Vocational Assistance to Injured Workers
Oregon Administrative Rules
Chapter 436, Division 120

Effective Aug. 1, 2018

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NOTE: Substantive revisions effective Aug. 1, 2018, are indicated by vertical lines in the right margin. Only rules 0003 and 0147 were revised at that time.

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

OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 120

Summary of changes effective Aug. 1, 2018:

- Revised rule 0003 explains that if an eligibility decision involves OAR 436-120-0147(3)(b)(B), the director's decisions under OAR 436-120-0008 regarding eligibility will rely on OAR 436-120-0147(3)(b)(B) in effect on the date of the director's order.
- Revised rule 0147:
  - Requires the insurer to make a reasonable calculation of the worker's weekly wage based on verifiable documentation available when they are unable to obtain complete information to calculate the weekly wage under section (3) of the rule if the worker provides verifiable documentation to establish wages at the time of injury.
  - Indicates that secondary jobs do not need to be subject employment.
  - Indicates volunteer work is not a job for purposes of the adjusted weekly wage calculation.
  - States that determining the nature of the job at injury must include contacting the employer at injury to verify the worker's employment status.
  - Describes the process for determining a worker's weekly wage when the worker held multiple jobs at the time of injury, which reflects the Court of Appeal's decision in *Chu v. SAIF* 290 Or App 194 (2018);
  - Clarifies that the adjusted weekly wage must consider the total of all of the weekly wages from section (3) of the rule; and
  - Explains that, when the weekly wage calculation requires reliance on OAR 436-060-0025, it is the OAR 436-060-0025 that was in effect on the date of injury.

436-120-0003 General Provisions

(1) Purpose of these rules.

The purpose of the rules in OAR 436-120 is to:

(a) Prescribe uniform standards for determining eligibility, delivery, and payment for vocational services to injured workers;

(b) Prescribe procedures for resolving disputes; and

(c) Establish standards for the certification of counselors and providers.

(2) Applicability of rules.

(a) These rules govern vocational assistance under the workers' compensation law on or after the effective date of these rules except as OAR 436-120 otherwise provides.

(b) Except as outlined below, the director's decisions under OAR 436-120-0008 regarding eligibility will be based on the rules in effect on the date the insurer issued the notice. If an eligibility decision involves the weekly wage under OAR 436-120-0147(3)(b)(B), the director's decisions under OAR 436-120-0008 regarding eligibility will rely on OAR 436-120-0147(3)(b)(B) in effect on the date of the director's order. The director's decisions regarding the nature and extent of assistance will be based on the rules in effect at the time the assistance was provided. If the director orders future assistance, such assistance must be provided in accordance with the rules in effect at the time assistance is provided.

(c) Under these rules a claim for aggravation or reopening a claim to process a newly accepted condition is considered a new claim for purposes of vocational assistance eligibility and vocational assistance, except as otherwise provided in these rules.

(3) Director's discretion.

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

(b) If the worker has returned to work with the employer at injury, the director reserves the right to verify whether the employment is suitable.

(4) 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 of any document required by these rules to be submitted to the division 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 faxed, it must be received by 11:59 p.m. Pacific Time to be considered submitted on that date.

(C) 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) 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.

(5) Availability of forms.

The forms and bulletins referenced in these rules are available on the division's website at wcd.oregon.gov.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.206, 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
Amended 7/17/18 as Admin. Order 18-059, eff. 8/1/18
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0005 Definitions

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

(1) "Cost-of-living matrix" is a chart issued annually by the division in Bulletin 124 that publishes the conversion factors, effective July 1 of each year, used to adjust for changes in the cost-of-living rate from the date of injury to the date of calculation. The conversion factor is based on the annual percentage increase or decrease in the average weekly wage, as defined in ORS 656.211.

(2) "Counselor" means the vocational assistance counselor certified under these rules to provide vocational assistance to injured workers and activities for determining a worker's eligibility for vocational assistance.

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

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

(5) "Employer at injury" means the organization that employed the worker when the worker sustained the injury or occupational disease.

(6) "Insurer" means the insurance company or self-insured employer responsible for the workers' compensation claim.

(7) "Provider" means the vocational assistance provider that is an insurer or other public or private organization registered under these rules to provide vocational assistance to injured workers and activities for determining a worker's eligibility for vocational assistance.

(8) "Reasonable cause" may include, but is not limited to, a medically documented limitation in a worker's activities due to illness or medical condition of the worker or the worker's family, financial hardship, incarceration for less than six months, or circumstances beyond the reasonable control of the worker. "Reasonable cause" for failure to provide information or participate in activities related to vocational assistance will be determined based upon individual circumstances of the case.

(9) "Reasonable labor market" for an occupation means it can be said to have reasonable employment opportunities if competitively qualified workers can expect to find equivalent jobs in the occupation within a reasonable period of time. A reasonable period of time, for workers in the majority of occupations, would be the six months that they could collect regular unemployment insurance benefits, if they were entitled to them.

(10) "Regular employment" means the employment the worker held at the time of the injury or at the time of the claim for aggravation, whichever gave rise to the potential eligibility for vocational assistance; or, for a worker not employed at the time of aggravation, the employment the worker held on the last day of work before the aggravation claim. If the basis for potential eligibility is a reopening to process a newly accepted condition, "regular employment" is the employment the worker held at the time of the injury. When the condition arose after claim closure, "regular employment" is determined as if it were an aggravation claim.

(11) "Substantial handicap to employment" means the worker, because of the injury or aggravation, lacks the necessary physical capacities, knowledge, skills, and abilities to be employed in suitable employment.

(a) **"Knowledge"** means an organized body of factual or procedural information derived from the worker's education, training, and experience.

(b) **"Skills"** means the demonstrated mental and physical proficiency to apply knowledge.

(c) **"Abilities"** means the cognitive, psychological, and physical capability to apply the worker's knowledge and skills.

(12)(a) "Suitable employment" or **"suitable job"** means employment or a job:

(A) For which the worker has the necessary physical capacities, knowledge, skills, and abilities;

(B) Located where the worker customarily worked, or within reasonable commuting distance of the worker's residence. A reasonable commuting distance is no more than 50 miles one-way modified by other factors including, but not limited to:

(i) Wage of the job;

(ii) The pre-injury commute;

(iii) The worker's physical capacities, if they restrict the worker's ability to sit or drive for 50 miles;

(iv) Commuting practices of other workers who live in the same geographic area; and

(v) The distance from the worker's residence to the nearest cities or towns that offer employment opportunities;

(C) That pays a suitable wage or would average on a year-round basis a suitable wage;

(D) That is permanent. Temporary work is suitable if the worker's job at injury was temporary and the worker has transferable skills to earn, on a year-round basis, a suitable wage; and

(E) For which a reasonable labor market as described under OAR 436-120-0157 is documented to exist.

(b) "Suitable employment" or "suitable job" may also be modified or new employment resulting from an employer at injury activated use of the Preferred Worker Program under OAR 436-110, as described in OAR 436-120-0165(1)(c).

(13) "Suitable wage" means:

(a) For the purpose of determining eligibility for vocational assistance, a wage at least 80 percent of the adjusted weekly wage.

(b) For the purpose of providing or ending vocational assistance, a wage as close as possible to 100 percent of the adjusted weekly wage. This wage may be considered suitable if less than 80 percent of the adjusted weekly wage, if the wage is as close as possible to the adjusted weekly wage.

(14) "Training" means a vocational rehabilitation service provided to a worker who is enrolled and actively engaged in an approved training plan as documented on Form 1081, "Training Plan."

(15) "Transferable skills" means the knowledge and skills demonstrated in past training or employment that make a worker employable in suitable new employment. More general characteristics such as aptitudes or interests do not, by themselves, constitute transferable skills.

(16) "Vocational assistance" means any of the services, goods, allowances, and temporary disability compensation under these rules to assist an eligible worker return to work. This does not include activities for determining a worker's eligibility for vocational assistance.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 1/29/15 as WCD Admin. Order 15-056, eff. 3/1/15
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0008 Administrative Review and Hearings

(1) Administrative review.

(a) A worker wanting review of any vocational eligibility evaluation or vocational assistance matter must request administrative review by the director.

(b) Under ORS 656.340(11) and OAR 436-120-0185 when the worker and insurer are unable to agree on a counselor, the insurer must request administrative review by the director.

(c) Effective vocational assistance is best realized in a nonadversarial environment. The first objective of administrative review is to bring the parties to resolution through alternative dispute resolution procedures, including mediation conferences, whenever possible and appropriate. When a dispute is not resolved through mutual agreement or dismissal, the director will close the record and issue a director's review and order.

(d) The worker's request for review must be submitted to the division no later than the 60th day after the date the worker received written notice of the insurer's action.

(e) Issues raised by the worker where written notice was not provided may be reviewed at the director's discretion.

(f) The worker, insurer, employer at injury, and provider must supply needed information, attend conferences and meetings, and participate in the administrative review process as required by the director.

(A) Upon the director's request, any party to the dispute must provide available information within 14 days of the request.

(B) The insurer must promptly schedule, pay for, and submit to the division any medical or vocational tests, consultations, or reports required by the director.

(C) The worker, insurer, employer at injury, or provider must simultaneously provide copies of material to the other parties to the dispute when submitting material to the division.

(D) Failure to comply with this subsection may result in the director dismissing the administrative review or deciding the issue on the basis of available information when the worker, insurer, provider, or employer at injury fails to comply without reasonable cause.

(g) The director may issue a letter of agreement when the parties resolve a dispute within the scope of these rules.

(A) Any agreement may include an agreement on attorney fees, if any, to be paid to the worker's attorney.

(B) The agreement will become effective on the 10th day after the letter of agreement is issued unless the agreement specifies otherwise.

(C) The director may revise a letter of agreement.

(h) The parties have 60 days from the date the director's review and order is issued to request a hearing under OAR 436-001-0019.

(i) The director may on the director's own motion reconsider or withdraw any order that has not become final by operation of law.

(j) A party may request reconsideration of a director's review and order upon an allegation of error, omission, misapplication of law, incomplete record, or the discovery of new material evidence that could not reasonably have been discovered and produced during the review.

(A) The director may grant or deny a request for reconsideration at the director's sole discretion.

(B) A request for reconsideration must be received by the division before the director's review and order becomes final or, if appealed, before the proposed and final order is issued.

(C) The parties may submit new material evidence consistent with this rule and may respond to such evidence submitted by others.

(D) Parties must simultaneously notify all other interested parties of their contentions and provide them with copies of all additional information presented.

