions an amount up to \$ _____ and to issue this amount to the _____ County Clerk of Courts, (address), to be applied as restitution in this matter.

The Court directs the Clerk of Courts to distribute the restitution funds in the following manner: _____.]

The Clerk shall provide a copy of this Order to the public retirement system named above.

IT IS SO ORDERED.

Judge

