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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
08/30/2021 5:22 PM
ARCHIVES DIVISION
SECRETARY OF STATE

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

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/23/2021 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.

CONTACT: Fred Bruyns
503-947-7717
WCD.Policy@oregon.gov

350 Winter Street NE
PO Box 14480
Salem, OR 97309

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: 09/16/2021

TIME: 4:00 PM - 5:00 PM

OFFICER: Fred Bruyns

ADDRESS: Virtual - videoconference
or telephone

350 Winter Street NE
PO Box 14480
Salem, OR 97309

SPECIAL INSTRUCTIONS:

The connection information for the hearing is located under "Need for the rules" below.

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.

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)

+16692161590,,1619870789#,,,,*489060# US (San Jose)

Dial by your location

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

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

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Join by H.323

161.199.138.10 (US West) | 161.199.136.10 (US East)

Meeting ID: 161 987 0789 | Passcode: 489060

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.

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 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.

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

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.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

436-070-0001, 436-070-0002, 436-070-0003, 436-070-0005, 436-070-0008, 436-070-0010, 436-070-0020, 436-070-0040, 436-070-0050

REPEAL: 436-070-0001

RULE SUMMARY: Repealed rule 0001 describes the director's authority under ORS 656.726; the statute is sufficient without the rule.

CHANGES TO RULE:

436-070-0001

Authority for Rules

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

Statutory/Other Authority: ORS 656.726, 656.506

Statutes/Other Implemented: ORS 656.506

REPEAL: 436-070-0002

RULE SUMMARY: Repealed rule 0002 describes the purpose of OAR 436-070. Its statements have been revised and relocated to rule 0003.

CHANGES TO RULE:

~~436-070-0002~~

~~Purpose-~~

~~The purpose of these rules is to:~~

- ~~(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.~~

~~Statutory/Other Authority: ORS 656.506, 656.726(4)~~

~~Statutes/Other Implemented: ORS 656.506~~

AMEND: 436-070-0003

RULE SUMMARY: 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.

CHANGES TO RULE:

436-070-0003

Purpose and Applicability of Rules ¶¶

(1) Purpose. These rules ~~apre effective Jan. 1, 2020.~~¶

~~(2) These rules govern~~ scribe the rate of the Workers' Benefit Fund assessment under ORS 656.506.¶

~~(3) These rules apply to all subject employers as defined in ORS 656.005 effective Jan. 1, 2022, the method and manner for calculating the assessment rate, and the method and many otherwise non-subject employer who elects coverage pursuant to ORS 656.039~~ ner in which employers are to pay the assessment.¶

~~(4) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion~~ ility.¶

(a) These rules apply to all employers.¶

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

Statutory/Other Authority: ORS 656.506 ~~(OL 2019, ch. 494)~~, 656.726(4)

Statutes/Other Implemented: ORS 656.506 ~~(OL 2019, ch. 494)~~

AMEND: 436-070-0005

RULE SUMMARY: 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.

CHANGES TO RULE:

436-070-0005

Definitions ¶¶

~~Except where the context requires otherwise, the construction of these rules is governed by the definitions in the Workers' Compensation Law and as follows~~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 the context requires otherwise:¶¶

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

~~(2) "Employee" means a subject Oregon worker as defined in ORS 656.005 and any otherwise nonsubject worker for whom coverage is elected under ORS 656.039.¶¶~~

~~(3) "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 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.¶¶

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

Statutory/Other Authority: ORS 656.506

Statutes/Other Implemented: ORS 656.506

AMEND: 436-070-0008

RULE SUMMARY: Amended rule 0008 clarifies the processes for requesting hearings regarding certain orders or actions of the director.

CHANGES TO RULE:

436-070-0008

Administrative Review ¶

~~(1) Contested case hearings regarding~~Request for hearing on proposed sanctions and/or civil penalties: Any employer as defined by ~~ORS 656.005~~ aggrieved by ~~that~~ disagrees with a proposed order, or proposed assessment of civil penalty, of the director issued pursuant to ~~under~~ ORS 656.745, may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with ~~656.740.~~¶

~~(a) The board. To request for a 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.~~¶

~~(b) The request for hearing must be filed with the administrator of the Workers' Compensation D, the employer must:~~¶

~~(a) Mail or deliver a written request to the division within 60 days after of the mailing date 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; and~~¶

~~(b) Specify, in the request, the reasons why the employer disagrees with the proposed order or assessment.~~¶

(2) ~~Hearings regar~~Requests for hearings on other actions, including estimation actions and orders: Under ORS 656.704(2), a. Any 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 in~~under 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.

Statutory/Other Authority: ORS 656.735, ORS 656.740

Statutes/Other Implemented: ORS 656.704, 656.735, 656.740 & OL 2005, Ch. 2635, ORS 656.740, ORS 656.704

AMEND: 436-070-0010

RULE SUMMARY: Amended rule 0010 streamlines general instructions for calculating the WBF assessment.

CHANGES TO RULE:

436-070-0010

Assessment Rate: Method and Manner of Determining ¶¶

~~(1) All subject employers and~~The assessment owed by any employer electing to provide workers' compensation coverage for its employees must pay an assessment rate of 2.2 cents per hour to the Department of Consumer and Business Services, under this rule division and ORS 656.506 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.¶¶

(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.

Statutory/Other Authority: ~~ORS 656.506 (OL 2019, ch. 494),~~ ORS 656.726(4)

Statutes/Other Implemented: ~~ORS 656.506 (OL 2019, ch. 494)~~

AMEND: 436-070-0020

RULE SUMMARY: 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.

CHANGES TO RULE:

436-070-0020

Assessments: Manner and Intervals for Filing and Payment ¶¶

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

(4) 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.¶¶

(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.¶¶

(78) ~~¶~~Notwithstanding OAR 436-001-0500, when 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.

Statutory/Other Authority: ORS 656.506, ORS 82.010

Statutes/Other Implemented: ORS 656.506, ORS 293.445

AMEND: 436-070-0040

RULE SUMMARY: Amended rule 0040 includes a minor wording change to promote clarity.

CHANGES TO RULE:

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.

Statutory/Other Authority: ORS 656.726

Statutes/Other Implemented: ORS 656.506

AMEND: 436-070-0050

RULE SUMMARY: Amended rule 0050 includes a minor wording change to promote clarity.

CHANGES TO RULE:

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.

Statutory/Other Authority: ORS 656.726(4)

Statutes/Other Implemented: ORS 656.745