

Rulemaking advisory committee meeting
OAR 436-060-0025, hiring hall provision
Sept. 18, 2017, 3 p.m., Room 260, Labor & Industries Building, Salem, Oregon

Stakeholders attending:

- Barb Reich, Asante Work Health
- Brian Noble, SMART 16
- Chris Carpenter, LiUNA
- Dan Schmelling, SAIF Corporation
- Diana Winther, IBEW Local 48 | MLAC
- Jennifer Flood, Ombudsman for Injured Workers
- Jessica Giannettino Villatoro, AFL-CIO
- Keith Semple, Johnson Johnson Larson & Schaller PC
- Rose Etta Ventucci, IATSE 28

Agency staff attending:

- Adam Breitenstein
- Barbara Belcher
- Chris Clark
- Fred Bruyns
- Karen Howard
- Lou Savage
- Sally Coen
- Troy Painter

Fred Bruyns welcomed the committee members, reminded the committee to describe any fiscal impacts that may result from potential rule changes, and asked the members to introduce themselves.

Agenda item:

Determination of weekly wage for workers employed through a union hall call board – rule in effect before Jan. 1, 2017, former OAR 436-060-0025:

(3) The rate of compensation for regularly employed workers shall be computed as outlined in ORS 656.210 and this rule. “Regularly employed” means actual employment or availability for such employment.

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(b) For workers employed through union hall call board insurers must compute 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.

For discussion: Stakeholders have reported that workers have been harmed by removal of this provision effective Jan. 1, 2017. Should the Workers' Compensation Division restore this provision to OAR 436-060-0025?

Summary of discussion:

Fred explained that the agency met with stakeholders over about a two-year period and subsequently streamlined rule 0025, effective Jan. 1, 2017.

Jessica explained that they met with Workers' Compensation Division staff members about two weeks ago. They are happy to have the same conversation again, and would like to have the rule returned to its previous calculation method. The new rule doesn't reflect how these workers live their lives or the industries they work in. They would be happy to provide an analysis of why they think that if needed. About 26,000 workers work for their affiliates' hiring halls throughout the state. At any given time someone might be working 60 hours or 13 hours, depending on the industry. The 40 hour method was fairer. They are paying into the system throughout, whether hours are high or low. Most of these folks can't seek work in their trade outside of the hiring hall. In a downturned economy they are dependent on being dispatched to work through that hiring hall.

Brian explained that his industry is in construction. Overtime is an option. You might only work part of the year and you have to plan for the slow months. But, no one can plan for an injury at work. Even in the current economy, their people are not working a lot of overtime, but are changing companies quite a bit.

Barbara asked about outlier situations, workers who have many employers over fairly brief periods.

Rose Etta explained that in her union members may have many employers, sometimes more than one on the same day, multiple employers over a week, up to 27 in a year. Workers may have their compensation determined by just one of those employers – a serious issue for them.

Barbara responded that the last employment would be considered a new wage earning agreement and wages would only be calculated based on that one employer.

Rose Etta said she has one worker who is being comped at eight hours per week. He had been working full time.

Diana noted that unions' hiring practices differ from one to another. It is not as bad for their workers as for Rose Etta's, but they had a worker who had just returned to the workforce but lost some time while the weather was bad. This caused him great financial distress.

Brian explained that their members don't get paid vacation. If you take time off work for a vacation, it is on you. This can affect the calculation. No holiday pay either.

Diana added that this is pretty much consistent through all of the building trades.

Jessica responded that this was an exemption the building trades sought, as it does not reflect their industry.

Rose Etta explained that she was injured in 1992 or 1993, and the rule was at first not applied to her, but later was applied to stage hands. It has been a life saver for them. About nine workers have been affected since January, and three are still out. One of the workers had to move back in with his parents. They have very physical jobs. When someone is broken, there is not a lot of light duty for them.

