

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Employer-at-Injury Program
Oregon Administrative Rules
Chapter 436, Division 105**

Effective Jan. 1, 2017

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NOTE: Significant revisions are marked with vertical lines in the right margins.

Historical rules: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
EMPLOYER-AT-INJURY PROGRAM**

**OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 105**

436-105-0001 Authority for Rules [Repeal]

Statutory authority: ORS 656.622, 656.726(4)
Statutes implemented: ORS 656.622
Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01
Repealed 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

436-105-0002 Purpose of Rules [Repeal – See rule 0003]

Statutory authority: ORS 656.622, 656.726(4)
Statutes implemented: ORS 656.622
Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07
Repealed 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

436-105-0003 General Provisions**(1) Purpose.**

- (a) The rules in OAR 436-105 explain who qualifies for and how to request assistance and reimbursements from the Employer-at-Injury Program.
- (b) The Employer-at-Injury Program encourages the early return to work of injured workers by providing incentives from the Workers' Benefit Fund to employers.
- (c) The Employer-at-Injury Program is activated by the employer and administered by the insurer.
- (d) The purpose of Employer-at-Injury Program assistance is to:
 - (A) Enable the worker to perform transitional work within the worker's limitations that resulted in the worker's eligibility for the Employer-at-Injury Program;
 - (B) Prevent a worsening of the worker's compensable injury or occupational disease;
or
 - (C) If the claim has not been accepted or denied, prevent a worsening of the claimed workers' compensation injury or occupational disease.

(2) Applicability.

These rules apply to:

- (a) All individual employer-at-injury programs started on or after the effective date of these rules, unless otherwise provided in subsections (b) or (c) of this section;
- (b) All wage subsidy reimbursement requests when the wage subsidy period began on or after the effective date of these rules; and
- (c) All reimbursement requests received by the division on or after the effective date of these rules for worksite modification or program purchases, regardless of when the purchase was made.

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(3) Submitting documents or information, calculating time.

(a) Documents or information required under these rules to be submitted to the division may be submitted in any of the following ways:

(A) Mailed to the division's mailing address with sufficient postage and placed in the custody of the U.S. Postal Service;

(B) Physical delivery to the division's Salem office;

(C) Faxed, if the document transmitted indicates it has been delivered by fax, is sent to the correct fax number, and indicates the date it was sent; or

(D) Any other method authorized by the director.

(b) Timeliness under these rules is determined as follows:

(A) If a document is mailed, it will be considered submitted on the date it is postmarked.

(B) If a document is delivered, it must be delivered during regular business hours and marked as received to be considered submitted on that date.

(C) If a document is faxed, it must be received by 11:59 p.m. Pacific Time to be considered submitted on that date.

(c) Time periods allowed under these rules are calculated in calendar days. The first day is not included. The last day is included unless it is a Saturday, Sunday, or legal holiday. In that case, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Legal holidays are those listed in ORS 187.010 and 187.020.

(4) Director's discretion.

The director may waive procedural rules as justice requires, unless otherwise obligated by statute.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 4/12/13 as Admin. Order 13-054, eff. 7/1/13

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0005 Definitions

For the purpose of these rules, unless the context requires otherwise:

(1) "Client" means a person to whom workers are provided under contract and for a fee on a temporary or leased basis.

(2) "Department" means the Department of Consumer and Business Services.

(3) "Director" means the director of the Department of Consumer and Business Services, or the director's delegate for the matter.

(4) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

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- (5) "Employer at injury" means the organization that employed the worker when the worker:
- (a) Sustained the injury or occupational disease;
 - (b) Made the claim for aggravation; or
 - (c) Requested an Own Motion opening under ORS 656.278.
- (6) "Insurer" means the insurance company or self-insured employer responsible for the workers' compensation claim.
- (7) "Premium" means the monies paid to an insurer for the purpose of purchasing workers' compensation insurance.
- (8) "Regular work" means the job the worker held at the time of injury, claim for aggravation, or Own Motion opening under ORS 656.278.
- (9) "Skills building" means a class or course of instruction taken by the worker for the purpose of enhancing an existing skill or developing a new skill.
- (10) "Transitional work" means temporary work with the employer at injury that is not the worker's full-duty regular work and is assigned because the worker cannot perform full-duty regular work.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 12-1-2009 as WCD Admin. Order 09-059, eff. 1-1-2010

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0006 Workers' Benefit Fund

- (1) The department maintains the financial integrity of the Workers' Benefit Fund under ORS 656.605 and all reimbursement is subject to the availability of funds. If the funds are too low for all reimbursements, the director has the final authority to determine how the funds will be disbursed.
- (2) Monies in the Workers' Benefit Fund may not be used to provide concurrent benefits under the Employer-at-Injury Program and the Preferred Worker Program under OAR 436-110 for the same worker for the same period of time, with the exception of claims costs reimbursed under OAR 436-110-0330.
- (3) The director may use monies from the Workers' Benefit Fund for activities to provide information about and encourage the re-employment of injured workers. A maximum of \$250,000 may be used in a fiscal year, July 1 to June 30. The director must approve all expenditures. Activities include, but are not limited to:
- (a) Advertisements and promotion of re-employment assistance programs and associated production costs; and
 - (b) Public re-employment assistance program conferences and workshops.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

