



# Oregon

Kate Brown, Governor

Department of Consumer and Business Services  
Workers' Compensation Division  
350 Winter St. NE  
P.O. Box 14480  
Salem, OR 97309-0405  
1-800-452-0288, 503-947-7810  
[www.wcd.oregon.gov](http://www.wcd.oregon.gov)

Feb. 8, 2018

## Notice of Temporary Changes to Workers' Compensation Rules

### Caption: Determining the worker's average weekly wages for workers with irregular wages

The Workers' Compensation Division has adopted temporary changes to OAR 436-060-0005 and 0025, to be effective **Feb. 21, 2018** through **Aug. 19, 2018**.

#### Summary of changes:

- Revised rule 0005 updates the definitions of wages; and
- Revised rule 0025 changes the method for determining the worker's average weekly wage if the worker has irregular wages and has experienced an increase or decrease in the rate of pay during the 52 weeks before the date of injury or verification of disability caused by an occupational disease, and clarifies that the rate of compensation may include regular wages, irregular wages, or both.

**Need for the Temporary Rule(s):** Temporary rules are needed to ensure that workers with irregular wages who have experienced wage increases during the year preceding their injuries are fairly compensated during their recovery.

**Documents Relied Upon, and where they are available:** Advisory committee records and written advice. These documents are available for public inspection upon request to the Workers' Compensation Division, 350 Winter Street NE, Salem, Oregon 97301-3879. Please contact Fred Bruyns, rules coordinator, 503-947-7717, [fred.h.bruyns@oregon.gov](mailto:fred.h.bruyns@oregon.gov).

**Justification of Temporary Rule(s):** Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. A worker's weekly wage is the basis for determining the rate of temporary disability. For workers whose wages have increased in the year before their injuries, the current rule requires wage averaging based on total earnings for a period of up to 52 weeks before the injury. This method has harmed some workers whose temporary disability rate does not reflect the wage subsequent to the pay increase.

The agency finds that issuing temporary rules under ORS 183.335(5) is appropriate because it will very quickly end the practice of basing the rate of temporary disability on wages that do not reflect the worker's wage subsequent to a pay increase.

The agency finds that issuing permanent rules under ORS 183.335(2) and (3) is not appropriate because more workers may not be fairly compensated during the time required to promulgate a permanent rule.

*/s/ Louis Savage*  
Authorized Signer

Louis Savage  
Printed name

Feb. 8, 2018  
Date



## Claims Administration

### Temporary Oregon Administrative Rules

### Chapter 436, Division 060

*Effective Feb. 21, 2018*

#### *Summary of changes effective Feb.21, 2018:*

- Revised rule 0005 updates the definitions of wages; and
- Revised rule 0025 changes the method for determining the worker's average weekly wage if the worker has irregular wages and has experienced an increase or decrease in the rate of pay during the 52 weeks before the date of injury or verification of disability caused by an occupational disease, and clarifies that the rate of compensation may include regular wages, irregular wages, or both.

**NOTE:** Revisions are marked as follows: [new text](#) | ~~deleted text~~.

#### **436-060-0005 Definitions**

Unless a term is specifically defined elsewhere in these rules or the context otherwise requires, the definitions of ORS chapter 656 are hereby incorporated by reference and made a part of these rules. For the purpose of these rules unless the context requires otherwise:

- (1) "Aggravation" means an actual worsening of the compensable conditions after the last award or arrangement of compensation that satisfies the requirements of ORS 656.273.
- (2) "Authorized nurse practitioner" means a nurse practitioner authorized to provide compensable medical services under ORS 656.245 and OAR 436-010.
- (3) "Dependent" means any of the relatives of a worker listed under ORS 656.005(10) who, at the time of an accident, depended in whole or in part for support on the earnings of a worker who dies as a result of an injury.
- (4) "Designated paying agent" means the insurer temporarily ordered responsible to pay compensation for a compensable injury under ORS 656.307.
- (5) "Director" means the Director of the Department of Consumer and Business Services or the director's designee.
- (6) "Disposition" or "claim disposition" means the written agreement to release rights or obligations under ORS 656.236.
- (7) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
CLAIMS ADMINISTRATION**