(E) A request for reconsideration does not stay the 60-day time period within which the parties may request a hearing.

(2) Attorney fees.

Attorney fees will be awarded as provided in ORS 656.385(1) and OAR 436-001-0400 to 436-001-0440.

(3) Hearings before an administrative law judge.

(a) Under ORS 656.340(16) and 656.704(2), any party that disagrees with an order issued under subsection (1)(c) of this rule or a dismissal may request a hearing as provided in OAR 436-001-0019 within 60 days of the mailing date of the order.

(b) Under ORS 656.704(2), any party that disagrees with an order of dismissal based on lack of jurisdiction or denial of reimbursement for vocational assistance costs may request a hearing as provided in OAR 436-001-0019 within 30 days after the party received the dismissal or written denial.

(c) Under ORS 656.704(2), an insurer sanctioned under OAR 436-120-0900, a provider or counselor sanctioned under ORS 656.340(9) and OAR 436-120-0915, a provider denied registration under ORS 656.340(9)(a) and OAR 436-120-0800, or an individual denied certification under ORS 656.340(9)(a) and OAR 436-120-0810, may request a hearing as provided in OAR 436-001-0019 no later than 60 days after the party received notification of the action.

(4) Contested case hearings of civil penalties.

Under ORS 656.740 an insurer or an employer may appeal a proposed order or proposed assessment of civil penalty issued under ORS 656.745 and OAR 436-120-0900 as follows:

(a) The insurer or employer must submit the request for hearing in writing to the division. The request must specify the grounds upon which the proposed order or assessment is contested.

(b) The party must submit the request to the division within 60 days after the mailing date of the notice of the proposed order or assessment.

(c) The division will forward the request and other pertinent information to the Hearings Division of the Workers' Compensation Board.

(d) The Hearings Division will conduct the hearing under ORS 656.740 and ORS chapter 183.

(5) Director's order.

At any time, the director may order the insurer to determine eligibility or provide specified vocational assistance to achieve compliance with ORS chapter 656 and these rules. The order may be appealed as provided by statute and these rules.

Statutory authority: ORS 656.704(2), 656.726(4)
Statutes implemented: ORS 656.704, 656.340, 656.447, 656.740, 656.745

Hist: Amended 9/15/10 as WCD Admin. Order 10-056, eff. 11/15/10
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0012 General Requirements for Notices and Warnings

(1) Insurer or provider may issue.

The insurer is responsible for mailing all notices and warnings required by these rules but may delegate that responsibility to the provider that is providing vocational assistance to the worker.

(2) Required content.

All notices and warnings to the worker issued under these rules must:

(a) Use the applicable heading. If a notice is used for more than one purpose, it must include all the headings that apply;

(b) Be in writing, signed, and dated;

(c) State the basis for the decision;

(d) Include the effective date of each action in the heading;

(e) Cite the relevant rules;

(f) Include the worker's appeal rights. All notices and warnings except those notifying a worker of entitlement to training or deferral of vocational assistance eligibility must contain the worker's appeal rights in bold type, as follows:

> **"If you disagree with this decision, you should contact [insert the person's name and the insurer name] within five days of receiving this letter to discuss your concerns. If you are still dissatisfied, you must contact the Workers' Compensation Division within 60 days of receiving this letter or you will lose your right to appeal this decision. A consultant with the division can talk with you about the disagreement and, if necessary, will review your appeal. The address and telephone number of the division are: Employment Services Team, Workers' Compensation Division, P.O. Box 14480, Salem, Oregon 97309-0405; 1-800-452-0288."**; and

(g) Include the telephone number of the Ombudsman for Injured Workers: 1-800-927-1271.

(3) Mailing and copies.

All notices and warnings must:

(a) Be mailed to the worker's last known address by both regular and certified mail; and

(b) Be copied to the division and worker's attorney, if any, at the same time the notice or warning is mailed to the worker.

(4) Effective date.

A notice is not effective until it is sent to all required parties including the worker's attorney.

(5) Requirements for warning letters.

(a) A warning letter can be issued at any time during the vocational eligibility evaluation or vocational assistance process.

(b) Warning letters do not require specific language in the headings but must include a heading clearly indicating the purpose of the warning.

(c) A warning letter must state what the worker must do, and by when, to avoid ineligibility or the ending of eligibility or training.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0115 Vocational Eligibility Evaluation

(1) Purpose of eligibility evaluation.

An eligibility evaluation is done to determine whether the worker is or is not eligible for vocational assistance.

(2) When an eligibility evaluation is not required.

An eligibility evaluation is not required if:

(a) The worker's claim is reopened under Own Motion under ORS 656.278;

(b) The worker is receiving permanent total disability benefits; or

(c) The worker is deceased.

(3) When an eligibility evaluation is required.

Except as provided in OAR 436-120-0117, the insurer is required to begin an eligibility evaluation for workers with accepted disabling claims within five days of any of the following conditions:

(a) The insurer receives information such as medical or investigative reports that indicate, before the worker is medically stationary, the worker is likely eligible for vocational assistance;

(b) The worker is medically stationary, is not currently receiving vocational assistance, and:

(A) Has not returned to or been released to regular employment; or

(B) Has not returned to other suitable employment with the employer at the time of injury or aggravation; or

(c) Eligibility was previously determined under the current opening of the claim and the insurer has accepted a new condition.

(4) Services may be provided at any time.

Nothing in these rules prevents an insurer from finding a worker eligible and providing vocational assistance at any time.

(5) Worker request for vocational assistance.

If the insurer receives a request for vocational assistance from the worker and the insurer is not required to do an eligibility evaluation, the insurer may not deny eligibility for assistance, but must notify the worker in writing within 14 days of the request of:

(a) The reasons an eligibility evaluation is not required;

(b) The circumstances that require an eligibility evaluation; and

(c) Instructions to contact the division with questions about vocational assistance eligibility requirements and procedures.

(6) The eligibility evaluation process.

(a) The eligibility evaluation must be done by a counselor.

(b) At the insurer's request, the worker must provide vocationally relevant information needed to determine eligibility within a reasonable time set by the insurer.

(c) The insurer must provide the counselor with all relevant vocational and medical information.

(d) The eligibility evaluation process, including notifying the worker of the results under section (9) of this rule, must be completed within 30 days of when the process began under section (3) of this rule, unless extended under section (7) of this rule.

(e) Either the insurer or the counselor may notify the worker of the results of the eligibility evaluation under section (9) of this rule.

(7) Extension of time.

(a) The counselor may extend the time frame in section (6) of this rule for completing the eligibility evaluation if the counselor is unable to obtain needed information from the worker, employer, or medical provider.

(b) An extension of time may be for no more than 30 days.

(c) The counselor must notify the worker of the extension under section (8) of this rule, and submit a copy of the letter to the division.

(8) Notice of extension of time.

The letter informing the worker that the time frame for completing the eligibility evaluation process has been extended must:

(a) Clearly indicate the purpose of the letter;

(b) Explain the reason for the extension of time;

(c) Explain what information is necessary to complete the eligibility evaluation process;

(d) State when the eligibility evaluation process is expected to be completed;

(e) Be mailed to the worker within five days of the date the counselor determines an extension is needed under subsection (7)(a) of this rule; and

(f) Include the following language in bold type:

"If you have questions about the vocational assistance process, contact [use appropriate reference to the insurer]. If you still have questions contact the Workers' Compensation Division's toll free number 1-800-452-0288."

(9) Results of the eligibility evaluation.

The results of the eligibility evaluation must be mailed to the worker following the requirements for the appropriate notice under subsection (a) or (b) of this section.

(a) The NOTICE OF ELIGIBILITY FOR VOCATIONAL ASSISTANCE must:

(A) Include the worker's responsibilities, as specified in OAR 436-120-0197(2) and 436-120-0520(1);

(B) Include the following statement in bold type:

"You have the right to request a return-to-work plan conference if the insurer does not approve a return-to-work plan within 90 days of determining you are entitled to a training plan, or within 45 days of determining you are entitled to a direct employment plan. The purpose of the conference will be to identify and remove all obstacles to return-to-work plan completion and approval. The insurer, the worker, the counselor, and any other parties involved in the return-to-work process must attend the conference. The insurer or the worker may request a conference with the division if other delays in the vocational assistance process occur. Your request for this conference should be directed to the Employment Services Team of the Workers' Compensation Division. The address and telephone number of the division are: Employment Services Team, Workers' Compensation Division, P.O. Box 14480, Salem, Oregon 97309-0405; 1-800-452-0288.";

(C) Explain that the worker and the insurer must agree on the selection of a counselor, and:

(i) Provide instructions for the worker to access the list of providers on the division's website (wcd.oregon.gov/rtw/Pages/voc-assistance.aspx);

(ii) Include a phone number for the worker to call to request a paper copy of the list; and

(iii) Include the following language in bold type:

"If you have questions about the vocational counselor selection process, contact [use appropriate reference to the insurer]. If you still have questions, call the Workers' Compensation Division at 1-800-452-0288.";

(D) Include information about the Preferred Worker Program;

(E) Explain what the worker can do if he or she disagrees with something the insurer does; and

(F) Explain direct employment services and state the worker is not entitled to training, if the worker is entitled to direct employment services but not training.

(b) The NOTICE OF INELIGIBILITY FOR VOCATIONAL ASSISTANCE must include:

(A) Information about services that may be available at no cost from the Oregon Employment Department or the Office of Vocational Rehabilitation Services;

(B) A brief description of the Preferred Worker Program benefits and contact information. The information can be part of the notice or a separate document attached to the notice; and

(C) A list of suitable occupations the worker can perform without being retrained, if the notice is based on a finding that the worker does not have a substantial handicap to employment.

(10) Multiple claims.

Vocational assistance may only be provided for one claim at a time. If the worker is eligible for vocational assistance under two or more claims, the claim for the injury with the most severe vocational impact is the claim that gave rise to the need for vocational assistance. The parties may agree to provide services for more than one claim at a time, and extend time and fee limits beyond those allowable in these rules.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0117 Deferral of Eligibility Evaluation

(1) Deferral of eligibility evaluation.

The eligibility evaluation may be deferred when all of the following circumstances exist:

(a) The employer at injury has activated Preferred Worker Program benefits under OAR 436-110;

(b) The employer has made a written job offer to the worker that includes the following information:

(A) The start date;

(B) Wage and hours;

(C) Job site location;

(D) Description of job duties that includes physical requirements; and

(E) A statement that the job does not begin until any modifications are in place;

(c) The worker has agreed in writing to accept the new or modified job; and

(d) If the new or modified job needs worksite modifications to enable the worker to perform the job duties within the worker's injury-caused limitations:

(A) The modifications are in progress but not yet complete and the worker is working in a temporary modified position with the employer at injury that accommodates the worker's restrictions; or

(B) The worksite modifications are in place and the worker is working in and receiving payment for the new or modified job.