Keith explained that the Oregon Trial Lawyers Association was involved in discussions that preceded this rule change and they did oppose this change. For the same reason they opposed the elimination of it, they support the reinstatement of the rule. There was discussion about this helping some workers and harming others, that some might be getting a lot of overtime and some might be working somewhat less than 40 hours. There appears to be much more to this. Although overtime and extra wages are valuable, the person who is not earning as much and loses what little they have is more impacted. The fact that the most recent wage earning agreement is applied to workers with a quick turnaround will create horrible litigation and unjust outcomes. They completely support reinstatement of this rule as it was before. They don't believe stakeholders brought this to the department as something that was in need of change. It is a mistake that can relatively easily be undone.

Jessica and Brian noted that the unions she has heard from all support a reinstatement of the former rule.

Fred noted that the division has heard complaints from workers whose compensation didn't reflect their overtime. But, the recommendation here is about a compromise, a balance.

Brian responded that their members' budgets are based on a 40-hour week. Overtime is not something you can count on.

Diana added that she would much rather explain to the overtime worker how the rule is intended to work.

Rose Etta added that there have been one or two complaints from overtime workers, whereas they have nine affected workers right now. More than four times as many people are being impacted negatively.

Fred asked if "union hall call board" is an outdated term.

Everyone: Yes, the term is hiring hall now.

Brian explained that their hiring hall rules are a joint venture between the union and the contractors.

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Fred asked if most of the hiring halls are “closed,” in that workers cannot go outside the hall to get work.

Brian responded that they could face penalties and fines if they go outside the hall.

Diana added that if workers do that, they might as well withdraw from the union at that point.

Rose Etta responded that they are the only union she knows about that is a “soft call.” They can seek non-union work. However, there are no benefits at all. Most work is under contract.

Chris Carpenter emphasized that there is a double danger. Work might be limited by availability or the weather. Or, as Rose Etta explained, you could be super busy, but with so many different employers, it wouldn’t help you very much.

Rose Etta: For us, we are not booked yet for next week, only for this week. Everyone takes what is offered – if 40 hours, you take it. The multiple-employer component is a big part of it.

Brian explained that their hall always provides employment considered full time, even if it is only of short duration.

Diana added that any dispatch is not a guarantee of employment. Delivery of building materials, etc., can affect it. Much is out of their control. The 40-hour rule better expresses what the industry is trying to provide but sometimes cannot.

Dan Schmelling explained that they support the advisory committee process and appreciated the simplification brought by the changes to rule 0025. They don’t have an opinion one way or another on the union hall call board provision. They see how some workers may benefit and some may be harmed under the current rule. They do ask that if the rule is reinstated that it be reinstated verbatim. Dan asked for Keith’s thoughts on whether changing the term from call board to hiring hall might have an effect on application of the rule.

Keith said he didn’t think it would.

Fred asked Dan if it doesn’t change the intent, is there a concern about referring to hiring hall.

Dan said no, and that they knew how to apply the rule before January 1, and they’ll apply it the same way if it changes.

Fred said the only way to make a change quickly is to issue a temporary rule, and that the division has to prepare a justification, that there has been a serious prejudice to the public interest. It appears there is a basis to make that kind of a judgment call. He added that this is not his decision, but that this would be our next step, and it could happen quickly. A temporary rule can only be in effect for 180 days, so the division would immediately need to begin rulemaking to replace it. During that process, the division would broaden the scope to address other concerns about rule 0025 in division 060.

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Troy explained that someone expressed concerns about the wage averaging method prescribed by rule 0025. There also some housekeeping changes needed.

Barbara added that the housekeeping changes are included in some rulemaking in progress.

Fred told the committee that they might see recently proposed changes to rule 0025, and they might wonder what happened to the hiring hall provision, but these changes are for separate rulemaking that was in progress before the hiring hall concerns were surfaced.

Jennifer added that those changes to 0025 wouldn't impact the hiring hall issue.

Chris Clark confirmed by noting that this rule falls in a different section altogether. Hiring hall rulemaking would be separate.

Jessica again noted that Rose Etta has identified nine workers harmed by the rule change, one of whom is homeless, and another is living with his parents. Because of the new calculation method, even these folks whose members work 40 hours could be in a similar situation. Jessica asked if the division has a timeline.

Lou said a decision will be made within days.

Diana Winther asked who will make the final decision.

Lou Savage will make the decision. Lou thanked the committee members for their participation.

Meeting adjourned.