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436-105-0008 Denial of Reimbursement, Reconsideration, Director's Review**(1) Denial of reimbursement.**

The director will deny any reimbursement for Employer-at-Injury Program assistance it finds violates these rules. The director has the discretion to deny any reimbursement of Employer-at-Injury Program assistance it determines is not reasonable, practical, or feasible, or considers an abuse of the program.

(2) Reconsideration.

- (a) Parties directly affected by an Employer-at-Injury Program decision may request reconsideration by submitting a written request to the division no later than 60 days after the date the decision was issued.
- (b) The request for reconsideration must specify the reasons why the decision is appealed and may include additional documentation.
- (c) The director will reconsider the decision and will notify all directly affected parties of its decision upon reconsideration.
- (d) Reconsideration must precede a director's review under section (3) of this rule.

(3) Director's review.

- (a) Parties affected by the reconsideration may request a director's review by submitting a written request to the division no later than 60 days after the date the reconsideration was issued. The request must specify the reasons why the decision is appealed and may include additional documentation.
- (b) The director may require any affected party to provide information or to participate in the director's review. If the party requesting the director's review fails to participate without reasonable cause as determined by the director, the director may dismiss the review.
- (c) The director's review decision will be issued in writing. The director's review decision is final and not subject to further review by any court or other administrative body.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0500 Insurer Participation in the Employer-At-Injury Program**(1) Insurer participation.**

An insurer must be an active participant in providing re-employment assistance under the Employer-at-Injury Program with the employer's consent. Participation includes issuing notices of the available assistance and administering the Employer-at-Injury Program as specified in these rules.

(2) Notice of assistance available.

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The insurer must notify the worker and employer at injury in writing of the assistance available from the Employer-at-Injury Program. A notice must be issued:

- (a) Upon acceptance or reopening of a claim; and
- (b) Within five days of a worker's first release for work after claim opening unless the release is for regular work.

(3) Required notice language.

- (a) The notice to the worker required by section (2) of this rule must be in bold type and contain the following language:

The Employer-at-Injury Program provides Oregon's qualified injured workers help with staying on the job or getting back to work. Because of your injury, your employer may be eligible for assistance to return you to transitional work through this program while your claim is open. Your employer may contact [insurer name and phone number].

- (b) The notice to the employer at injury required by section (2) of this rule must be in bold type and contain the following language:

Because of your worker's injury, you may be eligible for assistance through the Employer-at-Injury Program to return the worker to transitional work while the worker's claim is open. To learn more about the assistance available from the program, please call [insurer name and phone number].

(4) Insurer administration of program.

The insurer must administer the Employer-at-Injury Program according to these rules. The insurer must assist an employer to:

- (a) Obtain from the medical service provider a medical release that meets the requirements of section (5) of this rule;
- (b) Identify a transitional work position:
 - (A) The transitional work position must be within the worker's injury-caused limitations and may be created through modification of the worker's regular work, job restructuring, assistive devices, worksite modification, reduced hours, or reassignment to another job;
 - (B) Unless the transitional work is skills building, the position must be within the employer's course and scope of trade or profession; and
 - (C) When skills building is the transitional work, the worker must agree in writing to take the class or course of instruction;
- (c) Process employer wage subsidy requests as specified in OAR 436-105-0520(2);
- (d) Make worksite modification purchases as specified in OAR 436-105-0520(3);
- (e) Make Employer-at-Injury Program purchases as specified in OAR 436-105-0520(4); and

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(f) Request Employer-at-Injury Program reimbursement from the division as specified in OAR 436-105-0540.

(5) Medical releases.

(a) Medical releases are required for purposes of the Employer-at-Injury Program.

(b) A medical release must be related to the compensable injury or occupational disease or, if the claim has not been accepted or denied, the claimed workers' compensation injury or occupational disease.

(c) A medical release must:

(A) State the worker's specific current or projected restrictions; or

(B) Indicate the worker is not released to regular work and be accompanied by an approval of a job description that includes the job duties and physical demands required for the transitional work.

(d) A medical release that releases the worker to part-time work or fewer hours than the worker normally worked before the injury must specify the worker's hourly restrictions.

(e) A medical release must be dated and cover any period of time for which benefits are requested.

(A) The date a medical release is issued is considered the effective date if an effective date is not otherwise specified.

(B) A medical release, and any restrictions it contains, remains in effect until another medical release is issued.

(C) If a medical release does not specify an end date or follow-up date and no subsequent medical release is issued, and there is no indication that the worker followed up with the medical service provider, the medical release is effective for no more than 30 days.

