

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION



**Construction Carve-Out Programs
Oregon Administrative Rules
Chapter 436, Division 140**

Effective Jan. 1, 2020

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**OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 140**

Summary of changes effective Jan. 1, 2020:

- Amended rule 0120 –
 - Implements HB 2087 (2019), which raised the limits for certain civil penalty maximums; references to specific dollar amounts are replaced by a reference to ORS 656.745(2); and
 - Includes minor wording changes that enhance clarity.

436-140-0001 Authority For Rules

These rules are promulgated under the director's authority pursuant to ORS 656.726(4) and 656.174.

Stat. Auth.: ORS 656.726(4), 656.174
Stats. Implemented: ORS 656.170, 656.172, 656.174
Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0002 Purpose

The purpose of these rules is to implement ORS 656.170 and 656.172, and to establish and provide procedures and requirements for the administration and enforcement of programs entered into under ORS 656.170 and 656.172.

Stat. Auth.: ORS 656.726(4), 656.174
Stats. Implemented: ORS 656.170, 656.172, 656.174
Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0003 Applicability of Rules

(1) These rules shall be applicable on their effective date and thereafter to carry out the provisions of ORS 656.170 and 656.172.

(2) Notwithstanding sections 2 and 3, chapter 841, Oregon Laws 1999 (ORS 656.170 and 656.172), prior to January 1, 2002 the director may issue letters of eligibility to only two qualified unions for participation in an alternative dispute resolution system authorized under section 2 of the 1999 Act (656.170). The director may not issue letters of eligibility after January 1, 2002.

(3) These rules apply to parties to a collective bargaining agreement only insofar as **and** only to the extent that the agreement contains the provisions provided by ORS 656.170, has been approved by the director, and for which eligibility has been established under these rules.

(4) Except as otherwise provided by law, the provisions of ORS Chapter 656, OAR Chapter 436, and OAR Chapter 438 apply to programs entered into under these rules, unless the collective bargaining agreement expressly specifies otherwise.

(5) Applicable to this chapter, the director may, unless otherwise obligated by statute, waive any procedural rules as justice so requires.

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Stat. Auth.: ORS 656.726(4), 656.174
 Stats. Implemented: ORS 656.170, 656.172, 656.174
 Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0005 Definitions

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

- (1) **"Alternative dispute resolution system"** means a process that exists outside the normal Workers' Compensation system to settle disputes arising from a workers' compensation claim.
- (2) **"Arbitration"** means the hearing and determination of a case in controversy by an arbiter.
- (3) **"Collective bargaining representative"** means a person who represents a union.
- (4) **"Construction carve-out program"** means a program established pursuant to ORS 656.170 and 656.172 for either an alternative dispute resolution system or use of a list of medical service providers, or both, which the director has approved and for which eligibility has been established under these rules.
- (5) **"Director"** means the Director of the Department of Consumer and Business Services, or the director's delegate for the matter.
- (6) **"Division"** means the Workers' Compensation Division of the Department of Consumer and Business Services.
- (7) **"Employer"** is limited to a private employer, or group of employers, engaged in construction; construction maintenance; or activities limited to rock, sand, gravel, cement and asphalt operations; heavy duty mechanics; surveying; or construction inspection.
- (8) **"Employee"** is limited to an employee of an employer defined by section (7) of this rule.
- (9) **"Insurer"** includes **"insurer," "guaranty contract insurer,"** and **"self-insured employer"** as defined by ORS 656.005.
- (10) **"Letter of eligibility"** means a letter issued by the director under ORS 656.172(4) indicating that eligibility to participate in a construction carve-out program has been established under ORS 656.170 and ORS 656.172.
- (11) **"Mediation"** means the act or process of intervening between conflicting parties to promote reconciliation, settlement, or compromise.
- (12) **"Plan administrator"** means the person responsible for administering the Construction Carve-Out Program.
- (13) **"Union"** means a collective bargaining union that is recognized or certified as the exclusive bargaining representative of employees for an employer or group of employers.

Stat. Auth.: ORS 656.726(4), 656.174
 Stats. Implemented: ORS 656.170, 656.172, 656.174
 Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0006 Administration of Rules

Any orders issued by the division in carrying out the director's authority under ORS Chapter 656

ORDER NO. 19-068

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and these rules are considered orders of the director.

Stat. Auth.: ORS 656.726(4), 656.174
Stats. Implemented: ORS 656.170, 656.172, 656.174
Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0008 Administrative Review

(1) If the director determines that a proposed construction carve-out program is not eligible, the director will issue a notice to the employer or collective bargaining representative.

(a) Under ORS 656.704(2), if the employer or collective bargaining representative disagrees with the notice, it may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 60 days of the mailing date of the notice.

(b) OAR 436-001 applies to the hearing.

