

**ADMINISTRATIVE ORDER NO. 3-1992
EFFECTIVE FEBRUARY 1, 1992**

**OREGON DEPARTMENT OF INSURANCE AND FINANCE
WORKERS' COMPENSATION DIVISION
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 80**

NONCOMPLYING EMPLOYERS

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**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 80**

436-80-001 AUTHORITY FOR RULES

These rules are promulgated under the Director's authority contained in ORS 656.726 and 656.054.

Hist: WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75, WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88

436-80-002 PURPOSE

It is the purpose of the Director that under the provision of ORS 656.726(3) and ORS 656.054 rules be established to ensure the requirements of ORS 656.017 are met. To meet that responsibility the Director has delegated to Compliance the responsibility of ensuring the requirements of the statutes, rules and bulletins of the Department are complied with as they relate to employer coverage.

Hist: Filed 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88

436-80-003 APPLICABILITY OF RULES

These rules are effective February 1, 1992, and carry out the provisions of:

(1) ORS 656.017 - Employer required to pay compensation and perform other obligations and duties.

(2) ORS 656.052 - Prohibition against employment without coverage; proposed order declaring noncomplying employer; effect of failure to comply.

(3) ORS 656.054 - Claim of injured worker of noncomplying employers; notice of proposed penalty; recovery of costs from noncomplying employer.

(4) ORS 656.735 - Civil penalty for noncomplying employers; amount; liability of corporate officers; effect of final order; penalty as preferred claim; disposition of moneys collected.

(5) ORS 656.740 - Review of proposed order declaring noncomplying employer, proposed assessment or civil penalty; insurer as party; hearing.

Hist: WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, effective 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90
Amended 01/10/92 as WCD Admin. Order 3-1992, effective 2/1/92

436-80-005 DEFINITIONS

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

(1) "Compliance" means the Compliance Section of the Workers' Compensation Division of the Department of Insurance and Finance.

(2) "Department" means the Department of Insurance and Finance.

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(3) "Director" means the Director of the Department of Insurance and Finance or the Director's delegate.

(4) "Hearings" means the Hearings Division of the Workers' Compensation Board.

Hist: WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, effective 1-1-90

436-80-006 ADMINISTRATION OF RULES

Any order issued by Compliance in carrying out the Director's authority to enforce ORS Chapter 656 and the rules adopted pursuant thereto is considered an order of the Director.

Hist: WCB 4-1973 (Temp), f. 12-6-73, eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-010 INITIATION OF PROCEEDINGS; ISSUANCE OF NONCOMPLYING EMPLOYER ORDER

If an employer has failed to comply with ORS 656.017, Compliance shall investigate. If Compliance finds the employer is a subject employer that has failed to file proof of qualification in the manner required by ORS 656.407, as either:

- (1) A carrier-insured employer; or,
- (2) A self-insured employer; then,

Compliance shall issue a Proposed and Final Order declaring the employer to be a noncomplying employer, and assessing a civil penalty pursuant to ORS 656.735(1) for violation of ORS 656.052.

Hist: WCB 10-1970, f. & eff. 7-24-70; WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-020 WHEN A HEARING ON THE ORDER IS NOT REQUESTED

If the employer does not request a hearing on the order within the 20 days allowed by ORS 656.740, Compliance may request the Department of Justice to commence proceedings to enjoin the employer under ORS 656.052(3).

Hist: WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12/22/89 as WCD Admin. Order 4-1989, effective 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-030 WHEN A HEARING ON THE ORDER IS REQUESTED

(1) A request for hearing on an order issued under OAR 436-80-010 or 436-80-040 must specify the grounds upon which the employer contests the order and must be received by the department at the Workers' Compensation Division, Compliance Section, Registration Unit within 20 calendar days after service of the order.

(2) When a person who is served with an order files a request for a hearing within the time allowed by ORS 656.740, Compliance shall forward the request and other pertinent

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information to the Hearings Division.

(3) A Compliance officer or employe is authorized to appear (but not make legal argument) on behalf of the Director in a hearing or in a class of hearings in which the Attorney General or the Deputy Attorney General has given written consent for such representation. A copy of the list of contested case hearings for which the Attorney General or the Deputy Attorney General has given consent is maintained by Compliance and the Department of Justice.

(4) Legal argument as used in ORS 182.450 (8) and this rule has the same meaning as in the Attorney General's Model Rule of Procedure 137-03-008 (1) (c) and (d), which is hereby adopted by reference.