(f) An employer or insurer may get clarification about a medical release from the medical service provider who issued the release any time before submitting the reimbursement request.

(6) Required documentation.

The insurer must maintain all records and documentation of the Employer-at-Injury Program for a period of three years from the date of the last Employer-at-Injury Program reimbursement request. All documentation must be prepared before reimbursement is requested from the division. The insurer must maintain the following information at an authorized claim processing location:

(a) The worker's claim file;

(b) Documentation from the worker's medical service provider that the worker is unable to perform regular work due to the injury and dated copies of all work releases from the worker's medical service provider;

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(c) Documentation of the transitional work that includes the start date, wage and hours, and a description of the job duties;

(d) A legible copy of the worker's payroll records for the wage subsidy period.

(A) Payroll records must include:

(i) The date of payment;

(ii) The dates of work covered by the payment;

(iii) The rate or rates of pay;

(iv) Gross wages;

(v) Whether the worker is paid by the hour, shift, day, or week or on a salary, piece, or commission basis;

(vi) The regular hourly rate or rates of pay, the number of regular hours worked, and pay for those hours;

(vii) The number of overtime hours worked, if any, and pay for those hours; and

(viii) The overtime rate or rates of pay;

(B) Payroll records may be supplemented with documentation of how the worker's earnings were calculated for the wage subsidy. Supplemental documentation may be used to determine a worker's work schedule, wages earned on a particular day, dates of paid leave, or to clarify any other necessary information not fully explained by the payroll record;

(e) Documentation of the time of the appointment and hours and wages of transitional work for any days for which a partial day's reimbursement is requested after the worker is released for transitional work, or before returning from a medical appointment with a regular work release;

(f) A legible copy of proof of purchase, providing proof the item was ordered during the Employer-at-Injury Program period and proof of payment of the items for worksite modification purchases and Employer-at-Injury Program purchases;

(g) Documentation of the insurer's approval of worksite modifications;

(h) Documentation that payments for a home care worker were made to the Oregon Department of Human Services or Oregon Health Authority, if applicable;

(i) Written acceptance by the worker when skills building is the transitional work; and

(j) Documentation, including course title and curriculum for a class or course of instruction, when Employer-at Injury Program purchases are requested.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 1/29/15 as Admin. Order 15-054, eff. 3/1/15

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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436-105-0510 Employer Eligibility

To be eligible for the Employer-at-Injury Program, an employer must:

- (1) Maintain Oregon workers' compensation insurance coverage;
- (2) Be the employer at injury; and
- (3) Employ an eligible worker.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 10-3-2012 as Admin. Order 12-057, eff. 11-1-2012

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0511 Worker Eligibility

To be eligible for the Employer-at-Injury Program, a worker must:

- (1) Have an Oregon workers' compensation injury or occupational disease claim at the time of the Employer-at-Injury Program; and
- (2) Not be covered as an injured inmate under ORS 655.505 to 655.555 and OAR 125-160.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended and renumbered from OAR 436-105-0510 11/1/07 as WCD Admin. Order 07-065, eff. 12/1/07

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0512 End of Eligibility

Employer-at-Injury Program eligibility ends:

- (1) When the worker or employer no longer meets the eligibility provisions stated in OAR 436-105-0510 and 436-105-0511;
- (2) When the worker's claim is closed or denied;
- (3) When sanctions issued under OAR 436-105-0560 preclude eligibility;
- (4) When the insurer ends the Employer-at-Injury Program at any time while the worker's claim is open;
- (5) Two years after the original date of acceptance of a nondisabling claim; or
- (6) When benefits under the Preferred Worker Program under OAR 436-110 begin, including premium exemption but excluding claims costs reimbursed under OAR 436-110-0330.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 10-3-2012 as Admin. Order 12-057, eff. 11-1-2012

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0520 Assistance Available from the Employer-at-Injury Program**(1) General provisions.**

- (a) The Employer-at-Injury Program may be used only once per worker per claim opening or request for reopening. If a nondisabling claim becomes a disabling claim after

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one year from the date of acceptance, the disabling claim is considered a new opening and the Employer-at-Injury Program may be used again.

(b) Assistance available includes wage subsidy, worksite modification, and purchases.

(c) Any modification and other purchases must be ordered before the end of the Employer-at-Injury Program.

(2) Wage subsidy.

Wage subsidy provides reimbursement of 45 percent of the worker's gross wages for the wage subsidy period. Wage subsidy benefits are subject to the following conditions:

(a) A wage subsidy may not exceed 66 workdays and must be completed within a 24-consecutive month period;

(b) A wage subsidy may not start or end with paid leave;

(c) If the worker has hourly restrictions, reimbursable paid leave cannot exceed the maximum number of hours of the worker's hourly restrictions. Paid leave exceeding the worker's hourly restrictions will not be reimbursed; and

(d) Any day during which the worker exceeds his or her injury-caused limitations will not be reimbursed. If, however, an employer uses a time clock, a reasonable time of up to 30 minutes per day will be allowed for the worker to get to and from the time clock and the worksite without exceeding the worker's hourly restrictions.

