



Oregon

Kate Brown, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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Aug. 30, 2021

Proposed Changes to Workers' Compensation Rules

Caption: Standards for calculating the Workers' Benefit Fund (WBF) assessment

The Workers' Compensation Division proposes to amend OAR 436-070, "Workers' Benefit Fund Assessment."

When is the hearing? Sept. 16, 2021, 4 p.m.

Where is the hearing? Virtual hearing: Connection information:

Join ZoomGov Meeting

<https://www.zoomgov.com/j/1619870789?pwd=MGpVYmtlOVg4RC9QV284SjBIV09iZz09>

Meeting ID: 161 987 0789 | Passcode: 489060

One tap mobile

+16692545252,,1619870789#,,,,*489060# US (San Jose)

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Dial by your location

+1 669 254 5252 US (San Jose) | +1 669 216 1590 US (San Jose)

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833 568 8864 US Toll-free

Meeting ID: 161 987 0789 | Passcode: 489060

Find your local number: <https://www.zoomgov.com/u/auFRUpXct>

Join by SIP 1619870789@sip.zoomgov.com

Join by H.323

161.199.138.10 (US West) | 161.199.136.10 (US East)

Meeting ID: 161 987 0789 | Passcode: 489060

How can I make a comment? Connect or dial in to the hearing and speak, send written comments, or do both. Send written comments to:

Email – WCD.Policy@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 closing date for written comments is Sept. 23, 2021.

Questions?

Contact Fred Bruyns, 503-947-7717.

Proposed rules and public testimony are available on the Workers' Compensation Division's website: <http://wcd.oregon.gov/laws/Pages/proposed-rules.aspx>. Or, call 503-947-7717 to get paper copies.

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

Summary of proposed changes:

- **Repealed rule 0001** describes the director's authority under ORS 656.726; the statute is sufficient without the rule.
- **Repealed rule 0002** describes the purpose of OAR 436-070. Its statements have been revised and relocated to rule 0003.
- **Amended rule 0003:**
 - Includes statements of purpose moved in and revised from rule 0002; and
 - Includes other wording changes to promote clarity and consistency with other rules in OAR chapter 436.
- **Amended rule 0005:**
 - Incorporates by reference the definitions in ORS chapter 656, unless a term is defined in these rules or the context otherwise requires;
 - Defines "board" to mean the Workers' Compensation Board, including its Hearings Division;
 - Defines "division" to mean the Workers' Compensation Division of the Department of Consumer and Business Services; and
 - Defines "employer" to mean a subject employer as defined in ORS 656.005, including an employer that elects coverage for an otherwise nonsubject worker under ORS 656.039.
- **Amended rule 0008** clarifies the processes for requesting hearings regarding certain orders or actions of the director.
- **Amended rule 0010** streamlines general instructions for calculating the WBF assessment.
- **Amended rule 0020:**
 - Provides detailed instructions for calculation of the WBF assessment and explains how to round fractions of cents;
 - Explains that for Form OQ, Oregon Quarterly Tax Report, filed with the Department of Revenue, if the due date is on a weekend or holiday, the report and payment are due the next business day; and
 - Excepts refund provisions under OAR 436-070 from OAR 436-001-0500.
- **Amended rule 0040** includes a minor wording change to promote clarity.
- **Amended rule 0050** includes a minor wording change to promote clarity.

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): The method for determining the WBF assessment for an individual employee sometimes results in amounts of less than a cent being owed. The Workers' Compensation Division has published some informal guidance for employers to round down the employee's portion of the WBF assessment and to round up the employer's portion to make up the difference, but statute and rule provide that the employee's and employer's shares are to be equal. Without direction in rule for rounding fractional amounts, employers may be at risk of overwithholding if they round fractional amounts up to the nearest cent. If they round fractional amounts down to the nearest cent and therefore underpay the WBF assessment, their account may eventually be sent to collections. The proposed rules explain how to round fractions of cents and how to calculate assessments so amounts paid by employees and employers are equal.

Documents Relied Upon, and where they are available: Rulemaking advisory committee meeting 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, WCD.Policy@oregon.gov.

Fiscal and Economic Impact: Proposed instructions to round the employee's portion of the assessment to the nearest cent and not make up the differences caused by rounding down in the employer's portion would not meaningfully affect income to the WBF. The agency estimates an impact of less than one tenth of one percent. This possible impact is not expected to affect the sufficiency of moneys available for programs funded by the WBF.

