



Noncomplying Employers Oregon Administrative Rules Chapter 436, Division 080

Effective June 19, 2020

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*Temporary rule 0040 was issued with an effective date of June 1, 2020. The temporary rule was suspended on June 18, 2020. The rule in effect starting Jan. 1, 2019 was reinstated effective June 19, 2020.

NOTE: These rules have been substantially revised throughout. A copy with marked revisions is posted here: <https://wcd.oregon.gov/laws/Pages/Rule.aspx?r=080>.

HISTORY LINES: These rules include only the most recent “History” lines. The history line shows when the rule was last revised and its effective date. To obtain a comprehensive history for OAR chapter 436, please call the Workers’ Compensation Division, 503-947-7627, or visit the division’s website: https://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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

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**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
NONCOMPLYING EMPLOYERS**

**OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 080**

Summary of changes effective Jan. 1, 2019:

- Repealed rule 0001 included a statement of the director's authority for promulgating rules – removed because this authority is provided under ORS chapter 656, and it does not need to be stated in rule.
- Repealed rule 0002 included a statement of purpose that has been moved, with wording changes, to rule 0003.
- Amended rule 0003 includes a statement of purpose to replace the statement in repealed rule 0002, and the rule explains that the director may waive procedural rules as justice requires, unless otherwise obligated by statute.
- Amended rule 0005 defines “noncomplying employer order,” and removes definitions of certain terms no longer used in these rules or that are defined in ORS chapter 656.
- Repealed rule 0006 explained that orders issued by the division are considered to be orders of the director; however, all orders under these rules are orders of the director.
- Amended rule 0010 describes the procedure for an employer to contest a noncomplying employer order and the consequence of not appealing the order within the time allowed.
- Repealed rule 0020 explained the consequences if an employer does not appeal a noncomplying employer order within the time allowed, and this provision has been moved to rule 0010.
- Repealed rule 0030 explained procedures for an employer to contest a noncomplying employer order, and this provision has been moved and reworded to rule 0010. The provisions of rule 0030 related to the agency's participation in hearing are replaced with a reference to OAR 436-001-0030.
- Amended rule 0040:
 - Provides for the director's discretion to impose civil penalties under ORS 656.735(2) in amounts less than \$250 per day, consistent with statute;
 - Specifies methods that may be used for the calculation of premium amounts that would have been paid if the employer had obtained coverage, to include estimation of payroll when necessary, and application of assigned risk rates established by the National Council on Compensation Insurance; and
 - Has clearer wording and is reorganized to enhance clarity.
- Amended rule 0060 has clearer wording and includes a statement that OAR 436-001-0030(2) to (5) apply to hearings regarding nonsubjectivity determinations.
- Amended rule 0065 has clearer wording regarding determination of an assigned claims agent.
- Amended rule 0070 has clearer wording regarding reimbursement of the assigned claims agent.
- Amended rule 0080 has clearer wording and removes a provision explaining which section within the Department of Consumer and Business services is responsible for collection of moneys owed by noncomplying employers.

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436-080-0001 Authority for Rules (Repeal)

Stat. Auth.: ORS 656.054, ORS 656.726
 Stats. Implemented: ORS 656.726
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Repealed 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

436-080-0002 Purpose (Repeal)

Stat. Auth.: ORS 656.054, ORS 656.726
 Stats. Implemented: ORS 656.726
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Repealed 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

436-080-0003 Applicability and Purpose of Rules**(1) Purpose.**

These rules carry out the provisions of ORS 656.017, 656.052, 656.054, 656.407, 656.735, and 656.740.

(2) Applicability.

These rules apply to all orders issued under ORS 656.052, 656.735, or 656.740 on or after the effective date of these rules.

(3) Director's discretion.

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

Stat. Auth.: ORS 656.726
 Stats. Implemented: ORS 656.017; 656.052; 656.054; 656.735 and 656.740.
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19
 See also the *Index to Rule History*: https://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-080-0005 Definitions

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

- (1) **“Board”** means the Workers' Compensation Board and includes its Hearings Division.
- (2) **“Director”** means the director of the Department of Consumer and Business Services or the director's designee.
- (3) **“Noncomplying employer order”** means an order issued under these rules declaring an employer to be a noncomplying employer and containing the amount of civil penalty assessed under ORS 656.735, if any.

Stat. Auth.: ORS 656.726
 Stats. Implemented: ORS 656.726
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19
 See also the *Index to Rule History*: https://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

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436-080-0006 Administration of Rules (*Repeal*)

Stat. Auth.: ORS 656.054, ORS 656.726
 Stats. Implemented: ORS 656.052, ORS 656.054, ORS 656.726
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Repealed 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

436-080-0010 Issuance of Noncomplying Employer Order; Requests for Hearing**(1) Issuance of noncomplying employer order.**

If the director determines that a person has engaged as a subject employer without qualifying as a carrier-insured employer or a self-insured employer as provided in ORS 656.017 and 656.407, the director will issue a noncomplying employer order.

(2) Request for hearing.

