



Oregon

Kate Brown, Governor

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May 24, 2018

Proposed Changes to Workers' Compensation Rules

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

The Workers' Compensation Division proposes changes to OAR 436-060.

When is the hearing? June 21, 2018, 10 a.m.

Where is the hearing? Portland State Office Building, Room 1C (first floor)
800 NE Oregon St, Portland, OR 97232

How can I make a comment? Come to the hearing and speak, send written comments, or do both. Send written comments to:
Email – fred.h.bruyns@oregon.gov
Fred Bruyns, rules coordinator
Workers' Compensation Division
350 Winter Street NE (for courier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Fax – 503-947-7514

The public may also listen to the hearing or testify by telephone: Dial-in number is 1-213-787-0529; Access code is 9221262#.

The closing date for written comments is June 26, 2018.

How can I get copies of the proposed rules and view testimony?

On the Workers' Compensation Division's website –
<http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>.

Or call 503-947-7717 to get free paper copies

Questions? Contact Fred Bruyns, 503-947-7717.

Auxiliary aids for persons with disabilities are available upon advance request.

Summary of proposed changes:

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

The agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business.

Need for the Rule(s): Rule amendments are needed to replace the temporary rules now in effect and to ensure that workers with irregular wages are fairly compensated during their recovery. A worker’s weekly wage is the basis for determining the rate of temporary disability and certain permanent disability. For workers with irregular wages whose wages have increased in the year before their injuries, the existing, permanent rules require wage averaging based on total earnings for a period of up to 52 weeks before the injury. This method has harmed some workers whose temporary disability rate does not reflect the wage subsequent to the pay increase.

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

Fiscal and Economic Impact: The agency projects that proposed rule changes will not substantially increase or decrease costs to the agency. Possible economic effects, if any, on other state agencies, units of local government, and the public are described below under “Statement of Cost of Compliance.”

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

- a. State agencies: The agency estimates that proposed rule changes will not increase or decrease costs to state agencies.
- b. Units of local government: The agency projects proposed rule changes will have some cost impacts for units of local government that are self-insured employers or part of self-insured employer groups. These effects are described under “The public” below.
- c. The public: The agency estimates that proposed rule changes will affect costs to the public as follows:

A worker’s weekly wage is the basis for determining the rate of temporary and certain permanent disability. Proposed rule amendments will increase benefits paid to workers who had irregular wages and experienced an increase in the rate of pay during the 52 weeks before the date of injury, or during a lesser time period if there has been a change in the wage earning agreement, at a corresponding cost to workers’ compensation insurers, self-insured employers, and self-insured employer groups. With some exceptions, proposed amendments would return the methods of wage calculation to the methods required before Jan. 1, 2017. However, the exceptions are significant, and costs would not revert to 2016 levels. For example, before Jan. 1, 2017, many overtime and bonus payments were excluded from wage calculations, but these payments would be included under the proposed amendments. Therefore, the agency is confident in projecting an

overall increase in benefits that are based on a worker’s wage at the time of injury, such as temporary disability and certain permanent disability benefit payments.

The agency does not have data showing how many workers have irregular wages and who also experience pay increases during the 52 weeks before the injury, or during a shorter time period if there has been a change in the wage earning agreement, and therefore cannot estimate a specific, overall cost impact. For those workers affected by the proposed rule amendment, the extent of the increase in the wage calculation (relative to the existing permanent rule) depends on the timing of the increase; with increases occurring near to the date of injury having a larger impact than earlier increases. Given that an increase may occur at any time during the 52 weeks before the injury, or during a shorter period after a change in the wage earning agreement, it is reasonable to conclude the average increase in the wage calculation for affected workers should be at least one-half of the annual change in the state average weekly wage (SAWW). The SAWW from 1998 through 2017 has increased by an average of 2.9 percent per year, so wage calculations for affected workers are expected to increase by an average of 1.5 percent or slightly more. During that 20-year span, the SAWW declined twice, though this was probably due to changes in the availability of high and low wage jobs rather than to actual cuts in the rate of pay for existing jobs. Still, if Oregon were to suffer substantial wage deflation, the proposed rule amendments would result in reduced benefits for affected workers.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

The businesses primarily affected by these rules are workers’ compensation insurers, self-insured employers, and self-insured employer groups. These entities tend to be large employers and not small businesses as defined by ORS 183.310. However, claims costs ultimately affect premiums charged to Oregon employers to cover their workers. Oregon has more than 116,000 employers, and a substantial majority of these employers are small businesses.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

The agency projects there will be no direct impacts on small businesses for reporting, recordkeeping or other administrative activities required for compliance, including costs of professional services.

c. Equipment, supplies, labor and increased administration required for compliance:

The agency projects there will be no direct impacts on small businesses for equipment, supplies, labor or increased administration required for compliance.

How were small businesses involved in the development of this rule? The agency sent a request for rulemaking advisory committee members and agenda topics to more than 3,000 stakeholders, including many who are small businesses or who represent the interests of small businesses. Small business interests are not directly affected by these rules, though at least one member of the rulemaking advisory committee works for a small business.