(3) Worksite modification.

(a) Worksite modification is altering a worksite by renting, purchasing, modifying, or supplementing equipment to:

(A) Enable a worker to perform the transitional work within the worker's limitations that resulted in the worker's Employer-at-Injury Program eligibility;

(B) Prevent a worsening of the worker's compensable injury or occupational disease;
or

(C) If the claim has not been accepted or denied, to prevent a worsening of the claimed workers' compensation injury or occupational disease.

(b) For purposes of the Employer-at-Injury Program, a "worksite" is a primary work area available for a worker to use to perform the required job duties. The worksite may be the employer's, client's, or worker's premises, property, or equipment used to conduct business under the employer's or client's direction and control. A worksite may include a worker's personal property or vehicle if required to perform the job.

(c) Worksite modification assistance is subject to the following conditions:

(A) The insurer must determine the appropriate worksite modifications for the worker;

(B) The insurer must document its reasons for approving the modifications; and

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(C) Worksite modification items become the employer's property at the end of the Employer-at-Injury Program.

(4) Employer-at-Injury Program purchases.

Employer-at-Injury Program purchases are limited to:

(a) Tuition, books, fees, and materials required for skills building or to meet the requirements of the transitional work position. Maximum expenditure is \$1,000. Tuition, books, fees, and required materials will be provided under the following conditions:

(A) The insurer must determine the class or course of instruction will help the worker enhance an existing skill or develop a new skill, and must document its decision; and

(B) The worker must begin participation in the class or course of instruction while eligible for the Employer-at-Injury Program;

(b) Clothing required for the job, except clothing the employer normally provides. Clothing becomes the worker's property. Maximum expenditure is \$400; and

(c) Tools and equipment required for the worker to perform transitional work, including consumables required to support the functioning of the tools or equipment. These purchases become the employer's property.

(5) Other conditions for worksite modifications and purchases.

(a) Worksite modification and purchases of tools and equipment are limited to a combined maximum reimbursement of \$5,000.

(b) Extended warranties that are in addition to the standard or manufacturer's warranty are not reimbursable under the Employer-at-Injury Program.

(c) All modifications and purchases made by the employer in good faith are reimbursable, even if the worker refuses to return to work, or if the worker agreed to take part in training and then later refused to attend training.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 1/29/15 as Admin. Order 15-054, eff. 3/1/15

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0530 Employer-at-Injury Program Procedures for Concurrent Injuries

(1) A worker is eligible for only one Employer-at-Injury Program at a time.

(2) When a worker in an Employer-at-Injury Program incurs a new compensable injury, transitional work for the first Employer-at-Injury Program is considered regular work for purposes of the second Employer-at-Injury Program.

(3) If the new injury makes the first Employer-at-Injury Program unsuitable, the worker may be eligible for a second Employer-at-Injury Program under the new injury.

(4) When the worker is no longer eligible for the second Employer-at-Injury Program, the first Employer-at-Injury Program may be resumed if the employer and worker still meet eligibility criteria under that claim.

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Statutory authority: ORS 656.622, 656.726(4)
Statutes implemented: ORS 656.622
Hist: Amended 5/16/03 as WCD Admin. Order 03-057 eff. 6/8/03
Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0540 Employer-at-Injury Program Reimbursement Procedures

The following provisions apply when the insurer requests reimbursement from the division under the Employer-at-Injury Program:

(1) Reimbursable benefits.

Reimbursements may include wage subsidy, Employer-at-Injury Program purchases, and worksite modification.

(2) Program administrative costs.

The insurer is entitled to a program administrative cost of \$120 for the first approved reimbursement request for an Employer-at-Injury Program. Subsequent requests for reimbursement, including amended requests, for the same Employer-at-Injury Program are not entitled to additional program administrative costs.

(3) Minimum reimbursement request.

The first reimbursement request for an Employer-at-Injury Program must be for a minimum of \$100. Subsequent requests, including amended requests, may be for less than \$100.

(4) Required documentation.

The insurer must have all documentation required for reimbursement in its possession at the time reimbursement is requested. The insurer must stamp or display evidence of the initial date of receipt on each document as required under OAR 436-060-0017(2).

(5) Timeframe for submitting request form.

The insurer must submit Form 2360, "Employer-at-Injury Program (EAIP) Reimbursement Request Form," to the division within one year and 30 days from the end of the Employer-at-Injury Program. The form is published with Bulletin 260, both of which are available on the division's website at wcd.oregon.gov.

(6) Corrected request forms.