---

- (8) "Employer" means a subject employer under ORS 656.023.
- (9) "Hearings Division" means the Hearings Division of the Workers' Compensation Board.
- (10) "Inpatient" means a worker who is admitted to a hospital before and extending past midnight for treatment and lodging.
- (11) "Insurer" means the State Accident Insurance Fund Corporation; an insurer authorized under ORS chapter 731 to transact workers' compensation insurance in Oregon; or an employer or employer group certified under ORS 656.430 that it meets the qualifications of a self-insured employer under ORS 656.407.
- (12) "Mailed" or "mailing date," unless otherwise specified, means:
- (a) The date a document is postmarked;
  - (b) The date automatically produced by electronic transmission (e.g., email or facsimile);
  - (c) The date a hand-delivered document is stamped or punched in by the recipient; or
  - (d) The date of a phone, or in-person request, when allowed under these rules.
- (13) "Physical rehabilitation program" means any services provided to a worker to prevent the compensable injury from causing continuing disability.
- (14) "Regularly employed worker" means any worker who receives a regular wage as defined in section (17) of this rule. For workers who are paid a daily wage, "regularly employed" means actual employment or availability for such employment.
- (15) "Service company" means the contracted agent for an insurer authorized to process claims and make payment of compensation on behalf of the insurer.
- (16) "Suspension of compensation" means:
- (a) No temporary disability, permanent total disability, or medical and related service benefits accrue or are payable during the period of suspension; and
  - (b) Vocational assistance and payment of permanent partial disability benefits will stop during the period of suspension.
- (17) "Wages" is as defined in ORS 656.005(29) and, in these rules, is categorized as either irregular wages or regular wages. Wages do not include expenses incurred due to the job and reimbursed by the employer (e.g., meals, lodging, per diem, equipment rental). As used in these rules:
- (a) "Irregular wages" means a variable money-pay rate paid at variable rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and it includes but is not limited to:
    - (A) Tips;
    - (B) Commissions;
    - (C) Monies, ~~or is~~ paid on unscheduled or unpredictable intervals, including but not limited to workers who are seasonally employed, on call, paid hourly at varying hours, or ~~are~~ paid by piece rate; and

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
CLAIMS ADMINISTRATION**

---

(D) The reasonable value of any in-kind considerations only if the considerations will not continue during the period of disability; and

(b) "Regular wages" means a constant and uniform money-pay rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and it includes, is paid at a constant rate at uniform intervals including, but is not limited to, wages paid on a daily or weekly basis. Hourly wages may be considered regular if the same number of hours are worked each pay period.

(18) "Wage earning agreement" means the verbal or written contract of hiring or terms of employment made between the worker and employer.

(19) "Written" means expressed in writing, including electronic transmission.

Statutory authority: 656.726(4)

Statutes implemented: 656.005, 656.726(4)

Hist: Amended 10/12/15 as WCD Admin. Order 15-062, eff. 1/1/16

Amended 11/28/16 as WCD Admin. Order 16-055, eff. 1/1/17

Amended 12/14/17 as WCD Admin. Order 17-062, eff. 1/1/18

Amended 2/8/18 as WCD Admin. Order 18-050, eff. 2/21/18

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

**436-060-0025     Worker's Weekly Wage Calculation and Rate of Temporary Disability Compensation**

**(1) Continuation of wages, insured employers.**

An employer may not continue to pay wages in place of temporary disability benefits. However, with the consent of the worker, the employer may pay the worker amounts in addition to the temporary disability benefits due the worker, if:

- (a) The employer identifies temporary disability benefits separately from other payments; and
- (b) The employer does not withhold payroll deductions from the temporary disability benefits.

**(2) Continuation of wages, self-insured employers.**

Notwithstanding section (1) of this rule, a self-insured employer may continue to pay the same wage at the same pay interval that the worker received at the time of injury. Such payment qualifies as timely payment of temporary disability under ORS 656.210 and 656.212. If the self-insured employer continues to pay wages in place of temporary disability benefits under this section:

- (a) Normal deductions including but not limited to, taxes, benefits, and voluntary deductions, must be withheld;
- (b) The claim must be classified as disabling;
- (c) The self-insured employer must report to the division the rate and duration of temporary disability that would have been paid had wages not continued; and

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
CLAIMS ADMINISTRATION**

---

(d) If the pay interval changes or the amount of wages decreases, the worker must be paid temporary disability as otherwise prescribed by the workers' compensation law.

**(3) Rate of compensation, generally.**

Except when payments are made under section (2) of this rule, the worker must receive compensation as calculated under ORS 656.210 during the period of temporary total disability, subject to the following:

(a) The benefits of a worker who incurs an injury must be based on the worker's wages at the time of injury and may include regular wages, irregular wages, or both;

(b) The benefits of a worker who incurs an occupational disease must be based on the worker's wages at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease and may include regular wages, irregular wages, or both. If the worker is not working at the time that there is medical verification that the worker is unable to work because of the disability caused by the occupational disease, the benefits must be based on the worker's wages at the worker's last regular employment;

(c) The benefits of a worker who was employed in multiple jobs at the time of injury, and who is eligible for supplemental disability under ORS 656.210(2)(b) and OAR 436-060-0035, must be based on the worker's earnings from all eligible subject employment under OAR 436-060-0035;

(d) For a worker with a cyclic schedule, the cycle must be considered to have no scheduled days off; and

(e) When a work shift extends into another calendar day, the date of injury used to determine the wage under this section is the date the employer used for payroll purposes.

