



Oregon

Kate Brown, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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Nov. 13, 2017

Proposed Changes to Workers' Compensation Rules Determining the worker's weekly wage for the purpose of benefit calculations

The Workers' Compensation Division proposes changes to OAR 436-060-0025:
"Rate of Temporary Disability Compensation."

Please review the attached documents for more information about proposed changes and possible fiscal impacts.

The department welcomes public comment on proposed changes and has scheduled a public hearing.

When is the hearing? Dec. 18, 2017, 9 a.m.

Where is the hearing? Labor & Industries Building
350 Winter Street NE, Room F (basement)
Salem, Oregon 97301

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 closing date for written comments is Dec. 21, 2017.

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.

OFFICE OF THE SECRETARY OF STATE

DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
MARY BETH HERKERT
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

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

FILED

11/13/2017 3:50 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Determining the worker's weekly wage for the purpose of benefit calculations

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/21/2017 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
fred.h.bruyns@oregon.gov

350 Winter Street NE
Salem, OR 97301

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: 12/18/2017

TIME: 9:00 AM

OFFICER: Fred Bruyns

ADDRESS: Rm F Labor & Industries

Building

350 Winter Street NE

Salem, OR 97301

SPECIAL INSTRUCTIONS:

The public may also listen to the
hearing or testify by telephone:

Dial-in number is 1-213-787-0529;

Access code is 9221262#.

NEED FOR THE RULE(S):

Rule amendments are needed to ensure that workers who are hired through union hiring halls are appropriately compensated for job-related injuries and illnesses. Additional rule amendments are needed to promote accurate benefit determination when workers have experienced gaps in earnings or changes in wage earning agreements.

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, fred.h.bruyns@oregon.gov.

FISCAL AND ECONOMIC IMPACT:

The agency projects that proposed rule changes will have no fiscal or economic impact on the agency. Potential impacts on other state agencies, units of local government, and the public are described below under "Statement of Cost of Compliance."

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. State agencies: The agency estimates that proposed rule changes will have no direct impact on the cost of compliance for state agencies.

b. Units of local government: The agency estimates that there will be no direct impact on the cost of compliance for units of local government, unless the government unit is certified as a self-insured employer or a member of a self-insured employer group. See the impacts under the "public" below.

c. The public: The agency estimates that proposed rule changes will have the following effects on the public:

The rule in effect until Dec. 31, 2016, required insurers and self-insured employers to calculate the rate of compensation for workers employed through a union hiring hall on the basis of a five-day work week at 40 hours a week, regardless of the number of days actually worked per week. Restoring this requirement will increase benefit payments to union workers who are injured during a temporary reduction in work hours. Conversely, workers who are injured while working significant amounts of overtime may experience a reduction in benefits. Based on information provided by labor unions, the overall result of this rule change will be largely positive – many more workers will gain than lose benefits. Increased benefits to workers will result in a corresponding increase in costs to workers' compensation insurers and self-insured employers. Increased costs for insurers can affect the cost of workers' compensation insurance premiums that are paid by Oregon employers. The agency cannot project an overall dollar impact likely to result from an increase in benefits, because the division does not have data on how often the hiring hall provision is applicable or what the wage calculations would have been without the assumed wage rate.

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 affected by proposed rule changes are primarily workers' compensation insurers and self-insured employers, and these companies are typically large businesses. However, individual members of self-insured employer groups that join together for the purpose of self-insuring are small businesses as defined by ORS 183.310(10). Oregon has one private self-insured employer group that has for-profit member businesses – 39 members are in the group. Oregon employers may be affected indirectly if any increased insurer costs influence the cost of workers' compensation premiums; Oregon has approximately 115,000 employers, and at least 90 percent are small businesses.

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

The agency projects no costs for compliance by small businesses for reporting, recordkeeping, or other administrative activities required for compliance. The agency projects increased costs for insurers and self-insured employer groups, indirectly causing increased costs to insured employers and members of the self-insured employer groups, for increased benefits payable to certain workers employed through a union hiring hall who are injured on the job. The agency cannot project an overall dollar impact likely to result from an increase in benefits, because the division does not have data on

how often the hiring hall provision is applicable or what the wage calculations would have been without the assumed wage rate.

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

The agency projects no costs for compliance by small businesses for equipment, supplies, labor, or increased administration required for compliance.

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

The agency solicited advisory committee members by notice to more than 3,000 stakeholders. Many of those contacted represent the interests of small businesses, and several committee members work in small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

AMEND: 436-060-0025

RULE SUMMARY: The agency proposes to amend OAR 436-060-0025 to:

- Restore the method for determining the weekly wage for workers employed through a union hiring hall to the one in place before Jan. 1, 2017; for these workers, insurers 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;
- Correct a typographical error to explain that the insurer may not include any gap in "earnings" (not "employment") of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average earnings; and
- Clarify that when a wage earning agreement has been changed due to reasons other than a pay raise, it is a new wage earning agreement.

CHANGES TO RULE:

436-060-0025

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;¶¶

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

(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.¶

(A*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.¶

(B*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 wage earning agreement" means the worker's wage earning agreement changed for reasons other than only a change in rate of pay, 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) 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, the insurer must average the workers' total earnings 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 any gap in ~~employment~~ earnings of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average earnings; and¶

(B) ~~If the worker's wage earning agreement changed due to reasons other than only a change in rate of pay, including but not limited to a change of hours worked or a change of job duties, 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, the insurer must average earnings only for the weeks worked under the most recent wage earning agreement; and¶

~~(C) For the purposes of this section, 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.¶~~

(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 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, regular wages. If a worker receives regular wages, the insurer must calculate the worker's 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; ~~or~~¶

(c) Wages for other pay intervals must be calculated on an equivalent basis; or¶

(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. 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, 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/Other Authority: ORS 656.210(2), 656.704, 656.726(4)

Statutes/Other Implemented: ORS 656.210, 656.704