Statement of Cost of Compliance:

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 may slightly reduce costs to state agencies for compliance with the rule. Existing agency publications advise to round up fractions of cents for the employer's portion of the assessment. The proposed direction to not make up the differences caused by rounding down in the employer's portion may reduce the employer's cost by 0.5 to 1 percent and increase the assessment owed by some employees by the same amount. The agency estimates that affected employees will owe between 1 and 7 additional cents per quarter.

b. The agency estimates that proposed rule changes may slightly reduce costs to units of local government for compliance with the rule. Existing agency publications advise to round up fractions of cents for the employer's portion of the assessment. The proposed direction to not make up the differences caused by rounding down in the employer's portion may reduce the employer's cost by 0.5 to 1 percent and increase the assessment owed by some employees by the same amount. The agency estimates that affected employees will owe between 1 and 7 additional cents per quarter.

c. The agency estimates that proposed rule changes may reduce costs to the public for compliance with the rule and thereby benefit Oregon employers. Existing agency publications advise to round up fractions of cents for the employer's portion of the assessment. The proposed direction to not make up the differences caused by rounding down in the employer's portion may reduce the employer's cost by 0.5 to 1 percent and increase the assessment owed by some employees by the same amount. The agency estimates that affected employees will owe between 1 and 7 additional cents per quarter. The agency projects a small cost for payroll companies and employers to adjust payroll systems to change how fractions of cents are rounded. The agency does not have data it can use to estimate the specific dollar impact of these adjustments but invites testimony regarding the 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:

More than 125,000 Oregon employers are subject to the WBF assessment. At least 90 percent of employers are small businesses (50 or fewer employees).

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


The agency projects a small cost for payroll companies and employers to adjust payroll systems to change how fractions of cents are rounded. The agency does not have data it can use to estimate the specific dollar impact of these adjustments but invites testimony regarding the costs.

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

The agency projects that there will be no impact on equipment, supplies, labor, or increased administration for compliance.

How were small businesses involved in the development of this rule? The agency reached out to approximately 4,000 stakeholders, including small business representatives, to request rulemaking advisory committee volunteers and agenda topics. A representative of the National Federation of Independent Business, a small business association, participated on the rulemaking committee.

Administrative Rule Advisory Committee consulted?: Yes If not, why?

	Sally Coen	Aug. 30, 2021
Authorized Signer	Printed name	Date

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Workers' Benefit Fund Assessment Oregon Administrative Rules Chapter 436, Division 070

Proposed, to be Effective Jan. 1, 2022

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HISTORY LINES: These rules include only the most recent "History" lines. A rule's history line shows when the rule was last revised and its effective date. To obtain a "Chapter 436 revision history index," please call the Workers' Compensation Division, (503) 947-7627, or visit the division's Web site: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 070

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

436-070-0001 Authority for Rules (Repealed)

~~(1) These rules are adopted under the director's authority contained in ORS 656.726 and 656.506.~~

Stat Auth: ORS 656.726, 656.506
Stats. Impltd: ORS 656.506
Hist: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05
Repealed xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22

436-070-0002 Purpose (Repealed)

- ~~(1) Prescribe the rate of the Workers' Benefit Fund assessment under ORS 656.506;~~
~~(2) Prescribe the manner and intervals in which the assessment rate is to be calculated;~~
~~(3) Prescribe the manner and intervals employers are to withhold, file, and remit assessments; and~~
~~(4) Prescribe the conditions affecting the adjustment of the assessments as authorized by ORS 656.506.~~

Stat Auth: ORS 656.506, 656.726(4)
Stats. Impltd: ORS 656.506
Hist: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05
Amended 12/7/12 as WCD Admin. Order 12-063, eff. 4/1/13
Repealed xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22

436-070-0003 Purpose and Applicability of Rules

(1) Purpose.

~~These rules prescribe the rate of the Workers' Benefit Fund assessment under ORS 656.506 are effective Jan. 1, 2022~~0~~, the method and manner for calculating the assessment rate, and the method and manner in which employers are to pay the assessment.~~

(2) Applicability. ~~These rules govern the Workers' Benefit Fund assessment under ORS 656.506.~~

~~(a3) These rules apply to all subject employers as defined in ORS 656.005 and any otherwise non-subject employer who elects coverage pursuant to ORS 656.039.~~

~~(b4) Applicable to this chapter, The director may, waive procedural rules as justice requires, unless otherwise obligated by statute, ~~in the director's discretion waive any procedural rules as justice so requires.~~~~

Stat Auth: ORS 656.506 ~~(OL 2019, ch. 494)~~, 656.726(4)
Stats. Impltd: ORS 656.506 ~~(OL 2019, ch. 494)~~
Hist: Amended 11/1/18 as WCD Admin. Order 18-063, eff. 1/1/19
Amended 10/1/19 as WCD Admin. Order 19-055, eff. 1/1/20

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Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22

436-070-0005 Definitions

Unless a term is defined elsewhere in these rules, the definitions of ORS chapter 656 are incorporated by reference and made a part of these rules. For the purpose of these rules, unless ~~Except where~~ the context requires otherwise, the construction of these rules is governed by the definitions in the Workers' Compensation Law and as follows:

(1) "Assessments" means the funds due from employees and employers pursuant to under ORS 656.506.