If the reimbursement request form is incomplete or contains an error, the division may return the form to the insurer for correction. The insurer has 60 days from the date it receives the returned reimbursement request form from the division, or one year and 30 days from the end of Employer-at-Injury Program eligibility, whichever is later, to make the corrections and return the corrected form to the division.

(7) Amended requests.

- (a) Amended reimbursement requests must be submitted to the division within one year and 30 days from the end of the Employer-at-Injury Program eligibility except as otherwise permitted in this rule.

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(b) An amended reimbursement request must clearly state that it is an amendment and clearly state the corrected information.

(8) Denied claims.

(a) The insurer may request reimbursement when a claim that was initially denied is subsequently accepted after the Employer-at-Injury Program eligibility ended and more than one year and 30 days have passed. In that case, the insurer must submit a completed Form 2360, "Employer-at-Injury Program (EAIP) Reimbursement Request Form," (published with Bulletin 260, available on the division's website at wcd.oregon.gov) to the division within 60 days of the first litigation order or stipulation and order accepting the claim. A copy of the order or stipulation must be attached to the reimbursement request form.

(b) The insurer may request reimbursement for a qualifying Employer-at-Injury Program that took place before a claim denial even if the claim is denied at the time the insurer submits the request to the division.

(9) Effect on rates, dividends, premiums, or assessments.

The insurer may not use Employer-at-Injury Program costs subject to reimbursement for rate making, individual employer rating, dividend calculations, or in any manner that would affect the employer's insurance premiums or premium assessments under ORS 656.612 and OAR 436-085 with the present or a future insurer. The insurer must be able to document that Employer-at-Injury Program costs do not affect the employer's rates or dividend.

(10) Claim costs.

If a preferred worker employed by an eligible employer with active premium exemption under OAR 436-110-0325 incurs a new injury, the claim is subject to claim costs reimbursement under OAR 436-110-0330. If the worker subsequently begins an Employer-at-Injury Program, program costs must be separated from claim costs and will not be reimbursed as claim costs.

Statutory authority: ORS 656.622, 656.726(4)

Statutes implemented: ORS 656.622

Hist: Amended 10-3-2012 as Admin. Order 12-057, eff. 11-1-2012

Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0550 Audits

(1) Insurers and employers are subject to periodic program and fiscal audits by the director. All reimbursements are subject to subsequent audits, and may be disallowed on any of the grounds set forth in these rules. Disallowed reimbursements may be recovered by the director directly or from future reimbursements by way of offset. If the director finds upon audit that procedures that led to disallowed reimbursements are still being used, the director may withhold further reimbursements until corrections satisfactory to the director are made.

(2) An audit may include but not be limited to a review of the records required in OAR 436-105-0500(6).

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
EMPLOYER-AT-INJURY PROGRAM**

(3) When there is conflicting documentation, the director will use a preponderance of evidence standard to decide eligibility for reimbursement. If there is no clear preponderance, reimbursement will be denied.

(4) The director reserves the right to visit the worksite to determine compliance with these rules.

Statutory authority: ORS 656.455, 656.622, 656.726(4), 731.475
Statutes implemented: ORS 656.455, 656.622, 731.475
Hist: Amended 12-1-2009 as WCD Admin. Order 09-059, eff. 1-1-2010
Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-105-0560 Sanctions

(1) Penalties for false statement or report or misrepresentation.

Any person who knowingly makes a false statement or misrepresentation to the director or an employee of the director for the purpose of obtaining any benefits or reimbursement from the Employer-at-Injury Program, or who knowingly misrepresents the amount of a payroll or knowingly submits a false payroll report, is subject to penalties under ORS 656.990.

(2) Reasons for sanction.

Reasons for the director to sanction an insurer, self-insured employer, employer, or their representative include, but are not limited to:

- (a) Misrepresenting information in order to receive Employer-at-Injury Program assistance;
- (b) Making a serious error or omission that resulted in the director approving reimbursement in error;
- (c) Failing to respond to employer requests for assistance or failing to administer Employer-at-Injury Program assistance; or
- (d) Failing to comply with any condition in these rules.

(3) Possible sanctions.

The director may order one or more of the following sanctions:

- (a) Ordering the person to take corrective action within a specific period of time;
- (b) Ordering the person being sanctioned to repay the department all, or part, of the monies reimbursed, with or without interest at a rate set by the department. The order may include the department's legal costs;
- (c) Ending the employer's eligibility to use the Employer-at-Injury Program for a specific period of time; or
- (d) Pursuing civil penalties under ORS 656.745 or criminal action against the party.

Statutory authority: ORS 656.622, 656.726(4)
Stat. Implemented: ORS 656.622, 656.745, 656.990
Hist: Adopted 8/14/01 as WCD Admin. Order 01-057, eff. 10/1/01
Amended 11/28/16 as WCD Admin. Order 16-056, eff. 1/1/17

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

In the Matter of the Amendment of Oregon Administrative)	ORDER OF
Rules (OAR):)	ADOPTION
436-105, Employer-at-Injury Program)	No. 16-056
)	

The Director of the Department of Consumer and Business Services, under the general rulemaking authority in ORS 656.726(4), and in accordance with the procedures in ORS 183.335, amends OAR chapter 436, division 105.