(2) Notice of deferral.

(a) When the eligibility evaluation process is deferred under this rule, the insurer must mail the worker a NOTICE OF DEFERRAL OF VOCATIONAL ASSISTANCE ELIGIBILITY EVALUATION.

(b) The notice must be mailed within five days of the date the conditions in section (1) exist.

(c) The notice must:

(A) Inform the worker that the eligibility evaluation has been deferred because the employer at injury has activated preferred worker benefits;

(B) Inform the worker that, if the job with the employer at injury does not begin on the date stated in the job offer letter, the worker can ask the insurer to resume the eligibility evaluation process; and

(C) Include the following language in bold type:

"If you have questions about the deferral of the process for determining your eligibility for vocational assistance, contact [use appropriate reference to the insurer]. If you still have questions contact the Workers' Compensation Division's toll free number 1-800-452-0288."

(3) Resumption of eligibility evaluation process.

If the eligibility evaluation has been deferred under this rule, the insurer must resume the process within 14 days of:

(a) A determination that preferred worker benefits will not be provided;

(b) Termination of the Preferred Worker Program agreement;

(c) Termination of the job offer; or

(d) The temporary modified position ends and the worksite modifications are still in progress.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended and renumbered 11/28/16 from 436-120-0155, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0145 Vocational Assistance Eligibility

(1) A worker whose permanent total disability benefits have been terminated by a final order is eligible for vocational assistance.

(2) A worker is eligible for vocational assistance if all of the following conditions are met:

(a) The worker is authorized to work in the United States;

(b) The worker is available in Oregon or within commuting distance of Oregon, unless:

(A) The worker states in writing that within 30 days of being determined eligible for vocational assistance the worker will move back to Oregon, or within commuting distance of Oregon, at the worker's expense;

(B) The worker did not work and live in Oregon at the time of the injury;

(C) The worker needs to live outside of Oregon due to financial hardship, family circumstances over which the worker has no control, or other similar situation; or

(D) The training program or supporting labor market for a specific vocational goal is only available outside of Oregon;

(c) As a result of the limitations caused by the injury or aggravation, the worker:

(A) Is not able to return to regular employment;

(B) Is not able to return to suitable and available work with the employer at injury or aggravation; and

(C) Has a substantial handicap to employment and requires assistance to overcome that handicap;

(d) The worker was not employed in suitable employment for at least 60 days after the injury or aggravation;

(e) The worker did not refuse or fail to make a reasonable effort in available light-duty work intended to result in suitable employment. Before finding the worker ineligible, the insurer must document the existence of one or more suitable jobs that would be available for the worker after completion of the light-duty work. If the employer at injury offers such employment to a worker who is not medically stationary, the offer must be made in accordance with OAR 436-060-0030;

(f) The worker is available for vocational assistance. If the worker is not available, the insurer must determine if the reasons are for reasonable or unreasonable cause before finding the worker ineligible. If the reason was for incarceration, this reason must be stated in the notice to the worker. Declining vocational assistance to accept modified or new employment that results from an employer at injury activated use of the Preferred Worker Program, under OAR 436-110, is reasonable cause; and

(g) The worker did not refuse or otherwise relinquish his or her rights to vocational assistance in writing.

(3) Individuals covered under ORS 656.033, 656.046, 656.135, or 656.138 (work experience program participants, apprentices, trainees), are eligible for vocational assistance if they

otherwise meet the eligibility requirements in section (2) of this rule. For purposes of vocational assistance:

(a) The employer at injury is the district, college, or school conducting the program or project in which the individual was injured;

(b) Regular employment is the job for which the individual was being trained at the time of the injury; and

(c) The assumed wage upon which premium was based, but in no event less than minimum wage, should be used to determine suitable wage under OAR 436-120-0147.

(4) The worker must participate in the vocational assistance process and must provide relevant information. If the worker does not participate, or fails to provide relevant information, the insurer must issue a written warning before finding the worker ineligible under this rule.

(5) The worker must not misrepresent a matter material to evaluating eligibility.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.206, 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0147 Establishing the Adjusted Weekly Wage

(1) General provisions.

(a) To determine a suitable wage the insurer must first establish the adjusted weekly wage as described in this rule.

(b) The insurer must calculate the adjusted weekly wage whenever determining or redetermining a worker's eligibility for vocational assistance.

(c) All figures used in determining a weekly wage by this method must be supported by verifiable documentation such as the worker's state or federal tax returns, payroll records, or reports of earnings or unemployment insurance payments from the Oregon Employment Department.

(d) If the insurer is unable to obtain complete information to calculate the weekly wage under section (3) of this rule, but the worker does provide verifiable documentation to establish wages at the time of injury, the insurer must make a reasonable calculation of the worker's weekly wage based on the verifiable documentation available.

(2) Definitions.

For the purposes of this rule, the following definitions apply:

(a) **"Adjusted weekly wage"** is the wage currently paid as calculated under this rule.

(b) **"Cost-of-living adjustments"** or **"collective bargaining adjustments"** are increases or decreases in the wages of all workers performing the same or similar jobs for a specific employer. These adjustments are not variations in wages based on skills, merit, seniority, length of employment, or number of hours worked.

(c) **"Earned income"** means gross wages, salary, tips, commissions, incentive pay, bonuses, and the reasonable value of other consideration (such as housing, utilities, and food) received from all employers for services performed from all jobs held at the time of injury or aggravation. Earned income also means gross earnings from self-employment after deductions of business expenses excluding depreciation. Earned income does not include fringe benefits such as medical, life, or disability insurance, employer contributions to pension plans, or reimbursement of the worker's employment expenses such as mileage or equipment rental.

(d) **"Job at aggravation"** means the job or jobs the worker held on the date of the aggravation claim or, for a worker not employed at the time of aggravation, the last job or concurrent jobs held before the aggravation. The job does not need to be subject employment. Volunteer work is not a job for purposes of this subsection.

(e) **"Job at injury"** is the job on which the worker originally sustained the compensable injury. For an occupational disease, the job at injury is the job the worker held at the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease. Volunteer work is not a job for purposes of this subsection.

(f) **"Permanent employment"** is a job with no projected end date or a job that had no projected end date at the time of hire. Permanent employment may be year-round or seasonal.

(g) **"Permanent, year-round employment"** is permanent employment in which the worker worked or was scheduled or projected to work in 48 or more calendar weeks a year. Paid leave is counted as work time. Permanent year-round employment includes trial service. It does not include employment with an annual salary set by contract or self-employment.

(h) **"Temporary disability"** means wage loss replacement for the job at injury.

(i) **"Time of injury"** means, in the case of an injury, the date of injury or, in the case of an occupational disease, the time there is medical verification that the worker is unable to work because of the disability caused by the occupational disease.

(j) **"Trial service"** is employment designed to lead automatically to permanent, year-round employment subject only to the employee's satisfactory performance during the trial service period.

(3) Determining weekly wage.

The insurer must determine the nature of the job at injury and any other paid jobs held at the time of injury, or the job or jobs at aggravation, and this must include contacting the employer at injury to verify the worker's employment status.

(a) When the job at injury or any other paid jobs held at the time of injury, or the job at aggravation was **seasonal or temporary**, calculate the worker's weekly wage as follows, then convert to the adjusted weekly wage as described in section (4) of this rule:

(A) When the worker's regular employment is the **job at injury** and the worker did not hold more than one job at the time of injury, and did not receive unemployment insurance benefits during the 52 weeks before the injury, use the same wage upon which temporary disability was based.

(B) When the worker's regular employment is the **job at aggravation** and the worker did not hold more than one job at the time of aggravation, and did not receive unemployment insurance benefits during the 52 weeks before the aggravation, use the same methods used to calculate temporary disability as described under OAR 436-060-0025 that was in effect on the date of injury.

(C) When the worker held **more than one job** at the time of injury or aggravation, and did not receive unemployment insurance payments during the 52 weeks before the date of the injury or aggravation, divide the worker's earned income by the number of weeks the worker worked in those jobs during the 52 weeks before the date of injury or aggravation.

(D) When the worker held **one or more jobs** at the time of injury or aggravation, and received unemployment insurance payments during the 52 weeks before the date of the injury or aggravation, combine the earned income with the unemployment insurance payments and divide the total by the number of weeks the worker worked in those jobs and received unemployment insurance payments during the 52 weeks before the date of the injury or aggravation.

(b) When subsection (3)(a) of this rule does not apply, calculate the worker's weekly wage as follows, then convert to the adjusted weekly wage as described in section (4) of this rule:

(A) When the worker's regular employment is the **job at injury** and the worker **did not hold more than one job** at the time of injury, use the same wage upon which temporary disability was based.

(B) When the worker's regular employment is the **job at injury** and the worker **held more than one job** at the time of injury, use the same methods used to calculate temporary disability as described under OAR 436-060-0025 that was in effect on the date of injury. The job does not need to be subject employment. Volunteer work is not a job for purposes of this paragraph.

(C) When the worker's regular employment is the **job at aggravation**, use the same methods used to calculate temporary disability as described under OAR 436-060-0025 that was in effect on the date of injury.

(4) Adjusted weekly wage.

After arriving at the worker's weekly wage under section (3) of this rule, establish the adjusted weekly wage by determining the percentage increase or decrease from the date of injury or aggravation, or last day worked before aggravation, to the date of calculation, as follows:

(a) Contact the employer at injury regarding any cost-of-living or collective bargaining adjustments for workers performing the same job. Adjust the total of all of the weekly wages from section (3) of this rule by any percentage increase or decrease;

(b) If the employer at injury is no longer in business and the worker's job was covered by a union contract, contact the applicable union for any cost-of-living or collective bargaining adjustments. Adjust the total of all of the weekly wages from section (3) of this rule by the percentage increase or decrease;

(c) If the employer at injury is no longer in business or does not currently employ workers in the same job category, adjust the total of all of the weekly wages from section (3) of this rule by the appropriate factor from the cost-of-living matrix in Bulletin 124;

(d) If the worker's regular employment was the employment the worker held at the time of aggravation, adjust the total of all of the weekly wages from section (3) of this rule by the appropriate factor from the cost-of-living matrix in Bulletin 124.

