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ARCHIVES DIVISION

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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 436  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION

**FILED**

11/18/2020 1:54 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Processing workers' compensation claims for COVID-19 or SARS-CoV-2 exposure

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/08/2021 11:55 PM

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

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Filed By:  
FREDERICK BRUYNS  
Rules Coordinator

HEARING(S)

*Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.*

DATE: 01/05/2021

TIME: 9:00 AM

OFFICER: Fred Bruyns

ADDRESS: Virtual - telephone only

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SPECIAL INSTRUCTIONS:

Telephone only:

Toll-free, 1-844-766-2282

PIN, 302398

NEED FOR THE RULE(S):

This rule is needed to promote appropriate and consistent processing of claims for COVID-19 or exposure to SARS-CoV-2.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Rulemaking advisory committee records; letter dated July 20, 2020, from the Management-Labor Advisory Committee (MLAC) to Gov. Kate Brown, including "DRAFT COVID RULES"; records from the MLAC COVID-19 subcommittee meeting of Sept. 24, 2020; and written advice on a draft temporary rule posted for comment in Sept. 2020. 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:

Proposed amendments to the rules are not expected to increase agency costs or workload. Possible impacts on stakeholders are described under "Statement of Cost of Compliance" below.

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#### COST OF COMPLIANCE:

*(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).*

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

a. The agency estimates that proposed rule changes will not affect costs to state agencies for compliance with the rule.

b. The agency estimates that proposed rule changes will not affect costs to units of local government for compliance with the rule, with the possible exception of those units of local government that are self-insured employers certified under ORS 656.430. Impacts on self-insured employers are described in 1.c.

c. The agency estimates that proposed rule changes may affect costs to the public for compliance with the rule, specifically for insurers, for self-insured employers, and for service companies that process claims for insurers and self-insured employers. Many of these claims processors already manage claims for COVID-19 or exposure to SARS-CoV-2 consistent with the proposed standards. To the extent adoption of this rule would prompt enhancements to claim investigations, responsible insurers, self-insured employers, and service companies may have additional costs, primarily for obtaining any needed medical or other expert opinions. The agency does not have data that would allow it to estimate the extent of additional costs, but invites public testimony regarding costs.

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:

Insurers and self-insured employers are generally not small businesses, but as many as ten service companies are small businesses and are subject to these rules.

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

Possible impacts are described under 1.c. above, which may include administrative activities required for compliance. Service companies process claims for insurers and self-insured employers, so any additional costs for service companies due to proposed rule changes will probably be passed along to insurers and self-insured employers.

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

Possible impacts are described under 1.c. above, which may include labor and increased administration required for compliance. Service companies process claims for insurers and self-insured employers, so any additional costs for service companies due to proposed rule changes will probably be passed along to insurers and self-insured employers.

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DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The agency notified more than 4,000 stakeholders, including representatives of small businesses, about the rulemaking advisory committee meeting and invited participation.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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ADOPT: 436-060-0141

RULE SUMMARY: Proposed OAR 436-060-0141:

- Defines "COVID-19," "isolation," "medical service provider," "presumptive case," "quarantine," and "SARS-CoV-2," as these terms are used in the rule;
- Explains that, under OAR 436-060-0140(1), insurers must conduct a "reasonable investigation" before denying any claim, and describes additional requirements for a reasonable investigation when the claim is filed on or after Feb. 1, 2021, for COVID-19 or exposure to SARS-CoV-2;
- Provides an exception to additional requirements for a reasonable investigation if a claim is denied for procedural reasons not related to the worker's exposure to COVID-19 or SARS-CoV-2 (for example, the claim was filed with the wrong insurer, the insurer did not provide coverage, or the worker is nonsubject);
- Explains that the director will audit denied claims for COVID-19 or exposure to SARS-CoV-2 reported to the director before Oct. 1, 2020, if the insurer had reported five or more claims for COVID-19 or exposure to SARS-CoV-2 before Oct. 1, 2020, regardless of whether those claims were accepted or denied, and if the denial is final by operation of law;
- States that the director retains authority to audit other insurers and claims as the director determines appropriate;
- Describes the focus of the director's audit of claims for COVID-19 or exposure to SARS-CoV-2 filed before Oct. 1, 2020, of claims filed on or after Oct. 1, 2020, but before Feb. 1, 2021, and of claims filed on or after Feb. 1, 2021; and
- Explains that failure to comply with requirements in ORS chapter 656, OAR chapter 436, or orders of the director may subject an insurer to civil penalties under ORS 656.745(2).