(2) "Board" means the Workers' Compensation Board and includes its Hearings Division.

(3) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

(4) "Employee" means an Oregon subject Oregon-worker as defined in ORS 656.005 and any otherwise nonsubject worker for whom coverage is elected under ORS 656.039.

(5) "Employer" means a subject employer as defined in ORS 656.005, including an employer that elects coverage for an otherwise nonsubject worker under ORS 656.039.

(6) "Fund" means the Workers' Benefit Fund as created in ORS 656.506.

(7) "Fund balance" means the balance of the fund after revenue and investment income has been added and expenditures have been subtracted.

Stat Auth: ORS 656.506

Stats. Impltd: ORS 656.506

Hist: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05

Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22

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

436-070-0008 Administrative Review

(1) ~~Contested case~~ Request for hearings regarding on proposed sanctions and or civil penalties.

Any employer as defined by ORS 656.005 aggrieved that disagrees with by a proposed order, or proposed assessment of civil penalty, of the director issued pursuant under to ORS 656.745, may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with 656.740. To request a hearing, the employer must:

(a) The request for hearing must be sent in writing to the administrator of the Workers' Compensation Division. No hearing will be granted unless the request specifies the grounds upon which the person requesting the hearing contests the proposed order or assessment. Mail or deliver a written request to the division within 60 days of the mailing date of the proposed order or assessment; and

(b) The request for hearing must be filed with the administrator of the Workers' Compensation Division within 60 days after the mailing of the proposed order or assessment. No hearing will be granted unless the request is mailed or delivered to the administrator within 60 days after the mailing date of the proposed order or

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assessment. Specify, in the request, the reasons why the employer disagrees with the proposed order or assessment.

(2) Requests for Hearings- on other actions, including regarding estimation actions and orders.:

Under ORS 656.704(2), aAny employer who that disagrees with an action or order of the director under these rules, other than as described in section (1), may request a hearing by filing a request for hearing as provided inunder OAR 436-001-0019 within 30 days of the mailing date of the order or notice of action. OAR 436-001 applies to the hearing.

Stat Auth: ORS 656.735 and 656.740
Stats. Impltd: ORS 656.704, ~~OL 2005 ch 26~~, 656.735, 656.740
Hist: Amended 10/19/05 as WCD Admin. Order 05-064, eff. 1/2/06
Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-070-0010 Assessment Rate: Method and Manner of Determining

~~(1) All subject employers and any employer electing to provide workers' compensation coverage for its employees must pay an~~The assessment owed by an employer under this rule division and ORS 656.506 must be calculated using the method in OAR 436-070-0020 and based on a rate of 2.2 cents per hour ~~to the Department of Consumer and Business Services, under this rule division and ORS 656.506.~~

(2) Factors considered by the director in developing the rate include, but are not limited to:

- (a) The estimated annual fund expenditures and revenues;
- (b) The fund balance requirements;
- (c) The estimated annual hours worked per employee;
- (d) The estimated number of employees covered by workers' compensation insurance; and
- (e) Other records relating to fund expenditures and revenues.

Stat Auth: ORS 656.506 (~~OL 2019, ch. 494~~), 656.726(4)
Stats. Impltd: ORS 656.506 (~~OL 2019, ch. 494~~)
Hist: Amended 9/28/18 as WCD Admin. Order 18-060, eff 1/1/19
Amended 10/1/19 as WCD Admin. Order 19-055, eff. 1/1/20
Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22

436-070-0020 Assessments: Manner and Intervals for Filing and Payment

~~(1) Every~~Each pay period, an employer must ~~compute~~retain from the moneys earned by each employee an amount equal to one-half (1/2) the assessment rate under OAR 436-070-0010 multiplied by the number of hours or parts of an hour the employee worked in that pay period.~~the total assessment amount due for each employee by multiplying the assessment rate determined in OAR 436-070-0010 by the number of hours or parts of an hour the employee worked in the pay period.~~

- (a) If actual hours worked are not tracked, an employer may either calculate the assessments using a flat rate, use contract information stating the number of hours an employee works, or ~~come up with~~use another a reasonable method for calculating hours

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worked. If the flat rate method is used, the calculation must be based on 40 hours per week for employees paid weekly or biweekly, or 173.33 hours per month for employees paid monthly or semi-monthly.