Statutory authority: ORS 656.340(9), ORS 656.726(4)
Statutes implemented: ORS 656.340(5) and (6)
Hist: Amended and renumbered 11/28/16 from 436-120-0007, as Admin. Order 16-058, eff. 1/1/17
Amended 2/22/18 as Admin. Order 18-051, eff. 2/23/18
Amended 7/17/18 as Admin. Order 18-059, eff. 8/1/18
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0157 Determining Substantial Handicap to Employment

(1) A counselor must do a substantial handicap evaluation as part of the eligibility evaluation when applicable.

(2) To complete the substantial handicap evaluation the counselor must submit a report documenting the following information about the worker:

(a) Relevant work history for at least the preceding five years;

(b) Level of education, proficiency in spoken and written English or other languages, and achievement or aptitude test data if it exists;

(c) Adjusted weekly wage and suitable wage;

(d) Permanent limitations due to the injury;

(e) An analysis of the worker's transferable skills, if any;

(f) A list of physically suitable jobs for which the worker has the knowledge, skills, and abilities, that pay a suitable wage, and for which a reasonable labor market is documented to exist as described in subsection (g);

(g) An analysis of the worker's labor market using standard labor market reference materials, including but not limited to information provided by the Employment Department's Oregon Labor Market Information System (OLMIS) and Oregon Wage Information (OWI) (available on the Oregon Employment Department's website at www.qualityinfo.org/). When using OWI data, the presumed standard will be the 10th percentile unless there is sufficient evidence that a higher or lower wage is more appropriate; and

(h) Consideration of the vocational impact of any limitations that existed before the injury.

(3) When determining the worker's eligibility for vocational assistance, the insurer may consider any knowledge, skills, and abilities the worker gained after the date of injury or aggravation that resulted from training provided by the employer; however, the insurer may not include any knowledge, skills, or abilities the worker gained at his or her own expense after the date of injury or aggravation.

Statutory authority: ORS 656.726(4)
Statutes implemented: ORS 656.340(5) and (6)
Hist: Amended and renumbered 11/28/16 from 436-120-0340, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0165 End of Eligibility for Vocational Assistance

(1) Reasons for ending eligibility.

A worker's eligibility for vocational assistance ends when any of the following conditions apply:

(a) Based on **new information** that did not exist or that could not have been obtained with reasonable effort at the time the insurer determined eligibility, the worker no longer meets the eligibility requirements;

(b) The worker has been employed in **suitable employment** for at least 60 days after the date of injury or date of aggravation;

(c) The worker has been employed in suitable employment that is modified or new employment resulting from an **employer-at-injury activated use of the Preferred Worker Program** under OAR 436-110 and:

(A) If there are no worksite modifications, premium exemption has been effective for 12 months;

(B) If there is a worksite modification, 12 months have passed since the director determined it to be complete; or

(C) During the 12-month period in paragraph (A) or (B), the worker is terminated for cause or voluntarily resigns for a reason unrelated to the work injury;

(d) The worker, before beginning an authorized return-to-work plan, **refused an offer of suitable employment**. If the employer-at-injury offers employment to a worker who is not medically stationary, the offer must be made in accordance with OAR 436-060-0030;

(e) The worker, before beginning an authorized return-to-work plan, **left suitable employment** after the injury or aggravation for a reason unrelated to the limitations caused by the injury;

(f) The worker, before beginning an authorized return-to-work plan, **refused or failed to make a reasonable effort in available light-duty work** intended to result in suitable employment. Before ending eligibility, the insurer must document the existence of one or more suitable jobs that would be available for the worker after completion of the light-

duty work. If the employer at injury offers such employment to a worker who is not medically stationary, the offer must be made in accordance with OAR 436-060-0030;

(g) The worker, after completing an authorized training plan, **refused an offer of suitable employment;**

(h) The worker **declined or became unavailable** for vocational assistance.

(A) The insurer must determine if the reasons are for reasonable or unreasonable cause before ending the worker's eligibility.

(B) If the reason was for incarceration, this reason must be stated in the notice to the worker.

(C) Declining vocational assistance to accept modified or new employment that results from an employer-at-injury activated use of the Preferred Worker Program, under OAR 436-110, is reasonable cause;

(i) The worker **refused a suitable training site** after the counselor and worker have agreed in writing upon a return-to-work goal;

(j) The worker **failed after written warning to participate in the development or implementation** of a return-to-work plan. No written warning is required if the worker fails to attend two consecutive training days and fails, without reasonable cause, to notify the counselor or the insurer by the close of the next business day;

(k) The worker's lack of suitable employment **cannot be resolved by providing vocational assistance**. This includes circumstances in which the worker cannot benefit from, or participate in, vocational assistance because of medical conditions unrelated to the injury;

(l) The worker **misrepresented information** relevant to providing vocational assistance;

(m) The worker **refused after written warning to return property** provided by the insurer or reimburse the insurer as required. No vocational assistance will be provided under subsequent openings of the claim until the worker returns the property or reimburses the funds;

(n) The worker **misused funds** provided for the purchase of property or services. No vocational assistance will be provided under subsequent openings of the claim until the worker reimburses the insurer for the misused funds;

(o) After written warning the worker continues to **harass** any participant to the vocational process. This subsection does not apply if such behavior is the result of a documented medical or mental condition;

(p) The worker entered into a **claim disposition agreement** and disposed of vocational rights. The parties may agree in writing to suspend vocational assistance pending approval of the agreement by the Workers' Compensation Board. The insurer must end eligibility when the Workers' Compensation Board approves the claim disposition agreement that disposes of vocational assistance rights. No notice regarding the end of eligibility is required; or

(q) The worker received **maximum direct employment services** and is not entitled to other categories of vocational assistance.

(2) Notice of end of eligibility.

When an insurer ends a worker's eligibility for vocational assistance, the insurer must mail to the worker a NOTICE OF END OF ELIGIBILITY FOR VOCATIONAL ASSISTANCE within five days of the end of eligibility date. The notice must include:

(a) The date when eligibility ended. The effective date is the worker's last date of eligibility; and

(b) The reason the worker's eligibility for vocational assistance is ending. However, notice is not required if the insurer is ending the worker's eligibility because the worker has given up his or her vocational assistance rights through a claim disposition agreement.

(3) Report to director.

When an insurer ends a worker's eligibility for vocational assistance, the insurer must submit to the division, within 30 days after the date eligibility ends, Form 2800, "Vocational Closure Report." The report must include:

(a) The effective date for the end of eligibility;

(b) The reason for the end of eligibility; and

(c) Return-to-work and provider information.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0175 Redetermining Eligibility for Vocational Assistance

If a worker was previously determined ineligible for vocational assistance or the worker's eligibility for vocational assistance ended, the insurer must redetermine eligibility within 30 days of notification of a change of any of these circumstances:

(1) The worker, for reasonable cause, was unavailable for vocational assistance and is now available;

(2) The worker's lack of suitable employment could not be resolved by providing vocational assistance. The insurer may require the worker to provide evidence that circumstances have changed;

(3) The worker declined vocational assistance to accept modified or new employment that resulted from an employer at injury activated use of preferred worker benefits under OAR 436-110. If the job was not suitable, the worker must request redetermination within 30 days of termination of the employment for which preferred worker benefits were provided;

(4) The worker was not available for vocational assistance in Oregon or within commuting distance of Oregon. The worker must request redetermination within six months of receiving the insurer's notice that he or she was not eligible for this reason;

(5) The worker, who was not authorized to work in the United States, is now authorized to work in the United States. Within six months of the date of the worker's receipt of the insurer's notice of ineligibility or end of eligibility, the worker must:

(a) Request redetermination; and

(b) Submit evidence to the insurer that the worker has applied for authorization to work in the United States and is awaiting a decision by the U.S. Citizenship and Immigration Services (USCIS). The worker must provide the insurer with a copy of any decision by the USCIS within 30 days of receipt. The insurer must redetermine eligibility upon receipt of documentation of the worker's authorization to work in the United States;

(6) Before claim closure, the worker's limitations due to the injury became more restrictive;

(7) Before claim closure, the insurer accepts a new condition that was not considered in the original determination of the worker's eligibility; or

(8) The worker's average weekly wage is redetermined and increased.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0177 Selection of Category of Vocational Assistance

(1) The insurer must select one of the following categories of vocational assistance before referring a worker to a counselor:

(a) **Direct employment services**, if the worker has the necessary transferable skills to obtain suitable new employment.

(b) **Training**, if the worker needs training in order to return to employment that pays a wage significantly closer to 100 percent of the adjusted weekly wage. "Significantly closer" may vary depending on several factors, including, but not limited to: the worker's wage at injury, adaptability, skills, geographic location, limitations, and the potential for the worker's income to increase with time as the result of training.

(2) The insurer must notify the worker of the category selection and the reason for the selection in the NOTICE OF ELIGIBILITY FOR VOCATIONAL ASSISTANCE issued under OAR 436-120-0115(9).

(3) The insurer must reconsider the category of vocational assistance within 30 days of the insurer's knowledge of a change in circumstances including, but not limited to:

(a) A change in the worker's permanent limitations;

(b) A change in the labor market; or

(c) The category of vocational assistance proves to be inappropriate.

(4) The insurer must notify the worker within five days if the reconsideration under section (3) results in a change in the vocational assistance category.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340(7)
Hist: Amended and renumbered 11/28/16 from 436-120-0400, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0185 Choosing a Counselor

(1) Choosing a counselor.

(a) The insurer and worker must agree on a counselor within 14 days of the worker being determined eligible for vocational assistance.

(b) When the parties agree on a counselor, the insurer must mail the worker a NOTICE OF SELECTION OF VOCATIONAL COUNSELOR.

(c) If the parties do not agree on a counselor, the insurer must notify the division within five days, and the director will select a counselor.

(2) Changing counselors.

(a) If the worker or insurer requests a change in counselor, the insurer and worker must agree on a new counselor within 14 days of the request.

(b) If the parties do not agree on a new counselor, the insurer must refer the matter to the division within five days.

(c) Any time there is a change in counselor, the insurer must mail the worker a NOTICE OF CHANGE OF VOCATIONAL COUNSELOR.

Statutory authority: ORS 656.340, ORS 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended and renumbered 12-1-2009 from OAR 436-120-0320 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0187 Optional Services

(1) Optional services are services provided to:

(a) A worker who is not eligible for vocational assistance; or

(b) A worker who is eligible for vocational assistance, in excess of the services described in these rules.

(2) Optional services are provided at the discretion of the insurer.

(3) The insurer may not use optional services to circumvent the intent of these rules.