On Sept. 15, 2016, the Workers' Compensation Division filed with the Secretary of State a *Notice of Proposed Rulemaking Hearing* and *Statement of Need and Fiscal Impact*. The division mailed copies of the *Notice* and *Statement* to interested persons and legislators in accordance with ORS 183.335 and OAR 436-001-0009, and posted copies to its website. The Secretary of State included notice of the public hearing in its October, 2016 *Oregon Bulletin*. On Oct. 24, 2016, a public hearing was held as announced. The record remained open for written testimony through Oct. 28, 2016.

SUMMARY OF RULE AMENDMENTS

The agency has amended OAR 436-105, "Employer-at-Injury Program" (EAIP) to:

- Improve the clarity of the rules through improved organization, plain language, and definition of terms;
- Clarify the purpose of EAIP assistance;
- Clarify that monies in the Workers' Benefit Fund may not be used to provide concurrent benefits under the Employer-at-Injury Program and the Preferred Worker Program for the same worker for the same period of time, except for reimbursement of claims costs;
- Clarify how parties may request reconsideration if they are directly affected by a decision regarding the EAIP;
- Require that a medical release specify the worker's hourly restrictions if the release is for part-time work or fewer hours than the worker normally worked before the injury;
- Limit the effective period for a medical release to 30 days if the release does not specify an end date or follow-up date, no subsequent medical release is issued, and there is no indication that the worker followed up with the medical service provider;
- Require that all EAIP documentation be prepared and in the insurer's possession before reimbursement is requested from the division;
- More specifically describe what payroll records must include;
- Specify that EAIP eligibility ends when Preferred Worker Program benefits, including premium exemption, (except claim cost reimbursement) begin;
- Clarify that the EAIP may be used only once per worker per claim opening or request for reopening;
- State that modifications and purchases must be ordered before the end of the EAIP;

Order of Adoption
OAR chapter 436, division 105

- Expressly exclude reimbursement for extended warranties for worksite modifications and purchases that are in addition to the standard or manufacturer's warranty;
- Broaden the description of how an insurer must display receipt dates on documentation to accommodate non-physical date stamps and to be consistent with claim processing rules;
- State that if the director finds that procedures that led to disallowed reimbursements are still being used, the director may withhold further reimbursements until corrections satisfactory to the director are made, consistent with language in OAR 436-110; and
- Provide that if there is conflicting documentation regarding eligibility for reimbursement for EAIP services, the director will use a preponderance-of-evidence standard to make its decision, and if there is no clear preponderance, reimbursement will be denied.

FINDINGS

Having reviewed and considered the record and being fully informed, I make the following findings:

- a) The applicable rulemaking procedures have been followed.
- b) These rules are within the director's authority.
- c) The rules being adopted are a reasonable administrative interpretation of the statutes and are required to carry out statutory responsibilities.

IT IS THEREFORE ORDERED THAT

- 1) Amendments to OAR chapter 436, division 105 are adopted as **administrative order No. 16-056 on this 28th day of November, 2016, to be effective Jan. 1, 2017.**
- 2) A certified copy of the adopted rules will be filed with the Secretary of State.
- 3) A copy of the adopted rules with revision marks will be filed with the Legislative Counsel under ORS 183.715 within ten days after filing with the Secretary of State.

DATED this 28th day of November, 2016.

/s/ Louis Savage

Louis Savage, Administrator
Workers' Compensation Division

Under the Americans with Disabilities Act guidelines, alternative format copies of the rules will be made available to qualified individuals upon request.

If you have questions about these rules or need them in an alternate format, contact the Workers' Compensation Division, 503-947-7810.

Distribution: Workers' Compensation Division e-mail distribution lists, including advisory committee members and testifiers

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

FILED
11-28-16 9:19 AM
ARCHIVES DIVISION
SECRETARY OF STATE

I certify that the attached copies are true, full and correct copies of the PERMANENT Rule(s) adopted on Upon filing, by the
Department of Consumer and Business Services, Workers' Compensation Division 436
Agency and Division Administrative Rules Chapter Number
Fred Bruyns (503) 947-7717
Rules Coordinator Telephone
PO Box 14480, Salem, OR 97309-0405
Address

To become effective 01/01/2017 Rulemaking Notice was published in the October 2016 Oregon Bulletin.