(2) If the director determines that the acts or omissions of a construction carve-out program justify suspension, the director may issue a notice of intent to suspend eligibility pursuant to OAR 436-140-0090 and schedule a hearing on the matter of suspension. The notice must be served upon the employer or collective bargaining representative as provided in OAR 436-140-0130.

(a) At a hearing on a notice of intent to suspend, the employer or collective bargaining representative must show cause why eligibility should not be suspended.

(A) If the director determines that the acts or omissions of the employer or collective bargaining representative justify suspension, the director may issue an order suspending eligibility. If the director determines that the acts or omissions of the employer or collective bargaining representative do not justify suspension, the director shall issue an order withdrawing the notice.

(B) The order must be served upon the employer or collective bargaining representative as provided in OAR 436-140-0130.

(C) If the employer or collective bargaining representative disagrees with the order, it may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 60 days of the mailing date of the order.

(D) OAR 436-001 applies to the hearing.

(3) If the director determines that the acts or omissions of a construction carve-out program justify revocation, the director may issue a notice of intent to revoke eligibility pursuant to OAR 436-140-0090. The notice must be served upon the employer or collective bargaining representative as provided in OAR 436-140-0130.

(a) The revocation shall become effective within 10 days after service of notice, unless within such period of time the employer or collective bargaining representative correct(s) the grounds for revocation to the satisfaction of the director or files a written request for hearing with the director.

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- (A) If the employer or collective bargaining representative request(s) a hearing, the director will set a date and time, and give at least 10 days' notice of the hearing. At hearing, the employer or collective bargaining representative must show cause why eligibility should not be revoked.
 - (B) Within 30 days after the hearing, the director shall issue an order affirming or withdrawing the revocation. The director shall serve a copy of the order upon the employer or collective bargaining representative as provided in OAR 436-140-0130.
 - (C) If the employer or collective bargaining representative disagrees with the order, it may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 60 days of the mailing date of the order.
 - (D) OAR 436-001 applies to the hearing.
- (b) An emergency revocation issued pursuant to OAR 436-140-0090(5), is effective immediately. To contest the revocation, the employer or collective bargaining representative must file a request for hearing within 60 days of the mailing date of the order; the revocation shall remain in effect until the director orders otherwise. OAR 436-001 applies to the hearing.

Stat. Auth.: ORS 656.726(4), 656.174
 Stats. Implemented: ORS 656.170, 656.172, 656.174, 656.704, OL 2005 ch 26
 Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00
 Amended 10/19/05 as WCD Admin. Order 05-069, eff. 1/2/06

436-140-0010 Qualifying

- (1) An employer, group of employers or collective bargaining representative may not establish or continue to participate in a construction carve-out program under ORS 656.170 until the proposed program has been approved by the director and the director has issued a letter of eligibility. An application containing the information described in subsections (2) and (3) of this rule must be submitted to the director.
- (2) The employer or group of employers must provide at least the following:
 - (a) Payroll records sorted by National Council on Compensation Insurance (NCCI) classification for one of the three years prior to the year in which the collective bargaining agreement takes effect.
 - (b) A proposed plan for the construction carve-out program, along with four copies, in which it is demonstrated how the proposed construction carve-out program will meet the requirements of ORS 656.170, 656.172, and these rules;
 - (c) A copy of the collective bargaining agreement;
 - (d) An estimate of the number of employees covered by the collective bargaining agreement;
 - (e) A copy of a valid license when that license is required of the employer or group of employers to conduct business in Oregon;

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- (f) A signed, sworn statement that no action has been taken by any administrative agency or court of the United States to invalidate the collective bargaining agreement;
 - (g) The name, address, and telephone number of the contact person of the employer or group of employers;
 - (h) A statement from the insurer or self-insured employer that the insurer or self-insured employer is willing to insure the risk under the terms of the collective bargaining agreement; and
 - (i) If applicable, a list of the names, addresses, and specialties of the medical service providers who will provide medical services under the construction carve-out program, together with appropriate evidence of any licensing, registration or certification requirements for that individual to practice. This list shall indicate which medical service providers will act as attending physicians.
- (3) The collective bargaining representative must provide at least the following:
- (a) A copy of the most recent LM-2 or LM-3 filing with the United States Department of Labor, and a signed, sworn statement that the document is a true and correct copy; and
 - (b) The name, address, and telephone number of the contact person for the collective bargaining representative.
- (4) Within 45 days of receipt of the information required by subsections (2) and (3), the director will notify the applicants that the program is or is not approved. A letter of eligibility will be issued if the program is approved. If the program is not approved, a notice will be issued. The notice will include the reasons the program is not approved and a notice of appeal rights under OAR 436-140-0008(1). The notice will be served upon the employer and/or collective bargaining representative as provided in OAR 436-140-0130.
- (5) Upon issuance of a letter of eligibility, those provisions of the collective bargaining agreement or other documents entered into under ORS 656.170(1) are considered valid and binding, subject to the terms of the agreement.
- (6) One in-state location shall be established where the construction carve-out program is administered and records are maintained.
- (7) No construction carve-out program shall be approved that diminishes the entitlement of an employee to compensation as provided by ORS Chapter 656.
- (8) No more than two unions may qualify for participation in a construction carve-out program. In establishing qualification, the director will process all applications in the order in which they are received.
- (9) The employer, or group of employers, and collective bargaining representative shall meet the reporting requirements under OAR 436-140-0070 in order to continue to participate in a construction carve-out program.