Statutory authority: ORS 656.340, 656.704, 656.726
Statutes implemented: ORS 656
Hist: Amended and renumbered 11/28/16 from 436-120-0455, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0197 Direct Employment

(1) Direct employment services, generally.

(a) Direct employment services may include, but are not limited to:

(A) Employment counseling;

(B) Job search skills instruction, which teaches workers how to write resumes, research the job market, locate suitable new employment, complete employment applications, interview for employment, and develop other skills related to obtaining suitable new employment;

(C) Job development with related return-to-work activities, which helps the worker contact appropriate prospective employers; and

(D) Job analysis.

(b) If the insurer determines the worker is entitled to direct employment services, the insurer must provide the worker with at least four months of direct employment services.

(c) A direct employment plan must include a description of the worker's transferable skills that relate to the vocational goals and a discussion of why training will not bring the worker a wage significantly closer to 100 percent of the adjusted weekly wage at the time of injury.

(d) Direct employment services must be provided by a counselor.

(e) Direct employment services must begin on the date the insurer approves a direct employment plan, or on the completion date of an authorized training plan.

(f) If the insurer does not approve a direct employment plan within 45 days of determining the worker entitled to a direct employment plan, the insurer must contact the division within five days to schedule a conference.

(A) The purpose of the conference will be to identify and remove all obstacles to plan completion and approval.

(B) The insurer, the worker, the counselor, and any other parties involved in the process must attend the conference.

(C) The conference may be postponed for a period of time agreed on by the parties.

(D) The insurer or the worker may request a conference if other delays in the process occur.

(g) The insurer must provide return-to-work follow-up for at least 60 days after the worker becomes employed to ensure the work is suitable and to provide any necessary assistance that enables the worker to continue the employment.

(2) Responsibilities in direct employment plan.

(a) The worker is responsible for the following in a direct employment plan:

(A) Maintain regular contact with the counselor;

(B) Fully participate in plan services;

(C) Follow up on all job leads in a timely manner;

(D) Be an active participant in the job search;

(E) Accept suitable employment if it is offered and notify the counselor immediately;

(F) Promptly inform the counselor of any problems that might affect participation in the plan; and

(G) Meet any responsibilities agreed to in the plan.

(b) The counselor is responsible for the following in a direct employment plan:

(A) Provide instruction on job-search skills, as necessary;

(B) Provide job development, as necessary;

(C) Provide timely, accurate progress reports to the insurer; and

(D) Meet any responsibilities agreed to in the plan.

(3) Plan amendments.

(a) If the vocational goal is later changed, the insurer must amend the direct employment plan. All amendments to the plan must be initialed by the insurer, counselor, and worker.

(b) If the insurer amends a proposed plan, the insurer must indicate what the changes are and why they are necessary.

(4) Reporting to the director.

The direct employment plan and any amendments must be submitted to the division within five days of plan approval using Form 1083, "Direct Employment Plan."

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340(7)
Hist: Amended and renumbered 11/28/16 from 436-120-0430, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0410 Determining a Vocational Goal

A counselor must determine a suitable vocational goal for the worker using one or more of the following:

(1) Vocational testing.

Vocational testing must be administered by an individual certified to administer the test.

(2) Job analysis.

A job analysis is a detailed description of the physical and other demands of a job based on direct observation of the job.

(3) On-the-job evaluation.

An on-the-job evaluation must evaluate a worker's work traits, aptitudes, limitations, potentials, and habits in an actual job environment.

(a) The counselor must perform a job analysis to determine if the job is within the worker's capacities. The insurer must submit the job analysis to the attending physician if there is any question about the appropriateness of the job.

(b) The evaluation should normally be no less than five hours daily for four consecutive days and should normally last no longer than 30 days.

(c) The evaluation does not establish any employer-employee relationship.

(d) A written report must evaluate the worker's performance in the areas originally identified for assessment.

(4) Labor market search.

(a) A labor market search is obtained from direct contact with employers, other actual labor market information, or from other surveys completed within 90 days of the report date.

(b) A labor market search is needed when standard labor market reference materials do not have adequate information upon which to base a decision, or there are questions about a worker's specific limitations, training, and skills that must be addressed with employers to determine if a reasonable labor market exists.

(c) The person providing the information must have hiring responsibility or direct knowledge of the job's requirements and the job must exist at the firm contacted.

(d) The labor market search report must include, but is not limited to:

(A) Date of contact;

(B) Firm name, address, and telephone number;

(C) Name and title of person contacted;

(D) Qualifications of persons recently hired;

(E) Physical requirements;

(F) Wages paid;

(G) Condition of hire (full-time, part-time, seasonal, temporary);

(H) Date and number of last hire(s); and

(I) Available and anticipated openings.

(e) Specific openings found in the course of a labor market search are not, in themselves, proof a reasonable labor market exists.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340(7)
Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff.1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0443 Training - General

(1) Training services include but are not limited to plan development, training, monthly monitoring of training progress, and job placement services.

(2) The training plan must be developed and monitored by a counselor.

(3) The selection of plan objectives and the kind of training must attempt to minimize the length and cost of training necessary to prepare the worker for suitable employment.

(4) If there are any changes made to the original training plan, an addendum to Form 1081, "Training Plan," must be completed, signed by all parties, and submitted to the division.

(5) Basic education may be offered, with or without other training components, to raise the worker's education to a level to enable the worker to obtain suitable employment.

(6) On-the-job training prepares the worker for permanent, suitable employment with the training employer and for employment in the labor market at large. On-the-job training must be considered first in developing a training plan.

(7) Occupational skills training is offered through a community college, based on a predetermined curriculum, at the training employer's location.

(8) Formal training may be offered through a vocational school licensed by an appropriate licensing body, community college, or other post-secondary educational facility that is part of a state system of higher education.

(9) Rehabilitation facilities training provides evaluation, training, and employment for severely disabled individuals.

(10) Notwithstanding OAR 436-120-0145(2)(b), the director may order the insurer, or the insurer may elect, to provide training outside Oregon if such training would be more timely, appropriate, or cost effective than other alternatives.

(11) Training status continues during the following breaks:

(a) A regularly scheduled break of not more than six weeks between fixed school terms;

(b) A break of not more than two weeks between the end of one kind of training and the start of another for which the starting date is flexible; or

(c) A period of illness or recuperation of the worker that does not prevent completion of the training by the planned date.

(12) The insurer must pay the worker temporary disability compensation, under ORS 656.268 and 656.340, when the worker is actively engaged in an approved training plan and there is a Form 1081, "Training Plan," signed by the worker, the insurer, and the counselor who developed the plan.

(13) Temporary disability compensation is limited for each eligibility period to 16 months unless extended to 21 months by the insurer or ordered by the director when the worker provides good cause. Good cause may include but is not limited to the reasons given under section (14) of this rule. In no event may temporary disability compensation during training be paid for more than 21 months.

(14) Training costs may be paid for periods longer than 21 months. Reasons for extending training may include but are not limited to:

(a) Reasons beyond the worker's control;

(b) The worker has an exceptional disability, which is a disability equal to or greater than the complete loss, or loss of use, of both legs, or a brain injury that results in impairment equal or greater than Class 3 as defined in OAR 436-035-0390; or

(c) The worker has an exceptional loss of earning capacity, which exists when no suitable training plan of 18 months or less will eliminate the worker's substantial handicap to employment. The extension must allow the worker to obtain, at the time of completion of the training program, a wage that is as close as possible to the worker's adjusted weekly wage and greater than could be expected with a shorter training program.

(15) An eligible worker is entitled to four months of job placement assistance after completion of training.

(16) When the worker returns to work following training, the insurer must monitor the worker's progress for at least 60 days to assure the suitability of the employment before ending eligibility.

(17) If the worker chooses a training plan period of longer than he or she is entitled to receive under these rules, the worker may supplement training provided by the insurer by completing self-sponsored training or studies. For the purpose of this rule, self-sponsored means the worker is obligated to pay for the training.

(a) The first day of training provided by the insurer will be considered the training start date and the last day of training provided by the insurer will be the training end date.

(b) All self-sponsored training must be completed before the training start date unless the parties otherwise agree.

(c) During self-sponsored training, the insurer may provide optional services under OAR 436-120-0187, including but not limited to payment of expenses for tuition, fees, books, and supplies.

(d) The training plan support document must describe how the worker-sponsored training and the training provided by the insurer will combine to prepare the worker for suitable employment.

(18) The insurer must provide further training to a worker if the initial plan will not be or was not successful to prepare the worker for suitable employment.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 11/12/13 as Admin. Order 13-062, eff. 1/1/14
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0445 Training Requirements

(1) Basic education.

Basic education is limited to nine months unless extended by the insurer.

(2) On-the-job training.

(a) On-the-job training time is limited to 12 months unless extended by the insurer.

(b) The insurer must reimburse the training employer for a portion of the worker's wages.

(c) The on-the-job training contract between the training employer, the insurer, and the worker must include, but is not limited to:

(A) The worker's name;

(B) The employer's legal business name;

(C) The employer's current workers' compensation insurance policy number;

(D) The name of the individual providing the training;

(E) The training plan start and end dates;

(F) The job title and duties;

(G) The skills to be taught;

(H) The base wage and the terms of wage reimbursement;

(I) An agreement that the employer will pay all taxes normally paid on the entire wage and will maintain workers' compensation insurance for the trainee; and

(J) An acknowledgement that the training may not prepare the worker for jobs elsewhere, if the training prepares a worker for a job unique to the training site.

(d) The insurer must pay temporary disability compensation as provided in ORS 656.268.

(e) Unless there is a need to accommodate the worker's documented medical condition or class schedule, the worker's schedule must be the same as for a regular full-time employee.

(3) Occupational skills training.

(a) Occupational skills training is limited to 15 months unless extended by the insurer.

(b) The training is primarily for the worker's benefit. The worker may not receive wages.

(c) Training does not establish any employer-employee relationship with the training employer. The training employer makes no guarantee of employing the worker when the training is completed.

(d) The training employer has a sufficient number of employees to accomplish its regular work and the training of the worker, and the worker does not displace an employee.

(e) Unless there is a need to accommodate the worker's documented medical condition or class schedule, the worker's schedule must be the same as for a regular full-time employee.

(4) Formal training.

(a) Formal training time is limited to 18 months unless extended by the insurer.

(b) Course load must be consistent with the worker's abilities and limitations and the length of time since the worker last attended school.

(c) Courses must relate to the vocational goal.

(5) Training before eligibility determined.