RULE CAPTION

Amendments to rules governing return-to-work incentive programs and vocational assistance

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

436-105-0003, 436-105-0005, 436-105-0006, 436-105-0008, 436-105-0500, 436-105-0510, 436-105-0511, 436-105-0512, 436-105-0520, 436-105-0530, 436-105-0540, 436-105-0550, 436-105-0560, 436-110-0003, 436-110-0005, 436-110-0006, 436-110-0007, 436-110-0150, 436-110-0240, 436-110-0290, 436-110-0310, 436-110-0320, 436-110-0325, 436-110-0330, 436-110-0335, 436-110-0336, 436-110-0337, 436-110-0345, 436-110-0346, 436-110-0347, 436-110-0350, 436-110-0351, 436-110-0352, 436-110-0850, 436-110-0900, 436-120-0003, 436-120-0005, 436-120-0008, 436-120-0012, 436-120-0115, 436-120-0145, 436-120-0165, 436-120-0175, 436-120-0185, 436-120-0410, 436-120-0443, 436-120-0445, 436-120-0500, 436-120-0510, 436-120-0520, 436-120-0530, 436-120-0700, 436-120-0710, 436-120-0720, 436-120-0755, 436-120-0800, 436-120-0810, 436-120-0820, 436-120-0840, 436-120-0900, 436-120-0915

REPEAL:

436-105-0001, 436-105-0002, 436-110-0001, 436-110-0002, 436-120-0001, 436-120-0002, 436-120-0006, 436-120-0014, 436-120-0016, 436-120-0017, 436-120-0018, 436-120-0125, 436-120-0135, 436-120-0449, 436-120-0830

RENUMBER:

AMEND AND RENUMBER:

436-120-0007 to 436-120-0147, 436-120-0155 to 436-120-0117, 436-120-0340 to 436-120-0157, 436-120-0400 to 436-120-0177, 436-120-0430 to 436-120-0197, 436-120-0448 to 436-120-0523, 436-120-0451 to 436-120-0527, 436-120-0455 to 436-120-0187

Statutory Authority:

656.340, 656.622, 656.726(4)

Other Authority:

Statutes Implemented:

656.340, 656.622

RULE SUMMARY

The agency has amended OAR 436-105, "Employer-at-Injury Program" (EAIP) to:

- Improve the clarity of the rules through improved organization, plain language, and definition of terms;
- Clarify the purpose of EAIP assistance;
- Clarify that monies in the Workers' Benefit Fund may not be used to provide concurrent benefits under the Employer-at-Injury Program and the Preferred Worker Program for the same worker for the same period of time, except for reimbursement of claims costs;
- Clarify how parties may request reconsideration if they are directly affected by a decision regarding the EAIP;
- Require that a medical release specify the worker's hourly restrictions if the release is for part-time work or fewer hours than the worker normally worked before the injury;
- Limit the effective period for a medical release to 30 days if the release does not specify an end date or follow-up date, no subsequent

medical release is issued, and there is no indication that the worker followed up with the medical service provider;

- Require that all EAIP documentation be prepared and in the insurer's possession before reimbursement is requested from the division;
- More specifically describe what payroll records must include;
- Specify that EAIP eligibility ends when Preferred Worker Program benefits, including premium exemption, (except claim cost reimbursement) begin;
- Clarify that the EAIP may be used only once per worker per claim opening or request for reopening;
- State that modifications and purchases must be ordered before the end of the EAIP;
- Expressly exclude reimbursement for extended warranties for worksite modifications and purchases that are in addition to the standard or manufacturer's warranty;
- Broaden the description of how an insurer must display receipt dates on documentation to accommodate non-physical date stamps and to be consistent with claim processing rules;
- State that if the director finds that procedures that led to disallowed reimbursements are still being used, the director may withhold further reimbursements until corrections satisfactory to the director are made, consistent with language in OAR 436-110; and
- Provide that if there is conflicting documentation regarding eligibility for reimbursement for EAIP services, the director will use a preponderance-of-evidence standard to make its decision, and if there is no clear preponderance, reimbursement will be denied.

The agency has amended OAR 436-110, "Preferred Worker Program" (PWP) to:

- Improve the clarity of the rules through improved organization, plain language, and definition of terms;
- Clarify that monies in the Workers' Benefit Fund may not be used to provide concurrent benefits under the Preferred Worker Program and the Employer-at-Injury Program for the same worker for the same period of time, except for reimbursement of claims costs;
- Clarify how parties may request reconsideration if they are directly affected by a decision of the Workers' Compensation Division regarding the PWP;
- Specify that if a claim disposition agreement is approved before the worker is medically stationary, the insurer must continue to process the claim for purposes of the PWP;
- Explain that work experience program participants, apprentices, and trainees covered under ORS 656.033, 656.046, 656.135, or 656.138, are eligible for the PWP if they otherwise meet the eligibility requirements in the rules, and that the job for which the individual was being trained is regular work;
- Revise the requirements for premium exemption, requiring the employer to notify the division instead of the insurer;
- Require that requests for claim cost reimbursement must be submitted within 15 months of the date on which payment was made;
- More specifically describe what payroll records in support of reimbursement requests must include;
- Place a dollar maximum on wage subsidy for a worker and remove the limit on the number of times wage subsidy may be used unless the worker has an exceptional disability - if so the worker may use wage subsidy twice with no maximum total reimbursement;
- Provide that a worker may use a second wage subsidy with the same employer for a new job if the majority of job duties have changed and at least one year has passed from the end of the first wage subsidy period;
- Increase maximum allowed payments for several categories of employment purchases: tuition, books, and fees; lodging, meals, and mileage; tools and equipment; clothing; occupational certification, licenses, and related testing costs, drug screen testing, physical examinations, or membership fees required for the job; and worksite creation;
- Remove the limits on the number of uses for several categories of employment purchases: tuition, books, and fees; tools and equipment; and clothing;
- Add a new type of employment purchase - transportation-related purchases that enable a worker to commute to a job (does not include vehicles or vehicle maintenance);
- Describe placement services and provide that payment will be made up to a dollar maximum, regardless of whether the worker finds employment, but provide for additional payments if the worker is employed as a result of the services and again if the worker remains in that position for at least 30 days;
- Require that requests for payment for placement services be submitted within one year of the end date of the placement assistance agreement;
- Increase the dollar maximums allowed for worksite modification services and set a per-use cap;
- Increase the dollar maximums allowed for modifications to prevent further injury, rental of worksite modification items, and consultative services;
- For worker-activated worksite modification assistance, remove the limit on the number of times a worker may use the assistance, but limit use to once per employer, unless the job is a new job; and
- Provide that a worker can use a second worksite modification with the same employer for a new job if the majority of the job duties have changed.

The agency has amended OAR 436-120, "Vocational Assistance to Injured Workers" to:

- Improve the clarity of the rules through improved organization, plain language, definition of terms, and removal of obsolete provisions;
- Provide that if the worker returns to work with the employer at injury, the division may verify whether the employment is suitable;
- Clarify procedural requirements for administrative review and resolution of disputes;
- State that all notices and warnings must be copied to the division;
- State that a notice is not effective until it is mailed to all required parties including the worker's legal representative;

- Repeal the rule addressing notification of employment and reinstatement rights and responsibilities, because these statutory provisions are sufficiently described in ORS 656.262, 656.340, and ORS chapter 659A;
- Repeal rules allowing postponement of a worker's vocational eligibility evaluation, and allow deferral in specified circumstances when the employer at injury has activated Preferred Worker Program benefits;
- Remove the definition of "likely eligible" and clarify when an eligibility evaluation is required;
- Clarify that if a worker requests vocational assistance when the insurer is not required to do an eligibility evaluation, the insurer may not deny eligibility;
- Clarify the timeframe for completing an eligibility evaluation, including notifying the worker of the results;
- Allow the counselor to extend the time to complete the eligibility evaluation if the counselor is unable to obtain needed information;
- Include specified circumstances in which the worker does not need to be available in Oregon;
- Explain that work experience program participants, apprentices, and trainees covered under ORS 656.033, 656.046, 656.135, or 656.138, are eligible for vocational assistance if they otherwise meet the eligibility criteria; and define employer at injury, regular employment, and suitable wage for those individuals;
- Clarify the circumstances under which the insurer may end vocational assistance after a worker has been employed in suitable employment due to an employer-at-injury use of the PWP;
- Specify that the insurer and worker must agree on a counselor rather than a vocational assistance provider;
- Require that if the worker and insurer do not agree on a counselor or on a change of counselor, the insurer must notify the division within five days;
- List the responsibilities of the worker and counselor in training and direct employment plans;
- Remove outdated language regarding vocational evaluations;
- Clarify that training may be extended for a worker with an "exceptional loss of earning capacity" if the extension will allow the worker to obtain, at the time of completion of the training program, a wage what is as close as possible to the adjusted weekly wage and greater than could be expected with a shorter program;
- Require that the insurer provide further training to a worker when the initial plan will not be or was not successful to prepare the worker for suitable employment;
- Increase the allowable time (months) for basic education, occupational skills training, and formal training;
- Require the training plan to notify the worker if temporary disability benefits may end before training ends;
- Require the insurer to approve or disapprove a training plan within 14 days;
- Require the insurer to issue a written warning before ending an academic program for specified reasons;
- Require the insurer to pay for approved direct worker purchases within 30 days after the insurer receives the worker's request or proof of payment, whichever is later;
- Remove as factors the insurer may consider in determining the necessity of direct worker purchases: pre-injury net income compared with post-injury net income; family income; and evidence of financial hardship;
- Reduce the time within which an insurer must pay vocational assistance providers' bills for services from 60 to 30 days from receipt; and
- Allow continuing education credits for counselors who teach a class or provide a formal presentation to a group on a topic relating to vocational rehabilitation.

Fred Bruyns	fred.h.bruyns@oregon.gov
Rules Coordinator Name	Email Address