Stat. Auth.: ORS 656.726(4), 656.174

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Stats. Implemented: ORS 656.170, 656.172, 656.174
Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0020 Alternative Dispute Resolution

(1) A construction carve-out program may establish and operate an alternative dispute resolution system governing disputes between employees, employers, and their insurers. Any such system may include, but not be limited to:

- (a) Limitations on the liability of the employer while determinations regarding the compensability of an injury are being made;
- (b) A method for resolving disputes involving compensability of injuries and the amount of compensation due for a compensable injury, medical services, and legal services;
- (c) A method for payment of compensation for injuries incurred under the collective bargaining agreement, when the worker is no longer subject to the agreement; or
- (d) Arbitration and mediation procedures.

(2) If a construction carve-out program establishes an alternative dispute resolution system, a dispute to which that system applies shall first be processed through that system before it is brought before another forum.

(3) The plan administrator shall provide a written summary of the alternative dispute resolution system process to all parties to a dispute, or upon request. The written summary shall include at least the following:

- (a) The title, address, and telephone number of a contact person for the alternative dispute resolution system process;
- (b) The types of disputes to which the alternative dispute resolution system will apply and the types of disputes, if any, to which the dispute resolution processes provided by ORS Chapter 656, OAR Chapter 436, and/or OAR Chapter 438 will apply;
- (c) A description of the procedures and time frames at each level of the alternative dispute resolution system process; and
- (d) A statement of the right of an aggrieved party to request review by the Workers' Compensation Board, and reference to the applicable Board rules, after completion of the alternative dispute resolution system process.

(4) Written notification must be provided to all parties, including the worker's attorney if the worker is represented, when the alternative dispute resolution system receives a dispute for resolution and when the dispute resolution system issues any decision in that dispute. The notice shall inform the parties of the status of the dispute, and of the next level of the dispute resolution process.

(5) The time frame for resolution of a dispute by the alternative dispute resolution system, from date of receipt of a dispute until agreement or completion of the highest level of the

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system, including issuance of a final decision, shall not exceed 180 days without approval of all parties.

(6) The director may, at any time and/or upon request, issue an order to further the dispute resolution system process.

(7) The alternative dispute resolution system shall develop a record sufficient for any party to appeal a decision by the alternative dispute resolution system.

(8) An aggrieved party to any decision, order or award of compensation issued under the alternative dispute resolution system may request review by the Workers' Compensation Board in accordance with Chapter 656 and OAR Chapter 438 after completion of the alternative dispute resolution system.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0030 Medical Services

(1) A construction carve-out program may establish a list of medical service providers that the parties agree is the exclusive source of all medical treatment provided under ORS chapter 656.

(2) A construction carve-out program shall establish a method for access to medical services for workers no longer subject to the agreement when those injuries were sustained under the collective bargaining agreement.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0040 Compensation

Benefit amounts that exceed the statutory rates under ORS Chapter 656 shall not be subject to reimbursement from the Workers' Benefit Fund.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0045 Multiple Claims; Expiration or Termination of Collective Bargaining Agreement; Responsibility

(1) Disputes involving multiple claims when one or more of the claims are not subject to the collective bargaining agreement shall be resolved pursuant to ORS 656.307, 656.308, and OAR Chapter 436.

(2) Upon expiration of the collective bargaining agreement without renewal, or after termination of any arrangement under ORS 656.170 and 656.172, the insurer is responsible for benefits and claims in accordance with the provisions of ORS Chapter 656 unless otherwise provided for under the agreement.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

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436-140-0050 Duties and Responsibilities of Employer

- (1) An employer or group of employers that participates in a construction carve-out program shall comply with coverage requirements under ORS 656.017.
- (2) The participating employer or group of employers shall report all claims made under the program to the insurer as with other claims.
- (3) The participating employer or group of employers shall comply with the terms of the collective bargaining agreement and construction carve-out program.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0060 Insurer Duties and Responsibilities