If the worker begins or completes training between the date of injury and the date of the eligibility determination, and then the insurer finds the worker eligible for vocational assistance and finds the worker's training suitable, the insurer must reimburse the worker for costs required by that training and verified by the insurer or the director, including temporary disability as required under ORS 656.268 and 656.340.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0500 Training: Development and Implementation

(1) Collaborative effort.

A training plan should be a collaborative effort between the counselor and the worker and should include all the rights and responsibilities of the worker, the insurer, and the counselor.

(2) Review of the plan.

Before submitting the plan to the insurer, the counselor must review the plan and plan support with the worker. The worker must have the opportunity to review the plan with the worker's attorney, if any, before signing it. The counselor must confirm the worker's understanding of and agreement with the plan by obtaining the worker's signature.

(3) Copies of plan.

The counselor must submit copies of the plan, signed by the counselor and the worker, to all parties.

(4) Plan approval or disapproval.

Within 14 days of receipt of the signed training plan, the insurer must approve or disapprove the plan and notify the parties.

(a) If the insurer does not have enough information to approve or disapprove the training plan, the insurer must advise the parties what information is needed and when the insurer expects to make a decision.

(b) If the insurer disapproves the training plan, the insurer must issue a NOTICE OF DISAPPROVAL OF TRAINING PLAN, which must explain why the plan is disapproved.

(5) Conference.

If the insurer does not approve a training plan within 90 days of determining the worker is entitled to a training plan, the insurer must contact the division within five days to schedule a conference.

(a) The purpose of the conference will be to identify and remove all obstacles to plan completion and approval.

(b) The insurer, the worker, the counselor, and any other parties involved in the process must attend the conference.

(c) The conference may be postponed for a period of time agreeable to the parties.

(d) The insurer or the worker may request a conference if other delays in the vocational rehabilitation process occur.

(6) Job offer during plan development.

If, during development of a training plan, an employer offers the worker a job, the insurer must perform a job analysis, obtain approval from the attending physician, verify the suitability of the wage, and confirm the offer is for a bona fide, suitable job. If the job is suitable, the insurer must help the worker return to work with the employer. The insurer must provide return-to-work follow-up during the first 60 days after the worker returns to work. If return to work with the employer is not feasible or, during the 60-day follow-up the job proves unsuitable, the insurer must immediately resume development of the training plan.

(7) Plan amendments.

(a) If the vocational goal is later changed, the insurer must amend the training plan. All amendments to the plan must be initialed by the insurer, counselor, and the worker.

(b) If the insurer amends a proposed plan, the insurer must indicate what the changes are and why they are necessary.

(8) Reporting to the director.

The training plan and any amendments must be submitted to the division using Form 1081, "Training Plan."

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340(9)
Hist: Amended 9/15/10 as WCD Admin. Order 10-056, eff. 11/15/10
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0510 Training Plan Support

(1) Considerations in training plan.

The worker and counselor must work together to develop an appropriate training plan that considers the worker's:

(a) Transferable skills;

(b) Physical and mental capacities and limitations;

(c) Vocational interests;

(d) Educational background and academic skill level;

(e) Pre-injury wage; and

(f) Place of residence and that labor market.

(2) Training plan documentation.

Training plan supporting documentation must contain, but is not limited to, the following:

(a) Specific vocational goals and projected return-to-work wages;

(b) A description of the worker's current medical condition, relating the worker's permanent limitations to the vocational goals;

(c) A description of the worker's education and work history, including job durations, wages, Standard Occupational Classification (SOC) codes or other standardized job titles and codes, and specific job duties. The SOC codes can be found on the Oregon Employment Department OLMIS website at www.qualityinfo.org;

(d) An explanation of why direct employment services will not return the worker to suitable employment;

(e) A summary of the results of any evaluations or testing. If the results do not support the goals, the counselor must explain why the goals are appropriate;

(f) A summary of current labor market information that shows the labor market supports the vocational goals and documents that the worker has been informed of the condition of the labor market;

(g) A labor market search as prescribed in 436-120-0410(4), if needed;

(h) If the labor market information does not support the goals, the counselor must explain why the goals are appropriate. The worker and worker's representative, if any, must acknowledge in writing an awareness of the poor labor market conditions and a willingness to proceed with the plan in spite of these conditions. This acknowledgment must include an understanding the insurer will provide no additional training should the worker be unable to find suitable employment because of the labor market;

(i) A job analysis prepared by the counselor, signed by the worker and by the attending physician or a qualified facility designated by the attending physician, and based on a visit to a worksite comparable to what the worker could expect after completing training. If the attending physician is unable or unwilling to address the job analysis and does not designate a facility as described above, the insurer may submit the job analysis to a qualified facility of its choice. The insurer must submit the resulting information to the attending physician for concurrence. If the attending physician has not responded within 30 days of the date of request for concurrence, the plan may proceed;

(j) A signed on-the-job training contract, if applicable;

(k) A description of the curriculum, which must be term-by-term if the curriculum is for formal training;

(l) Information about the payment of temporary disability compensation while the worker is in training. If the training plan is for a longer period of time than temporary disability benefits may be paid, the plan must notify the worker that temporary disability benefits may end before training ends; and

(m) If material related to a plan is contained in a previous eligibility, the insurer may attach a copy of the evaluation to the plan.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0520 Responsibilities of the Worker and the Counselor

(1) Worker responsibilities.

The worker is responsible for all of the following in a training plan:

(a) Actively participate in all aspects of the plan;

(b) Maintain regular contact with the counselor throughout plan development and as required in the plan;

(c) Notify the counselor if problems develop and continue to attend training during attempts to resolve the issue;

(d) Inform the counselor immediately if anything threatens to interfere with successful completion of the program;

(e) Notify the counselor by the close of the next working day if the worker stops attending training for any reason;

(f) Maintain a 2.0 grade point average each grading period in formal training;

(g) Complete the courses outlined in the curriculum by the plan end date;

(h) Consult with the counselor before adding or dropping courses;

(i) Provide a written training report to the counselor by the fifth day of each month;

(j) Give the counselor a copy of each grade or progress report within 10 days of receipt; and

(k) Meet all responsibilities agreed to in the plan.

(2) Counselor responsibilities.

The counselor is responsible for all of the following in a training plan:

(a) During plan development, provide resource materials about jobs, training programs (if appropriate), labor markets and other related information to help the worker select a vocational goal; direct information gathering; and otherwise help the worker analyze and evaluate options;

(b) Help the worker plan the curriculum and enroll. The counselor must contact the worker, trainers, and training facility counselors to the extent necessary to assure the worker's participation and progress;

(c) Contact the worker on a regular basis;

(d) Monitor and evaluate the plan at least monthly;

(e) Contact the worker's trainers and training site counselors, as necessary to ensure the worker's participation and progress meet the requirements of the rules and are satisfactory to achieve the return-to-work objectives;

(f) Report potential problems in the program to the insurer immediately including additional needs of the worker;

(g) Advise the insurer within one business day of learning of any circumstance indicating a probable or actual interruption in the worker's entitlement to temporary disability benefits;

(h) Provide job-search skills and job development as necessary; and

(i) Meet any responsibilities agreed to in the plan.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0523 Re-evaluating a Training Plan

(1) Reasons to re-evaluate a plan.

The insurer must re-evaluate a training plan and modify or replace the plan when appropriate to ensure the worker's success, when:

(a) A change occurs in the worker's limitations that may make the training inappropriate; or

(b) In an academic program:

(A) There is an indication the worker may not maintain at least a 2.0 grade point average for two grading periods; or

(B) There is an indication the worker may not complete the minimum credit hours required under the training plan.

(2) Academic program.

In an academic program:

(a) The counselor must notify the insurer, and the insurer may give the worker a written warning of the possible end of training, when the worker:

(A) Fails to maintain a 2.0 grade point average for two consecutive grading periods; or

(B) Fails to complete the minimum credit hours in the training plan curriculum.

(b) If the insurer is going to end training for a reason listed in subsection (a), the worker must be given a written warning before training is ended.

(3) Non-academic program.

In a non-academic program, the counselor must notify the insurer, and the insurer may give the worker a written warning of the possible end of training, at the first indication that the

worker's performance in training is unsatisfactory and may not result in employment in that field.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended and renumbered 11/28/16 from 436-120-0448, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0527 Ending a Training Plan

(1) Reasons to end training.

Training ends when:

(a) The worker has successfully completed training;

(b) The worker's eligibility for vocational assistance has ended under OAR 436-120-0165;

(c) The worker is not actively engaged in the training;

(d) The worker fails, after written warning, to maintain at least a 2.0 grade point average for two consecutive grading periods;

(e) The worker fails, after written warning, to complete the minimum credit hours in the training plan curriculum for two consecutive grading periods;

(f) In a non-academic program, the worker's performance in training is unsatisfactory and further training is not likely to result in employment in that field; or

(g) The training plan was not going to be successful due to reasons beyond the worker's control.

(2) Notice of end of training.

When training ends, the insurer must mail a NOTICE OF END OF TRAINING to the worker. The notice must:

(a) Include the date the training plan ended. The effective date is the worker's last date of attendance; and

(b) State whether the worker is entitled to more training.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended and renumbered 11/28/16 from 436-120-0451, as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0530 Director Review of Return-to-Work Plan

The director may review return-to-work plans and supporting information. If the director finds a return-to-work plan or its supporting information does not conform to these rules:

(1) The director will notify the insurer and provider in writing of the preliminary finding of nonconformance. The notification will inform the insurer of changes or information required to bring the plan into conformance.

(2) The insurer must, within 30 days of notification, make appropriate changes, supply additional information requested by the director, or explain why no change should be made.

(3) If the insurer does not respond timely or is unable to bring the plan into conformance, the director will return the plan to the parties with notification that the plan does not conform to OAR 436-120 and may order the insurer to develop a plan that conforms to the rules.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0700 Direct Worker Purchases

(1) Purchases, generally.

(a) The insurer must provide the direct worker purchase categories listed in OAR 436-120-0710 as necessary for the worker's participation in vocational assistance and to meet the requirements of a suitable job.

(b) The worker is no longer eligible for these purchases once eligibility ends unless the purchases are necessary to complete a plan.

(c) Direct worker purchases include partial purchase, lease, rental, and payment.

(2) Exclusions.

Direct worker purchases do not include:

(a) Purchases of real property;

(b) Payment of fines or other penalties; or

(c) Payment of additional driver's license costs, increased insurance costs, or any other costs attributable to problems with the worker's driving record.

(3) Alternative purchases.

In making its decision regarding a direct worker purchase, the insurer may choose the least expensive, adequate alternative. If the worker wants a direct worker purchase that is more expensive than that authorized by the insurer, the worker may select that alternative and pay the difference in cost.