CHANGES TO RULE:

436-060-0141

Claims for COVID-19 or Exposure to SARS-CoV-2

(1) Definitions. For the purpose of this rule:¶

(a) "COVID-19" means a disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).¶

(b) "Isolation" means the physical separation and confinement of a person who is infected or reasonably believed to be infected with COVID-19 from nonisolated persons to prevent or limit the transmission of COVID-19 to nonisolated persons.¶

(c) "Medical service provider" means a person duly licensed to practice one or more of the healing arts.¶

(d) "Presumptive case" means:¶

(A) The person has not tested positive for COVID-19;¶

(B) The person has an acute illness with at least two of the following symptoms: shortness of breath, cough, fever, new loss of smell or taste, or radiographic evidence of viral pneumonia;¶

(C) There is no more likely alternative diagnosis; and¶

(D) The person, within the 14 days before illness onset, had close contact with a confirmed case of COVID-19.¶

(e) "Quarantine" means the physical separation and confinement of a person who has been or may have been exposed to COVID-19 or SARS-CoV-2 and who does not show signs or symptoms of COVID-19, from persons who have not been exposed to COVID-19 or SARS-CoV-2, to prevent or limit the transmission of COVID-19 to other persons.¶

(f) "SARS-CoV-2" means the strain of coronavirus that causes COVID-19.¶

(2) Reasonable investigation. Under OAR 436-060-0140(1), insurers must conduct a "reasonable investigation" before denying any claim. For claims filed on or after Feb. 1, 2021, for COVID-19 or exposure to SARS-CoV-2, in addition to the requirements of OAR 436-060-0140(1), a reasonable investigation must include the steps in

subsections (a) through (d) of this section. The steps in subsections (a) through (d) are not required if the claim is denied for procedural reasons not related to the worker's exposure to COVID-19 or SARS-CoV-2 (for example, the claim was filed with the wrong insurer, the insurer did not provide coverage, or the worker is nonsubject).<sup>¶¶</sup>

(a) Investigate whether there was likely exposure to COVID-19 or SARS-CoV-2 that arose out of and in the course of the worker's employment;<sup>¶¶</sup>

(b) Investigate the source of the worker's exposure to COVID-19 or SARS-CoV-2, which may involve obtaining a medical or expert opinion, if, before a compensability denial is issued, the worker tests positive for COVID-19 or a medical service provider diagnoses a presumptive case of COVID-19, the insurer is aware of the test results or presumptive diagnosis, and the source of the exposure is unclear;<sup>¶¶</sup>

(c) Determine whether the worker did not work for a period of quarantine or isolation at the direction of a medical service provider, the Oregon Health Authority Public Health Division, a local public health authority as defined in ORS 431.003, or the employer, for purposes of discovering information that may be relevant to the compensability determination; and<sup>¶¶</sup>

(d) Determine whether medical services were required as a result of potential workplace exposure to COVID-19 or SARS-CoV-2, even if the worker ultimately did not test positive for COVID-19.<sup>¶¶</sup>

(3) Auditing and monitoring. The director will audit claims for COVID-19 or exposure to SARS-CoV-2 as follows:<sup>¶¶</sup>

(a) Denied claims that were reported to the director under OAR 436-060-0011 before Oct. 1, 2020, will be audited if:<sup>¶¶</sup>

(A) The insurer had reported a total of five or more claims for COVID-19 or exposure to SARS-CoV-2 before Oct. 1, 2020, regardless of whether those claims were accepted or denied; and<sup>¶¶</sup>

(B) The denial is final by operation of law by the date of the audit.<sup>¶¶</sup>

(b) The director retains authority to audit other insurers and claims as the director determines appropriate.<sup>¶¶</sup>

(c) If the director audits a claim filed before Oct. 1, 2020, the director's audit will focus on whether a reasonable investigation was conducted as required by OAR 436-060-0140(1).<sup>¶¶</sup>

(d) If the director audits a claim filed on or after Oct. 1, 2020, but before Feb. 1, 2021, the director's audit will focus on, but not necessarily be limited to, whether the insurer complied with OAR 436-060-0141(2), effective 10/1/2020 (WCD Admin. Order 20-061).<sup>¶¶</sup>

(e) If the director audits a claim filed on or after Feb. 1, 2021, the director's audit will focus on, but not necessarily be limited to, whether the insurer complied with section (2) of this rule.<sup>¶¶</sup>

(f) Failure to comply with requirements in ORS chapter 656, OAR chapter 436, or orders of the director may subject an insurer to civil penalties under ORS 656.745(2).

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.262, 656.745