Hist: WCB 4-1973 (Temp), f. & eff. 12-6-73, WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78

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Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

Amended 01/10/92 as WCD Admin. Order 3-1992, effective 2/1/92

436-80-040 ASSESSMENT OF CIVIL PENALTIES AGAINST NONCOMPLYING EMPLOYER; HEARING ON PROPOSED ASSESSMENT

(1) If a person violates ORS 656.052(1), Compliance shall assess a civil penalty under ORS 656.735, unless another agency of the State of Oregon has assessed a civil penalty against the person for the same violation of ORS 656.052(1).

(2) In accordance with ORS 656.735(1), the amount of penalty for a person's first violation of ORS 656.052(1) shall be \$1,000.

(a) Compliance may reduce the amount of the penalty due to the lesser of the amount of premium the employer would have paid during the noncomplying period if insurance had been provided or \$25 for each calendar day of the noncomplying period if, prior to the penalty order becoming final, the employer:

(A) Agrees to not contest the penalty order,

(B) Provides evidence satisfactory to Compliance that it is no longer a subject employer or, if it is still a subject employer, that it has now complied with ORS 656.052(1),

(C) Provides adequate payroll information to enable Compliance to calculate the amount of premium the employer would have paid during the noncomplying period if insurance had been provided, and

(D) Makes arrangements satisfactory to Compliance for prompt payment of the reduced penalty amount.

(b) If the amount of premium the employer would have paid during the noncomplying period is more than \$1,000, and \$25 for each calendar day of the noncomplying period totals more than \$1,000, there will be no reduction of the penalty amount.

(3) The amount of penalty, when assessed against the employer pursuant to ORS 656.735(2), shall be \$25 per day for each calendar day the employer has continued to violate ORS 656.052(1), commencing with the first day of such violation.

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(a) Compliance may reduce the amount of the penalty due to \$250 plus the amount of premium the employer would have paid during the noncomplying period if insurance had been provided if, prior to the penalty order becoming final, the employer:

(A) Agrees to not contest the penalty order,

(B) Provides evidence satisfactory to Compliance that it is no longer a subject employer or, if it is still a subject employer, that it has now complied with ORS 656.052(1),

(C) Provides adequate payroll information to enable Compliance to calculate the amount of premium the employer would have paid during the noncomplying period if insurance had been provided, and

(D) Makes arrangements satisfactory to Compliance for prompt payment of the reduced penalty amount.

(b) If the amount of premium the employer would have paid during the noncomplying period plus \$250 is equal to or greater than \$25 per calendar day of noncompliance, there will be no reduction of the penalty amount.

(4) If a subject worker of a noncomplying employer receives a compensable injury while in the employ of such employer, Compliance shall assess a civil penalty against the employer in accordance with ORS 656.054(2) and 656.735(3) after the order is final and the worker's claim is closed.

(a) For the purposes of this subsection, a claim for a nondisabling compensable injury is considered closed if 30 days elapse during which the worker receives no medical services, as verified by the reports submitted to the department under OAR 436-80-070(1).

(b) The amount of penalty shall be 10 percent of the total claim cost, reduced to the nearest \$50, but not less than \$100 nor more than the maximum penalty set forth in ORS 656.735(3).

(5) Compliance shall serve an order assessing a civil penalty, with a notice to the employer of rights under ORS 656.740.

(6) When a penalty order becomes final, Compliance shall transfer the matter to the Business Administration Division of the Department to collect the penalty.

Hist: WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
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Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-050 SERVICE OF NOTICE, ORDER OR ASSESSMENT

When rules 436-80-006 through 436-80-040 require Compliance to serve an order or notice on an employer, Compliance shall serve the document by delivering a copy to the employer through certified mail or in any manner provided by Oregon Rules of Civil Procedure 7 D.

Hist: WCB 10-1970, f. & eff. 7-24-70; WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
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Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-060 WHEN A WORKER FILES A CLAIM FOR AN INJURY

(1) When Compliance issues an order under OAR 436-80-010 declaring an employer a noncomplying employer, and a subject worker has filed a claim for an injury sustained during the period of noncompliance while the worker was employed by such employer, Compliance shall:

(a) Refer the claim with a copy of the order and the results of its investigation to SAIF Corporation for processing as required by ORS 656.054; and

(b) Inform the worker that the claim has been referred to SAIF;

(2) When SAIF Corporation accepts or denies the claim, it shall notify the worker, employer, and Compliance of its action within the time provided by ORS 656.262.

(a) The notice shall also inform each party of the right to a hearing under ORS 656.283 on questions of compensability.

(b) The worker shall have the time specified in ORS 656.319 to request a hearing if SAIF denies the claim.