(4) Approval or denial.

Within 14 days of its receipt of a request for a direct worker purchase, the insurer must approve the purchase or notify the worker of its denial.

(5) Payment.

The insurer must pay for approved direct worker purchases in time to prevent delay in the provision of services, but in no event later than 30 days after the insurer receives the worker's request or proof of payment, whichever is later.

(6) Advancement of costs, worker reimbursement.

The worker may pay for mileage, child or senior care, or for purchases such as clothing, books, and supplies or the worker may request an advance of any of these costs based on documentation of need.

(a) The insurer must reimburse costs within 30 days of receiving a written request from the worker and any supporting documentation.

(b) The insurer must return denied requests for reimbursement to the worker within 30 days of receiving the request with an explanation of the reason for nonpayment.

(7) Right and title to nonexpendable purchases.

The insurer must assign to the worker right and title to the nonexpendable direct worker purchases paid by the insurer.

(a) The insurer must make such assignment no later than the 60th day of continuous employment unless the worker remains eligible and the suitability of the employment is in question.

(b) The insurer may repossess nonexpendable property if the worker no longer requires the property for training or employment.

(c) The insurer may require repayment of advancements or reimbursements if the worker misrepresented information material to the purchase decision or if the worker used the funds for something other than the approved purchase.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 11/1/07 as WCD Admin. Order 07-067, eff. 12/1/07
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0710 Direct Worker Purchases: Categories

The insurer must provide the direct worker purchases listed in this rule if necessary for the worker to participate in vocational assistance or to meet the requirements of a suitable job. The insurer may not require the worker to submit a financial statement in order to qualify for direct worker purchases.

(1) Tuition, fees, books, and supplies.

Payment for tuition, fees, books, and supplies for training or studies is limited to those items identified as mandatory by the instructional facility, trainer, or employer. The insurer must pay the cost in full, and may not require the worker to apply for grants to pay for tuition, books, or other expenses associated with training.

(2) Wage reimbursement.

The amount of wage reimbursement for on-the-job training must be agreed to in a contract between the training employer and the insurer.

(3) Travel expenses.

Travel expenses for transportation, meals, and lodging that are required for participation in vocational assistance, including but not limited to job search, required meetings with the

counselor, and meetings with employers or at training sites as required by the plan or plan development. The conditions and rates for payment of travel expenses are as follows:

(a) **Transportation costs** will be paid at public transportation rates when public transportation is available; otherwise, mileage will be paid at the rate published in Bulletin 112. Costs incidental to mileage, such as parking fees, also will be paid. For workers receiving temporary total disability or equivalent income, private car mileage will be paid only for mileage in excess of the miles the worker traveled to and from work at the time of injury. Mileage payment in conjunction with moving expenses will be allowed only for one vehicle and for a single one-way trip. To receive reimbursement for private car mileage, the worker must provide the insurer with a copy of the driver's valid driver's license and proof of insurance coverage.

(b) For **overnight travel, meal and lodging** expenses will be reimbursed at the rate published in Bulletin 112.

(c) Payment for **special travel costs** will be made in excess of the amounts specified in this section when special transportation or lodging is necessary because of the physical needs of the worker, or when the insurer finds prevailing costs in the travel area are substantially higher than average.

(4) Tools and equipment.

Payment for tools and equipment for training or employment is limited to items identified as mandatory for the training or initial employment, such as starter sets. Purchases may not include what the trainer or employer ordinarily would provide to all employees or trainees in the training or employment, or what the worker already owns.

(5) Moving expenses.

Payment for moving expenses is limited to workers with employment or training outside reasonable commuting distance. In determining the necessity of paying moving expenses, the insurer may consider the availability of employment or training that does not require moving, or that requires less than the proposed moving distance. Payment is limited to moving household goods weighing not more than 10,000 pounds. If necessary, payment includes reasonable costs of meals and lodging for the worker's family and mileage under section (3) of this rule.

(6) Second residence allowance.

The purpose of the second residence allowance is to enable the worker to participate in training outside reasonable commuting distance. The allowance must equal the rental expense reasonably necessary, plus not more than $200 a month toward all other expenses of the second residence, excluding refundable deposits. In order to qualify for second residence allowance, the worker must maintain a permanent residence.

(7) Primary residence allowance.

The primary residence allowance applies when the worker must change residence for training or employment. Payment includes the first month's rent and the last month's rent only if required before moving in.

(8) Medical and psychological examinations.

Payment for medical examinations and psychological examinations must be for conditions not related to the compensable injury when necessary for determining the worker's ability to participate in vocational assistance.

(9) Physical or work capacities evaluations.

(10) Living expense allowance.

Payment for living expenses is limited to workers involved in a vocational evaluation at least five hours daily for four or more consecutive days, and not receiving temporary disability payments. The worker will not be barred from receiving a living expense allowance if the worker is unable to participate five hours daily because of limitations caused by the injury. Payment must be based on the worker's temporary total disability rate if the worker's claim were reopened.

(11) Work adjustment, on-the-job evaluation, or situational assessment costs.

(12) Membership fees and occupational certifications, licenses, and related testing costs.

Payment for membership fees, occupational certifications and licenses, and related testing costs is limited to $500.

(13) Clothing.

Clothing purchases may not include items the trainer or employer would provide or the worker already possesses.

(14) Child or disabled adult care services.

Child or disabled adult care services are payable when required to enable the worker to participate in vocational assistance at rates prescribed by the Oregon Department of Human Services. For workers receiving temporary total disability compensation or equivalent income, these costs will be paid only when in excess of what the worker paid for such services at the time of injury, adjusted using the cost-of-living matrix in Bulletin 124.

(15) Dental work, eyeglasses, hearing aids, and prosthetic devices.

Payment for dental work, eyeglasses, hearing aids, and prosthetic devices is required even if not related to the compensable injury if they will enable the worker to obtain suitable employment or participate in training.

(16) Union dues and fees.

Payment for labor union dues and fees is limited to initiation fees, or back dues and one month's current dues.

(17) Vehicle rental or lease.

Payment for vehicle rental or lease is required when there is no reasonable alternative enabling the worker to participate in vocational assistance or accept an available job. The worker must provide the insurer with proof of a valid driver's license and insurance coverage. Payment is limited to $1,000.

(18) Other purchases.

Payment for other purchases the insurer considers necessary for the worker's participation in vocational assistance is limited to $1,000.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 10-3-2012 as Admin. Order 12-059, eff. 11-1-2012
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0720 Fee Schedule

(1) The director has established the fee schedule in section (3) of this rule for professional costs and direct worker purchases. The schedule sets maximum spending limits per claim opening for each category; however, the insurer may spend more than the maximum limit. Spending limits will be adjusted annually, effective July 1, based on the conversion factor described in OAR 436-120-0005 and published with the cost-of-living matrix in Bulletin 124.

(2) For workers needing an extended training plan under OAR 436-120-0443, the fee schedule spending limits for the Training category and Direct Employment/Training Combined category listed below must be increased by 30 percent.

(3) Amounts include professional costs, travel and wait time, and other travel expenses:

Categories of Vocational Assistance	Professional Spending Limits	Direct Worker Purchases Spending Limits
Eligibility determination without substantial handicap analysis	55%	Not applicable (NA)
Substantial handicap analysis	109%	NA
Direct Employment	736%	368%
Training	1840%	2429%
Direct Employment/Training Combined	2045%	NA
Dispute Resolution	61%	NA

NOTE: *Each limit is shown as a percentage of Oregon's state average weekly wage (SAWW), determined under ORS 656.211. Dollar amounts are published in Bulletin 124 and are adjusted annually, effective July 1, based on changes in the SAWW.

(4) The insurer must pay, within 30 days of receipt, the provider's bill for services provided under the insurer-provider agreement. The insurer may not deny payment on the grounds the worker was not eligible for the assistance if the provider performed the services in good faith without knowledge of the ineligibility.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340, 656.258
Hist: Amended 9/15/10 as WCD Admin. Order 10-056, eff. 11/15/10
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0755 Reimbursement from the Workers' Benefit Fund

(1) Reimbursement.

The director will reimburse the insurer for costs associated with providing vocational benefits when:

(a) The director issues an order overturning the insurer's denial of vocational benefits; and

(b) The insurer's denial is later upheld by a final order.

(2) Required documentation.

To receive reimbursement from the Workers' Benefit Fund, the insurer must provide the division with the following documentation, within one year from the date of the final order:

(a) Worker's name and Workers' Compensation Division's claim file number;

(b) Date and order number of the director's order appealed;

(c) Itemized listing with dates of service for all costs incurred after the date of the director's order that was reversed. All costs, in order to be reimbursed, must meet all conditions set forth in these rules, and reimbursement requests must:

(A) Use terms, "direct employment" or "training" to show the category of vocational assistance provided;

(B) List provider costs by category of "professional services";

(C) List direct worker purchases by the categories in OAR 436-120-0710, and include purchase dates and costs;

(D) Show temporary total disability paid between the start and end dates of the return to work plan; and

(E) List any other costs incurred in providing vocational benefits as a result of the order that was appealed.

(d) Signed statement certifying that the requested reimbursement amount was actually paid; and

(e) The insurer's name and address where reimbursement is to be sent.

(3) Administrative costs not reimbursable.

No reimbursement is allowed for the insurer's administrative costs.

Statutory authority: 656.726(4)
Statutes implemented: Oregon Laws 2005, chapter 588, sections 4 & 5; ORS 656.313, 656.605
Hist: Filed 12/5/05 as WCD Admin. Order 05-080 eff. 01/01/06
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf

436-120-0800 Registration of Providers

(1) A provider may not provide vocational assistance services unless the provider is first registered by the director under this rule.

(2) A provider must submit an application, Form 2814, "Vocational Assistance Certification Program Registration of Vocational Assistance Provider," to the division that includes a description of the specific vocational services to be provided and verification of staff certifications under these rules.

(3) The director may approve or deny registration based on the completed application and the department's registration and counselor certification records.

(a) The registration will specify the scope of authorized vocational services as determined by the provider's staff certifications.

(b) Providers whose registration is denied under this rule may appeal as described in OAR 436-120-0008.

(4) A registered provider must:

(a) Notify the division within 30 days of any changes in office address, telephone number, contact person, or staff; and

(b) Maintain worker vocational assistance files for four years after the end of vocational assistance with that provider.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0810 Certification and Classification of Provider Staff

(1) Certification, generally.

(a) Individuals determining workers' eligibility and providing vocational assistance must be certified by the director and on the staff of a provider.