~~(b) The employer will retain from the moneys earned by each employee one-half (1/2) of the amount due. In addition, the employer will be assessed an amount equal to the amount retained from each employee. If the amount to be retained from an employee under this section includes a fraction of a cent, the employer must round up or down as follows:~~

~~(A) For amounts greater than or equal to one-half (1/2) of a cent, the employer must round up to the nearest whole cent.~~

~~(B) For amounts less than one-half (1/2) of a cent, the employer must round down to the nearest whole cent.~~

(2) Every employer must file a report of employee hours worked and remit amounts due upon a combined tax and assessment report form prescribed by the Department of Revenue. The report must be filed with the Department of Revenue:

(a) At the times and in the manner prescribed in ORS 316.168 and 316.171; or

(b) Annually as required or allowed ~~pursuant to~~ under ORS 316.197 or 657.571.

(3) For each period in which an employer is required to remit an assessment under section (2) of this rule, the amount of the assessment must be equal to the sum of:

(a) The total amount retained from the moneys earned by each employee during the period; and

(b) An amount equal to the amount under subsection (a) of this section, to be paid by the employer.

~~(34)~~ For employers required to report quarterly, reports and payments are due on or before the last day of the first month after the close of each calendar quarter. For employers that report annually, reports and payments are due on or before the last day of January following the close of each calendar year. If the due date is on a weekend or holiday, the report and payment are due the next business day.

~~(45)~~ Employers who fail to timely and accurately file and remit assessments may be charged interest on all overdue balances at the rate established by ORS 82.010 and may be assessed civil penalties in accordance with OAR 436-070-0050.

~~(56)~~ (a) If an employer fails to file a report, or if the director determines, based on the available data, that the report filed understates the total assessments amount due, the director may send to the employer a written Failure to File Notice or Notice of Audit Findings. The notice will include a warning that failure to timely and accurately resolve all issues addressed in the written notice may result in the imposition of a civil penalty. The director may coordinate with the Department of Revenue and Employment Department to provide written notice of failure to file.

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(b) Within 30 days of the Failure to File Notice or the Notice of Audit Findings, the employer must file an accurate report and remit the assessments due, or otherwise resolve to the satisfaction of the director all issues identified in the written notice. If an employer fails to comply with the notice, the director may estimate the assessments due, including penalties and interest, and send to the employer a Notice of Estimation.

(c) Within 30 days of the Notice of Estimation, the employer must pay the director's estimated assessment or file and remit accurate assessment due. If the employer fails to comply with the notice, the director may send to the employer an Order of Default assessing all amounts due as calculated by the director.

(d) Within 30 days of the Order of Default, the employer must remit the estimated assessment due, unless the order is timely appealed as provided in OAR 436-070-0008.

(67) Employers or the director may initiate activity to resolve reporting errors, omissions, or discrepancies for a period not to exceed the current calendar year plus three prior calendar years. No calendar year limitation applies to cases involving fraud.

(87) Notwithstanding OAR 436-001-0500, wWhen the director determines that the department has received moneys in excess of the amount legally due and payable or that it has received moneys to which it has no legal interest, the director will refund or credit the excess amount. For amounts less than \$20, the director will refund to employers the excess amount only upon receipt of a written request from the employer or the employer's legal representative.

Stat Auth: ORS 656.506 and 82.010
Stats. Impltd: ORS 656.506 and 293.445
Hist: Amended 6/15/06 as WCD Admin. Order 06-057, eff. 7/1/06
[Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22](#)
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-070-0040 Monitoring/Auditing

(1) Employers must maintain payroll and employment records which-that reflect the total hours worked by all employees for the current calendar year plus three prior calendar years.

(2) Pursuant to Under ORS 656.726, the director may inspect the books, records and payrolls of employers pertinent to the administration of these rules. Employers must provide the director with all pertinent books, records and payrolls upon request.

Stat Auth: ORS 656.726
Stats. Impltd: ORS 656.506
Hist: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05
[Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22](#)
See also the *Index to Rule History*: http://wcd.oregon.gov/laws/Documents/Rule_history/436_history.pdf.

436-070-0050 Assessment of Civil Penalties

The director may assess a civil penalty under ORS 656.745(2) against an employer that violates does not comply with ORS chapter 656, OAR 436-070, or an order of the director.

Stat Auth: ORS 656.726(4)
Stats. Impltd: ORS 656.745
Hist: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05
Amended 12/17/19 as Admin. Order 19-065, eff. 1/1/20
[Amended xx/xx/xx as WCD Admin. Order 21-XXX, eff. 1/1/22](#)