An employer may contest a noncomplying employer order by requesting a hearing under ORS 656.740, subject to the following:

- (a) The request for hearing must be made in writing;
- (b) The request must specify the grounds upon which the employer contests the order;
- (c) The request must be filed with the director within 60 calendar days after the mailing date of the order; and
- (d) OAR 436-001-0030(2) through (5) apply to hearings requested under this section.

(3) Proceedings to enjoin a noncomplying employer.

The director may request the Department of Justice to commence proceedings to enjoin a noncomplying employer that does not request a hearing within the timeframe specified under subsection (2)(c) of this rule from employing subject workers without complying with ORS 656.017.

Stat. Auth.: ORS 656.726
 Stats. Implemented: ORS 656.017, 656.052, 656.407, 656.735, ORS 656.740
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19
 See also the *Index to Rule History*: https://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-080-0020 When a Hearing on the Order Is Not Requested (*Repeal*)

Stat. Auth.: ORS 656.726
 Stats. Implemented: ORS 656.052, ORS 656.735, ORS 656.740 (section 9, chapter 170, Oregon Laws 2003)
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Repealed 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

436-080-0030 When a Hearing on the Order Is Requested (*Repeal*)

Stat. Auth.: ORS 656.726
 Stats. Implemented: ORS 656.052, ORS 656.735, ORS 656.740
 Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04
 Repealed 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

436-080-0040 Assessment of Civil Penalties Against Non-complying Employer**(1) Calculation of premium amounts.**

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For the purpose of this rule, “**premium for the period of noncompliance**” means the estimated premium the employer would have paid during the period of noncompliance if workers’ compensation insurance had been provided. The director will estimate the premium for the period of noncompliance, subject to the following:

(a) The director will use the applicable assigned risk rates established by the National Council on Compensation Insurance effective during the period of noncompliance. The rates are available for purchase at www.ncci.com, or are available for review during regular business hours at the Workers’ Compensation Division, 350 Winter Street NE, Salem OR 97301;

(b) If the employer provides payroll information that is adequate to determine actual payroll amounts and duties performed by workers, the director will assign the payroll amounts to the applicable assigned risk rates; and

(c) If the employer does not provide payroll information that is adequate to determine actual payroll amounts and duties performed by workers:

(A) The director may estimate payroll by multiplying the total number of workers employed during the period of noncompliance by the state average weekly wage; and

(B) The director may assign all estimated payroll to the classification that best describes the employer’s type of business.

(2) Assessment of civil penalties under ORS 656.735(1).

The director will assess a civil penalty under ORS 656.735(1) for a person’s first violation of ORS 656.052(1) in an amount equal to the greater of:

(a) \$1,000; or

(b) 200 percent of premium for the period of noncompliance.

(3) Assessment of civil penalties under ORS 656.735(2).

If an employer continues to violate ORS 656.052(1) after an order under OAR 436-080-0010 has become final, the director will assess an additional civil penalty of not more than \$250 for each calendar day the violation continues, commencing with the first day of noncompliance after the initial noncomplying period. To determine the amount of a civil penalty assessed under this section, the director may consider factors including, but not limited to:

(a) The number of subject workers employed by the noncomplying employer;

(b) The nature of the noncomplying employer’s business;

(c) The premium for the period of noncompliance; and

(d) The employer’s compliance history.

(4) Penalty reductions.

The director may reduce the amount of a civil penalty assessed under section (2) or (3) of this rule, subject to the following:

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- (a) To be eligible for a reduced penalty, the employer must:
- (A) Agree to not contest the penalty order;
 - (B) Provide evidence that the employer has complied with ORS 656.017, or that it is no longer a subject employer;
 - (C) Provide adequate payroll information to enable the director to calculate premium for the period of noncompliance under subsection (1)(b) of this rule; and
 - (D) Make arrangements for prompt payment of the reduced penalty amount;
- (b) The director will not reduce a civil penalty if the employer fails to comply with subsection (a) before the order assessing the penalty becomes final, unless the director determines there was good cause for the delay;
- (c) A penalty assessed under section (2) of this rule may be reduced to the greater of:
- (A) \$500; or
 - (B) 105 percent of premium for the period of noncompliance; and
- (d) A penalty assessed under section (3) of this rule may be reduced to the greater of:
- (A) \$1,000; or
 - (B) 150 percent of premium for the period of noncompliance. If 150 percent of premium for the period of noncompliance is equal to or greater than \$250 per calendar day of noncompliance, there will be no reduction of the penalty amount.

Stat. Auth.: ORS 656.726 | Stats. Implemented: ORS 656.735
 Hist.: Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19
 Amended 5/28/20 as WCD Admin. Order 20-057, eff. 6/1/20 (temporary)
 Suspended 6/18/20 as WCD Admin. Order 20-058, eff. 6/18/20 (temporary)
 Reinstated 6/18/20 as WCD Admin. Order 18-062, eff. 6/19/20
 See also the *Index to Rule History*: https://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-080-0060 When a Worker Files a Claim for an Injury

(1) Referral of claim to assigned claims agent.