(b) An applicant for certification must submit Form 1880, "Vocational Assistance Certification Program Individual Certification Under OAR 436-120," to the division.

(c) All degrees required for certification must be from an accredited institution and copies of transcripts must be submitted with the application.

(d) If the director approves the application, certification will be granted for five years. A counselor who is nationally certified as described in subparagraph (3)(a)(B)(i) will be granted an initial certification period to coincide with the counselor's national certification.

(e) Certified individuals must notify the division within 30 days of any changes in address or telephone number.

(f) An individual whose certification is denied under this rule may appeal as described in OAR 436-120-0008.

(2) Classification of provider staff.

Certified individuals will be classified as follows:

(a) Vocational assistance counselor;

(b) Vocational assistance intern; or

(c) Return-to-work specialist.

(3) Certification requirements.

The requirements for certification as a counselor, intern, or specialist are as follows:

(a) Vocational assistance counselor.

(A) Certification as a counselor allows the individual to determine eligibility for vocational assistance and provide vocational assistance services.

(B) Counselor certification requires:

(i) Certification by one of the following national certifying organizations:

(I) The Commission on Rehabilitation Counselor Certification (CRCC);

(II) The Commission for Case Managers Certification (CCMC); or

(III) The Certification of Disability Management Specialists Commission (CDMSC);

(ii) A master's degree in vocational rehabilitation counseling and at least six months of direct experience;

(iii) A master's degree in psychology, counseling, or a field related to vocational rehabilitation, and 12 months of direct experience; or

(iv) A bachelor's or higher degree and 24 months of direct experience. Thirty-six months of direct experience may substitute for a bachelor's degree.

(C) To meet the direct experience requirements for a counselor, the individual must:

(i) Perform return-to-work plan development and implementation for the required number of months; or

(ii) Perform three or more of the qualifying job functions listed in sub-subparagraphs (I) through (X) for the required number of months, with at least six months of the experience in one or more of the functions listed in sub-subparagraphs (I) through (IV). The qualifying job functions are:

(I) Return-to-work plan development and implementation;

(II) Employment counseling;

(III) Job development;

(IV) Early return-to-work assistance that includes working directly with workers and their employers;

(V) Vocational testing;

(VI) Job search skills instruction;

(VII) Job analysis;

(VIII) Transferable skills assessment or employability evaluations;

(IX) Return-to-work plan review and approval; or

(X) Employee recruitment and selection for a wide variety of occupations.

(b) Vocational assistance intern.

(A) Certification as a vocational assistance intern allows the individual to determine eligibility for vocational assistance and provide vocational assistance services under the direct supervision of a counselor. A counselor must co-sign and assume responsibility for all of the intern's actions.

(B) Intern certification requires:

(i) A master's degree in psychology, counseling, or a field related to vocational rehabilitation; or

(ii) A bachelor's degree and at least six hours of training on the Oregon vocational assistance and re-employment assistance rules. Thirty-six months of direct experience may substitute for a bachelor's degree.

(C) To meet the direct experience requirements for an intern, the individual must:

(i) Perform return-to-work plan development and implementation for the required number of months; or

(ii) Perform three or more of the qualifying job functions listed in subparagraph (3)(a)(C)(ii) of this rule for the required number of months.

(c) Return-to-work specialist.

(A) Certification as a return-to-work specialist allows the individual to provide job search skills instruction, job development, return-to-work follow-up, and labor market search, and to determine eligibility for vocational assistance except when the determination requires a judgment as to whether the worker has a substantial handicap to employment.

(B) Specialist certification requires 24 months of direct experience. Full-time (or the equivalent) additional college coursework in psychology, counseling, education, a field related to human services, or a field related to vocational rehabilitation may substitute for up to 18 months of direct experience, on a month-for-month basis.

(C) The direct experience requirements for a specialist are the same for an intern, as described in paragraph (b)(C) of this section.

(d) To receive credit for the direct experience requirements, the individual must:

(A) Perform one or more of the qualifying job functions listed in subparagraph (3)(a)(C)(ii) of this rule at least 50 percent of the work time for each month of direct experience credit. Qualifying job functions performed in a job that is less than full-

time will be prorated. For purposes of this rule, full-time is 40 hours a week. An individual will not receive credit for any function performed less than 160 hours.

(B) Provide any documentation required by the director, including work samples. The director may also require verification by the individual's past or present employers.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0820 Renewal of Certification

(1) Required documentation.

A certified individual must renew his or her certification every five years by submitting the following documentation to the division no later than 30 days before the end of the certification period:

(a) Current certification by the Commission on Rehabilitation Counselor Certification (CRCC), the Commission for Case Managers Certification (CCMC), or the Certification of Disability Management Specialists Commission (CDMSC); or

(b) Verification of a minimum of 60 hours of continuing education units under this rule within the five years before renewal.

(2) Continuing education.

(a) The director will accept continuing education units for:

(A) Training approved by the CRCC, CCMC, or CDMSC;

(B) Courses in or related to psychology, sociology, counseling, or vocational rehabilitation, if given by an accredited institution of higher learning;

(C) Training presented by the division pertaining to OAR 436-120, 436-105, or 436-110;

(D) Teaching a class or making a formal presentation to a group on a topic related to vocational rehabilitation; and

(E) Any continuing education program certified by the director for providers. Sixty minutes of continuing education will count as one unit, except as noted in subsection (b) of this section.

(b) In the case of college course work, the director will grant credit only for grades of C or above and will multiply the number of credit hours by six to establish the number of continuing education units.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 9/15/10 as WCD Admin. Order 10-056, eff. 11/15/10
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0840 Professional Standards for Providers and Counselors

(1) Providers and counselors must:

(a) Determine eligibility and provide assistance in an objective manner not subject to any conditions other than those prescribed in these rules;

(b) Fully inform the worker of the categories and kinds of vocational assistance under OAR 436-120 and re-employment assistance under OAR 436-110;

(c) Document all case activities in legible file notes or reports;

(d) Provide only vocationally relevant information about workers in written and oral reports;

(e) Recommend workers only for suitable employment;

(f) Fully inform the worker of the purpose and results of all testing and evaluations; and

(g) Comply with generally accepted standards of conduct in the vocational rehabilitation profession.

(2) Providers and counselors may not:

(a) Provide evaluations or assistance if there is a conflict of interest or prejudice concerning the worker;

(b) Enter into any relationship with the worker to promote personal gain or the gain of a person or organization in which the provider or counselor has an interest;

(c) Engage in or tolerate sexual harassment of a worker. "Sexual harassment" means deliberate or repeated comments, gestures, or physical contact of a sexual nature;

(d) Violate any applicable state or federal civil rights law;

(e) Commit fraud, misrepresent, or make a serious error or omission in connection with an application for registration or certification;

(f) Commit fraud, misrepresent, or make a serious error or omission in connection with a report or return-to-work plan or the vocational assistance activities or responsibilities of a provider under OAR chapter 436;

(g) Engage in collusion to withhold information, or submit false or misleading information relevant to the determination of eligibility or provision of vocational assistance;

(h) Engage in collusion to violate these rules or other rules of the department, or any policies, guidelines, or procedures issued by the director;

(i) Fail to comply with an order of the director to provide specific vocational assistance, except as provided in ORS 656.313; or

(j) Instruct any individual to make decisions or engage in behavior that is contrary to the requirements of these rules.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.313, 656.340

Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0900 Audits, Penalties, and Sanctions

(1) Insurers and employers at injury must fully participate in any department audit, periodic program review, investigation, or review, and provide records and other information as requested.

(2) If the director finds the insurer or employer at injury failed to comply with OAR 436-120, the director may impose one or more of the following sanctions:

(a) Reprimand by the director;

(b) Recovery of reimbursements;

(c) Denial of reimbursement requests; or

(d) A civil penalty under ORS 656.745.

(3) In determining the amount of a civil penalty to be assessed the director may consider:

(a) The degree of harm inflicted on the worker;

(b) Whether there have been previous violations or warnings; and

(c) Other matters as justice may require.

Statutory authority: ORS 656.340, 656.726(4)
Statutes implemented: ORS 656.340, 656.447, 656.745(1) and (2)
Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-120-0915 Sanctions of Providers and Counselors

(1) Providers and counselors must fully participate in any department audit, periodic program review, investigation, or review, and provide records and other information as requested.

(2) If the director finds any provider or counselor failed to comply with OAR 436-120, the director may impose one or more of the following sanctions:

(a) Reprimand by the director;

(b) Probation, in which the department systematically monitors the provider's or counselor's compliance with OAR 436-120 for a specified length of time. Probation may include the requirement a counselor receive supervision or successfully complete specified training, personal counseling, or drug or alcohol treatment;

(c) Suspension, which is the termination of registration or certification to determine eligibility and provide vocational assistance to Oregon injured workers for a specified period of time. The provider or counselor may reapply for registration or certification at the end of the suspension period. If granted, the provider or counselor will be placed on probation as described in subsection (2)(b) of this rule; or

(d) Revocation, which is a permanent termination of registration or certification to determine eligibility and provide vocational assistance to Oregon injured workers.

(3) The director will investigate violations of OAR 436-120 and may impose a sanction under these rules. Before issuing a suspension or revocation, the director will send a notice of the proposed action and provide the opportunity for a show-cause hearing as follows:

(a) The director will send by certified mail a written notice of intended suspension or revocation and the grounds for such action. The notice must advise of the right to participate in a show-cause hearing.

(b) The provider or counselor has 10 days from the date of receipt of the notification of proposed action in which to request a show-cause hearing.

(c) If the provider or counselor does not request a show-cause hearing, the proposed suspension or revocation will become final.

(d) If the provider or counselor requests a show-cause hearing, the director will send a notification of the date, time, and place of the hearing.

(e) After the show-cause hearing, the director will issue a final order that may be appealed as described in OAR 436-120-0008(3).

(4) For the purposes of section (3) of this rule, "show-cause hearing" means an informal meeting with the director in which the provider or counselor will be provided an opportunity to be heard and present evidence regarding any proposed actions by the director to suspend or revoke a provider or counselor's authority to provide vocational assistance services to injured workers.

(5) The director may bar a provider or counselor who has received a suspension or revocation under this rule from sponsoring or teaching continuing education programs.

Statutory authority: ORS 656.340(9), 656.726(4)
Statutes implemented: ORS 656.340
Hist: Amended 12-1-2009 as WCD Admin. Order 09-061, eff. 1-1-2010
Amended 11/28/16 as Admin. Order 16-058, eff. 1/1/17
See also the Index to Rule History: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.