Administrative Rule Advisory Committee consulted?: Yes

/s/ Louis Savage
Authorized Signer

Louis Savage
Printed name

May 24, 2018
Date

Mailing distribution: US Mail, WCD – S, U, AT, CE, EG, NM, CI | agency email lists



Claims Administration Oregon Administrative Rules Chapter 436, Division 060

Proposed

NOTE: Revisions are marked as follows: new text | ~~deleted text~~.

436-060-0005 Definitions

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

- (1) “Aggravation” means an actual worsening of the compensable conditions after the last award or arrangement of compensation that satisfies the requirements of ORS 656.273.
- (2) “Authorized nurse practitioner” means a nurse practitioner authorized to provide compensable medical services under ORS 656.245 and OAR 436-010.
- (3) “Dependent” means any of the relatives of a worker listed under ORS 656.005(10) who, at the time of an accident, depended in whole or in part for support on the earnings of a worker who dies as a result of an injury.
- (4) “Designated paying agent” means the insurer temporarily ordered responsible to pay compensation for a compensable injury under ORS 656.307.
- (5) “Director” means the Director of the Department of Consumer and Business Services or the director’s designee.
- (6) “Disposition” or “claim disposition” means the written agreement to release rights or obligations under ORS 656.236.
- (7) “Division” means the Workers’ Compensation Division of the Department of Consumer and Business Services.
- (8) “Employer” means a subject employer under ORS 656.023.
- (9) “Hearings Division” means the Hearings Division of the Workers’ Compensation Board.
- (10) “Inpatient” means a worker who is admitted to a hospital before and extending past midnight for treatment and lodging.
- (11) “Insurer” means the State Accident Insurance Fund Corporation; an insurer authorized under ORS chapter 731 to transact workers’ compensation insurance in Oregon; or an employer or employer group certified under ORS 656.430 that it meets the qualifications of a self-insured employer under ORS 656.407.

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(12) "Mailed" or "mailing date," unless otherwise specified, means:

- (a) The date a document is postmarked;
- (b) The date automatically produced by electronic transmission (e.g., email or facsimile);
- (c) The date a hand-delivered document is stamped or punched in by the recipient; or
- (d) The date of a phone, or in-person request, when allowed under these rules.

(13) "Physical rehabilitation program" means any services provided to a worker to prevent the compensable injury from causing continuing disability.

(14) "Regularly employed worker" means any worker who receives a regular wage as defined in section (17) of this rule. For workers who are paid a daily wage, "regularly employed" means actual employment or availability for such employment.

(15) "Service company" means the contracted agent for an insurer authorized to process claims and make payment of compensation on behalf of the insurer.

(16) "Suspension of compensation" means:

- (a) No temporary disability, permanent total disability, or medical and related service benefits accrue or are payable during the period of suspension; and
- (b) Vocational assistance and payment of permanent partial disability benefits will stop during the period of suspension.

(17) "Wages" is as defined in ORS 656.005(29) and, in these rules, is categorized as either irregular wages or regular wages. Wages do not include expenses incurred due to the job and reimbursed by the employer (e.g., meals, lodging, per diem, equipment rental). As used in these rules:

(a) "Irregular wages" means a variable money-pay rate paid at variable rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and it includes but is not limited to:

(A) Tips;

(B) Commissions;

(C) Monies, ~~or is~~ paid on unscheduled or unpredictable intervals, including but not limited to workers who are seasonally employed, on call, paid hourly at varying hours, or ~~are~~ paid by piece rate; and

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

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

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

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

Statutory authority: 656.726(4)

Statutes implemented: 656.005, 656.726(4)

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

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

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

[Amended xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx](#)

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

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

(1) Continuation of wages, insured employers.

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

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

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

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

- (a) Normal deductions including but not limited to, taxes, benefits, and voluntary deductions, must be withheld;
- (b) The claim must be classified as disabling;
- (c) The self-insured employer must report to the division the rate and duration of temporary disability that would have been paid had wages not continued; and
- (d) If the pay interval changes or the amount of wages decreases, the worker must be paid temporary disability as otherwise prescribed by the workers' compensation law.

(3) Rate of compensation, generally.

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

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

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

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

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

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

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

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

(a) As used in this section:-

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

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

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

~~(B) "New~~

(A) "New wage earning agreement" means the worker's wage earning agreement changed for reasons other than only a change in rate of pay pay rate change, including but not limited to a change of hours worked or a change of job duties. A job assignment from a temporary service provider or worker leasing company as defined in OAR 436-050 is not considered to be a new wage earning agreement.

(B) "Pay rate change" means an increase or decrease in a previously established pay rate.

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

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

(B) If the worker began work under a **new wage earning agreement** in the 52 weeks before the date of injury or verification of disability caused by occupational disease, and there has been no pay rate change since the beginning of that work, the insurer must average ~~earnings~~ irregular wages only for the weeks worked under the most recent wage earning agreement; ~~and-~~

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

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

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

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

- (a) Daily wages must be multiplied by the number of days per week the worker was regularly employed;
- (b) Monthly wages must be divided by 4.35;
- (c) Wages for other pay intervals must be calculated on an equivalent basis; or

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

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

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

(6) Workers with no wages.

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

(7) Owners and corporate officers.

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

(8) Wage disputes.

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

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

Statutes implemented: ORS 656.210, 656.704

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

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

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

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

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