- (1) An insurer who contracts to provide coverage to an employer or group of employers under a construction carve-out program shall timely report claims made under the construction carve-out program to the director.
- (2) The insurer shall provide benefits in accordance with the terms of the collective bargaining agreement and construction carve-out program.
- (3) The insurer shall segregate all loss and payroll data for reporting and research purposes. Data shall be forwarded to the director upon request.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0070 Reporting Requirements

- (1) In order to ensure the construction carve-out program continues to comply with the eligibility requirements of these rules, the employer, or group of employers, and collective bargaining representative shall:
 - (a) upon renegotiation of the collective bargaining agreement, provide the director with a copy no less than 30 days before the agreement takes effect, including an estimate of the number of employees covered by the agreement; and
 - (b) on an annual basis, provide the director the following:
 - (A) A copy of a valid license when that license is required of the employer or group of employers to conduct business in Oregon;
 - (B) A signed, sworn statement that no action has been taken by any administrative agency or court of the United States to invalidate the collective bargaining agreement;
 - (C) The name, address, and telephone number of the contact person of the employer or group of employers;
 - (D) A statement from the insurer or self-insured employer that the insurer or self-insured employer is willing to insure the risk under the terms of the collective bargaining agreement;

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- (E) A copy of the most recent LM-2 or LM-3 filing with the United States Department of Labor, and a signed, sworn statement that the document is a true and correct copy; and
 - (F) The name, address, and telephone number of the contact person for the collective bargaining representative.
- (2) Upon request of the director, a construction carve-out program shall provide a listing by category of medical service providers, including provider names, specialty, Tax ID number, Oregon license number, business address and phone number. The listing shall include all health care providers participating in the construction carve-out program.
- (3) Nothing in this rule limits the director's authority to require information as necessary to monitor compliance with these rules.
- (4) The plan administrator and/or insurer may apply to the director for approval to modify forms or notices required by rule or bulletin. No modified form or notice shall be used without the director's prior approval.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0090 Suspension or Revocation

- (1) Prior eligibility of a construction carve-out program may be suspended or revoked if any of the following occur:
- (a) the director finds a serious danger to the public health or safety;
 - (b) the construction carve-out program fails to provide services under the terms of the collective bargaining agreement;
 - (c) the employer, or group of employers, collective bargaining representative, and/or insurer fails to comply with ORS Chapter 656, OAR 436-140, or orders of the director; or
 - (d) the employer, or group of employers, collective bargaining representative, and/or insurer submits any false or misleading information pertaining to the eligibility.
- (2) The director shall provide written notice of intent to suspend or revoke eligibility.
- (a) The notice shall:
 - (A) describe generally the acts and the circumstances that would be grounds for suspension or revocation; and
 - (B) advise of the right to a hearing in the case of revocation; and the date, time and place of the hearing in the case of suspension.
 - (b) The notice shall be served as provided in OAR 436-140-0130.
- (3) The hearing shall be conducted as provided in OAR 436-140-0008.

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(4) Suspension or revocation shall have the effect of removing director approval and eligibility of the construction carve-out program. A revoked program will have to re-apply for director approval and a letter of eligibility to be effective.

(5) Notwithstanding any other provision of this rule, in any case where the director finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the director may immediately revoke the eligibility of a construction carve-out program without opportunity for a hearing. The order must be served upon the employer and/or collective bargaining representative as provided in OAR 436-140-0130. Such order shall be final, unless the parties request a hearing. The process for review shall be as provided in OAR 436-140-0008.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0100 Monitoring/Auditing

(1) The director may conduct periodic audits of construction carve-out programs as necessary to ensure compliance with ORS 656.170, 656.172, and these rules.

(2) All records of a construction carve-out program shall be produced upon request of the director.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00.

436-140-0120 Sanctions and Civil Penalties; Rule Violations

(1) The director may assess a civil penalty under ORS 656.745 against an employer, group of employers, or insurer that violates ORS chapter 656, OAR 436-140, or an order of the director.

(2) Any complaint alleging a violation of these rules must be made in writing to the director. The complaint must:

- (a) State the grounds for the alleged rule violation;
- (b) Include the specific instances of the alleged rule violation;
- (c) State the complainant's request for correction and relief; and
- (d) Include sufficient documentation to support the complaint.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.745

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00

Amended 12/17/19 as Admin. Order 19-068, eff. 1/1/20

436-140-0130 Service of Orders

(1) An order or notice of the director shall include a notice of the party's appeal rights and shall be served upon the party when the director does any of the following:

- (a) notifies an applicant that a program is not approved pursuant to OAR 436-140-0010(4);

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(b) suspends or revokes eligibility of a construction carve-out program pursuant to OAR 436-140-0090; or

(c) assesses a civil penalty under the provisions of OAR 436-140-0120.

(2) The director shall serve the order by delivering a copy to the party in the manner provided by Oregon Rules of Civil Procedure 7D(3), or by sending a copy to the party by certified mail with return receipt requested.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00