If a worker files a claim for an injury sustained while the worker was employed by a noncomplying employer, the director will:

- (a) Refer the claim, with a copy of the noncomplying employer order and the results of the compliance investigation, to the assigned claims agent for processing; and
- (b) Issue a Notice of Referral to the worker, the worker's representative, if represented, and the employer. The notice will inform the employer of its right to object to the claim.

(2) Request for hearing to object to a claim.

An employer may request a hearing to object to a claim referred to the assigned claims agent under this rule. The request for hearing must be filed with the board within 60 calendar days after the mailing date of the Notice of Referral issued under subsection (1)(b) of this rule.

(3) Processing of claim.

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When the assigned claims agent accepts or denies the claim, it must notify the worker, employer, and the director within the time provided by ORS 656.262.

(4) Nonsubjectivity determinations.

If a worker files a claim for an injury and the director determines that the worker was not a subject worker, or the employer was not a subject employer, the director will notify the worker and the employer by issuing a nonsubjectivity determination.

(5) Request for hearing on nonsubjectivity determination.

A worker may request a hearing on a nonsubjectivity determination, subject to the following:

- (a) The request for hearing must be filed within 60 days after the mailing date of the determination;
- (b) The request for hearing must be sent to the director;
- (c) The worker and employer are parties to the hearing; and
- (d) OAR 436-001-0030(2) through (5) apply to hearings requested under this section.

Stat. Auth.: ORS 656.726 | Stats. Implemented: ORS 656.054; 656.740

Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

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

436-080-0065 Determination of Assigned Claims Agent

(1) When selecting an assigned claims agent, the director will consider:

- (a) Which claims agent can deliver the most timely and appropriate benefits to injured workers and can best control claim costs and administrative costs, based on claims processing performance and other available data; and
- (b) Any other factors the director considers appropriate.

(2) If no qualified entity agrees to be an assigned claims agent, the director may require one or more of the three highest premium producing insurers to be assigned claims agents, based on the criteria under section (1) of this rule.

Stat. Auth.: ORS 656.726 | Stats. Implemented: ORS 656.054

Hist: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

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

436-080-0070 Reimbursement of Assigned Claims Agent for Claims Costs for Injured Workers of Noncomplying Employers

(1) Reimbursement of incurred claims costs.

The director will reimburse the assigned claims agent for all claims costs the assigned claims agent incurs under ORS 656.054, under the terms of the contract between the assigned claims agent and the director. To request reimbursement, the assigned claims agent must report all claims costs to the director, subject to the following:

- (a) Claims costs for which reimbursement will be allowed include, but are not limited to:

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- (A) All compensation provided to a subject worker or beneficiary;
 - (B) Attorney fees and sums assessed under ORS 656.382(3), but not fees and sums paid under ORS 656.262(11) and 656.382(1); and
 - (C) A reasonable amount for administrative costs at a rate proposed by the assigned claims agent and approved by the director. The assigned claims agent must propose the rate before June 30 of each year. Late proposals for a rate increase, if approved, will be effective on the date the request was received by the director;
- (b) If the assigned claims agent is the paying agency in any action to recover damages from a noncomplying employer or third party under ORS 656.576 to 656.595, the assigned claims agent must report to the director:
- (A) The commencement and termination of each action;
 - (B) The status of all pending actions at the end of each calendar year; and
 - (C) The amount of the recovery retained by the assigned claims agent under ORS 656.593(1)(c), within 30 days after an action is settled or damages are recovered; and
- (c) The amount reported under paragraph (1)(b)(C) will be offset against the amount of incurred costs reported under subsection (a).

(2) Approval or denial of request.

The director will review the request and will approve or disapprove the reimbursement from the Workers' Benefit Fund under the terms of the contract between the assigned claims agent and the director.

(3) Audit of reimbursed amounts.

The director will annually audit the noncomplying employer claim files processed by the assigned claims agent to validate the amount reimbursed under section (2) of this rule. The director will disapprove reimbursement if any of the conditions described under ORS 656.054(3) are found to apply upon audit.

(4) Review of disapproval.

The assigned claims agent may request review of any disapproval of reimbursement made by the director under ORS 656.704(2) and OAR 436-001.

(5) Collection of reimbursed costs.

The director will collect all costs reimbursed from the Workers' Benefit Fund under this rule from the responsible noncomplying employer. The director will inform each noncomplying employer of its liability and advise the employer of costs incurred by the assigned claims agent.

Stat. Auth.: ORS 656.726 | Stats. Implemented: ORS 656.054, 656.704

Hist: Amended 10/19/05 as WCD Admin. Order 05-066, eff. 1/2/06

Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

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

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436-080-0080 Collection of Monies Withheld from Subject Workers

The director will collect any unremitted monies withheld by a noncomplying employer from subject workers under ORS 656.506, as described under OAR 436-070.

Stat. Auth.: ORS 656.726 | Stats. Implemented: ORS 656.506

Hist.: Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

Amended 11/14/18 as WCD Admin. Order 18-062, eff. 1/1/19

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