(c) The employer shall have only 60 days from the date SAIF accepts a claim to request a hearing to contest the compensability of the claim. No appeal from the employer on the compensability of the claim shall be entertained and the acceptance shall be final by law if no appeal is timely made within the period prescribed by this rule. Any challenge to compensability after the 60 days must be made by SAIF in a back-up denial.

(3) When Compliance finds that at the time of the injury, either the worker was not a subject worker or the employer was not a subject employer, the worker and employer shall be notified of such determination. The worker may request administrative review of such determination in the manner provided by OAR 436-50-008.

Hist: WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1979 (Admin), f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
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Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90

436-80-070 REIMBURSEMENT OF STATE ACCIDENT INSURANCE FUND CORPORATION FOR CLAIMS COSTS FOR INJURED WORKERS OF NONCOMPLYING EMPLOYERS

(1) When SAIF pays compensation to a claimant or incurs other costs on a claim referred to it under ORS 656.054, SAIF shall report the payment to the Department within 30 days. At the end of each calendar quarter, SAIF shall submit to the Department a request for reimbursement of all expenditures made from the Industrial Accident Fund during the quarter covered by the report, itemizing by claimant expenditures made for all claimants of noncomplying employers. There shall be offset against such expenditures, any amounts received by SAIF and reported to the Department under subsections (5) and (6) of this rule. Subject to section (3) of this rule, costs incurred by SAIF for which reimbursement will be allowed include:

(a) All compensation paid claimant.

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(b) All expenses incurred for medical services.

(c) Attorney fees paid to the claimant in addition to any compensation, and sums assessed under ORS 656.382(3) and paid by SAIF, but not fees and sums paid under ORS 656.262(10) and 656.382(1).

(d) A reasonable amount for administrative costs at a rate proposed by SAIF and approved by the Director prior to June 30 of each year. Late requests for increase on the rate of reimbursement, if approved, shall be effective on the date the request was received by the Director.

(2) The Department shall review the request and issue the reimbursement out of the Administrative Fund of the Department.

(3) The Department shall conduct an annual audit of the noncomplying employer claim files processed by SAIF to validate the amount reimbursed pursuant to section (1) of this rule. Reimbursement shall not be allowed, if, upon such audit, any of the following are found to apply:

(a) Compensation has been paid as a result of untimely, inaccurate, or improper claims processing;

(b) Compensation has been paid negligently for treatment of any condition unrelated to the compensable condition;

(c) The compensability of an accepted claim is questionable and the rationale for acceptance has not been reasonably documented in accordance with generally accepted claims management procedures;

(d) The separate payments of compensation have not been documented in accordance with generally accepted accounting procedures; or

(e) The payments were made pursuant to a disposition agreement as provided by ORS 656.236 without the prior approval of the Department.

(4) SAIF may appeal any disapproval of reimbursement made by the Department under this rule pursuant to ORS 183.310 to 183.550 and as provided by OAR 436-80-008.

(5) When a damage action is brought against a noncomplying employer or an action is brought against a third party by an employee of a noncomplying employer or the employee's beneficiaries, or by SAIF as the paying agency for such an employee, as authorized by ORS 656.576 to 656.595, SAIF shall report the commencement and termination of such action to the Department. Thereafter, at the end of each calendar year, SAIF shall report the status of all such actions that are pending.

(6) When an action against an employer, or third party is settled or if damages are recovered, SAIF shall report within (30) days to the Department the amount of the recovery retained by SAIF under ORS 656.593(1)(c).

(7) The Business Administration Division of the Department is responsible for collecting from noncomplying employers those costs incurred by the Industrial Accident Fund for which SAIF is entitled to reimbursement from the Department under this rule. The Business

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Administration Division shall inform each noncomplying employer of the liability under ORS 656.054(3) and keep the employer advised of costs incurred by SAIF.

Hist: WCB 10-1970, f. & eff. 7-24-70; WCB 4-1973 (Temp), f. & eff. 12-6-73; WCB 4-1974, f. 2-13-74, eff. 3-11-74; WCB 15-1975, f. 9-22-75, eff. 10-11-75; WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
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Amended 01/10/92 as WCD Admin. Order 3-1992, effective 2/1/92

436-80-080 COLLECTION OF SUBJECT WORKER'S PAYMENT

(1) When Compliance finds the noncomplying employer has withheld monies from subject workers pursuant to ORS 656.506, it will collect such money from the noncomplying employer.

(2) The Business Administration Division is responsible for collecting from noncomplying employers those workers' payments not collected by Compliance and referred to it by Compliance.

Hist.: WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, effective 1-1-90