**(4) ~~Rate of compensation,~~ Calculation of irregular wages.**

If ~~a the~~ worker receives irregular wages, ~~or receives earnings that are not based on wages alone,~~ the insurer must calculate the worker's irregular wages to determine the worker's average weekly wage rate of compensation under section (3) of this rule based on the weekly average of the worker's ~~total earnings~~ irregular wages for the period up to 52 weeks before the date of injury or verification of disability caused by occupational disease, subject to the following:-

(a) As used in this section:-

~~(A) "Total earnings" means all wages, salary, commission and other remuneration for services rendered under the worker's wage earning agreement with the employer.~~

~~(i) The insurer must include a reasonable value of any in-kind considerations as part of total earnings only if the considerations will not continue during the period of disability.~~

~~(ii) The insurer must not include expenses incurred due to the job and reimbursed by the employer (e.g., meals, lodging, per diem, equipment rental) as part of total earnings.~~

~~(B) "New new wage earning agreement" means the worker's wage earning agreement changed for reasons other than only a change in rate of pay, including but not limited to a~~

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
CLAIMS ADMINISTRATION**

---

change of hours worked or a change of job duties. A job assignment from a temporary service provider or worker leasing company as defined in OAR 436-050 is not considered to be a new wage earning agreement.

(b) If, on the date of injury or verification of disability caused by occupational disease, the worker had been employed by the employer at injury for four weeks or more, the insurer must average the worker's ~~total earnings~~irregular wages for the period up to 52 weeks of employment before the date of injury or verification of disability caused by occupational disease, subject to the following:

(A) The insurer may not include any gap in earnings of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average ~~earnings~~wages;

(B) If the worker began work under a new wage earning agreement in the 52 weeks before the date of injury or verification of disability caused by occupational disease, the insurer must average ~~earnings~~wages only for the weeks worked under the most recent wage earning agreement; ~~and-~~

(C) When there has been a change in the worker's wage earning agreement due only to an increase or decrease in the pay rate during the 52 weeks before the date of injury or verification of disability caused by occupational disease, this is not a "new wage earning agreement." In this situation, the insurer must calculate the worker's average weekly hours worked at each pay rate since a new wage earning agreement went into place, but not to exceed 52 weeks. The average weekly hours worked at each pay rate must then be multiplied by the pay rate(s) at the time of injury or verification of disability caused by occupational disease to determine the worker's average weekly wage for these wages. If there are irregular wages not paid at an hourly rate, the worker's average weekly wage under this paragraph must be added to the average of all of those other irregular wages paid at something other than an hourly rate.

(c) If, on the date of injury or verification of disability caused by occupational disease, the worker had been employed by the employer at injury for less than four weeks, or the worker's new wage earning agreement had been in place for less than four weeks, the insurer must base the rate of compensation on the intent of the worker's wage earning agreement in place at the time of injury, as confirmed by the employer and the worker.

**(5) ~~Rate of compensation,~~ Calculation of regular wages.**

If ~~a~~the worker receives regular wages, the insurer must calculate the worker's regular wages to determine the worker's average weekly wage: rate of compensation as outlined in ORS 656.210. To determine the worker's weekly wage:

(a) Daily wages must be multiplied by the number of days per week the worker was regularly employed;

(b) Monthly wages must be divided by 4.35;

(c) Wages for other pay intervals must be calculated on an equivalent basis; or

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
CLAIMS ADMINISTRATION**

---

(d) For workers employed through a union hiring hall, the insurer must calculate the rate of compensation on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per week.

(A) The rate of compensation for workers employed through a union hiring hall with dates of injury on or after January 1, 2018 must be calculated under this subsection.

(B) The rate of compensation for workers employed through a union hiring hall with dates of injury from January 1, 2017 through December 31, 2017 must be calculated under this subsection, unless such calculation would result in a reduction of benefits.

**(6) Workers with no wages.**

If the worker is a volunteer, inmate, or other covered worker that receives no ~~wage earnings,wages~~, the insurer must calculate the rate of compensation based on the assumed wage used to determine the employer's premium.

**(7) Owners and corporate officers.**

If the worker is a sole proprietor, partner, officer of a corporation, or limited liability company member, the insurer must calculate the rate of compensation based on the assumed wage used to determine the employer's premium.

**(8) Wage disputes.**

If the worker disputes the wage used to calculate the rate of compensation, the insurer must attempt to resolve the dispute by contacting the employer to confirm the correct wage and then contacting the worker with that information. If the worker still does not agree with the wage calculated by the insurer, the worker may request a hearing under OAR 436-060-0008.

Statutory authority: ORS 656.210(2), 656.704, and 656.726(4)

Statutes implemented: ORS 656.210, 656.704

Hist: Amended 12-1-2009 as WCD Admin. Order 09-057, eff. 1-1-2010

Amended 11/28/16 as WCD Admin. Order 16-055, eff. 1/1/17

Amended 9/21/17 as WCD Admin. Order 17-059, eff. 10/1/17

Amended 12/28/17 as WCD Admin. Order 17-065, eff. 1/1/18

[Amended 2/8/18 as WCD Admin. Order 18-050, eff. 2/21/18](#)

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