

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules
OAR chapter 436, division 050, worker leasing

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| Type of meeting: | Rulemaking advisory committee |
| Date, time, & place: | Oct. 16, 2017, 1 p.m., Pacific Daylight Time Room F Labor & Industries Building, 350 Winter St. NE, Salem, Oregon Teleconference: 1-213-787-0529 Access code: 9221262# |
| Facilitators: | Fred Bruyns and Chris Clark, Workers' Compensation Division |
| 1:00 to 1:10 | Welcome and introductions; meeting objectives |
| 1:10 to 2:30 | Discussion of issues |
| 2:30 to 2:45 | Break |
| 2:45 to 3:45 | Discussion of issues continued New issues? |
| 3:45 to 4:00 | Summing up – next steps – thank you! |

NOTE: The attached issues were discussed in part at a meeting on 9/22/17. We will complete the agenda on 10/16, revisit some issues, and discuss new issues raised by committee members.

Attached: [Issues document](#)

OAR 436-050-0400 to 050-0480 Worker Leasing
Issues Document
Stakeholder Advisory Meeting
Sept. 22, 2017

ISSUE #1364 - OAR 436-050-0400 to 436-050-0480 - “Worker leasing rules”

Issue: It can be difficult for stakeholders to locate the worker leasing rules and their associated definitions.

Background: OAR 436-050 covers several topics including coverage responsibilities, insurer registration, self-insurance, and worker leasing. Many of the worker leasing rules relate to coverage of workers employed by a worker leasing company or its clients, but the division has received feedback that worker leasing companies, temporary staffing agencies, or other affected parties have difficulty locating these provisions within the rules.

In addition, it is not always clear to the reader that the definitions in OAR 436-050-0005 also apply to the worker leasing rules. To make the rules more user friendly, it may be helpful to separate these rules into their own division, or establish a new rule providing definitions that apply specifically to OAR 436-050-0400 to 436-050-0480.

Alternatives:

- No action
- Establish new division of rules
- Establish new definition rule applicable to OAR 436-050-0400 to 436-050-0480.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1328 - OAR 436-050-0440 - “Limited worker leasing license”

Issue: Entities that are not leasing in the traditional sense or that only have a limited presence in Oregon, are regulated under the same standard as other leasing companies.

Background: ORS 656.850 requires “any person who provides workers, by contract and for a fee, to work for a client...” to obtain a license before performing services as a worker leasing company in Oregon.

The statute's broad construction allows the division to regulate all persons performing services as a leasing company, but also requires some entities that are not leasing in the traditional sense, such as a company that only provides workers to a related company, to license. The statute also requires a worker leasing company to license even when it only has a small number of leased workers in Oregon who are incidental to their operations in other states. Stakeholders have commented that it may not be necessary to make these entities go through the complete application and renewal process, which can be time-consuming and costly.

The division is considering establishing a limited license for worker leasing companies which fall into these categories. The limited license would provide a streamlined application process and/or lower fees for these companies as long as the appropriate coverage for Oregon subject workers is maintained and other reporting criteria are met. The division would appreciate stakeholder feedback on potential criteria and ideas for implementation of this alternative.

Another possible alternative to address the provision of workers among related entities would be to exclude companies that only provide workers to entities that they share common majority interest with. This could be accomplished by adding language similar to the combinability provisions of the National Council on Compensation Insurance (NCCI) Experience Rating Plan Manual and the combinability provisions for self-insured employers under ORS 656.430.

Alternatives:

- Amend the definition of “worker leasing company”:
 - Clarify in OAR 436-050-0005(4) that “worker leasing company” does not include a person that only provides workers to a person that shares common majority ownership; and
 - Separately define “common majority ownership” as “the same person, group of persons, or corporation owns more than 50 percent of each entity. If an entity owns a majority interest in another entity, which in turn owns a majority interest in another entity, all entities so related are considered to share common majority interest.”
- Amend OAR 436-050-0440 to allow a worker leasing company that is not domiciled in Oregon, maintain a license in another state with licensing requirements similar to Oregon, and has less than 5 leased workers in Oregon to apply for a limited license.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1371 - OAR 436-050-0005(26) “Worker Leasing Company”

Issue: Oregon statute and rules refer to “worker leasing companies” but these businesses are more commonly referred to as “professional employer organizations.”

Background: ORS 656.850(1)(a) defines a “worker leasing company” to mean “a person who provides workers, by contract and for a fee, to work for a client but does not include a person who provides workers to a client on a temporary basis.” A similar definition is found in OAR 436-050-0005.

Several stakeholders have commented that the term Professional Employer Organization (PEO) is more commonly used to refer to businesses in this industry nationally.

To be consistent with statute, the division believes OAR 436-050 should continue to use the term “worker leasing company,” but the rules could reference “professional employer organizations” as part of the definition under OAR 436-050-0005(26).

Alternatives:

- No Changes.
- Amend OAR 436-050-0005(26) to provide “Worker leasing company” means a professional employer organization, or other “person,” as described in section (14) of this rule, who provides workers, by contract and for a fee, as established in ORS 656.850.
- Other

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1233 - OAR 436-050-0400(5) - “Combinable worker leasing policies”

Issue: By including combinable policies in the prohibition against “piggybacking” under OAR 436-050-0400(5), the division may be unnecessarily limiting worker leasing companies’ access to premium discounts and other benefits.

Background: OAR 436-050-0400(5) provides, “a worker leasing company must not provide workers’ compensation coverage for another worker leasing company...” This prohibition against “piggybacking” was added in 2004. Piggybacking makes it difficult to determine responsibility for coverage, increases uncertainty in the level of exposure faced by insurers, and

makes verification of statistical reporting and experience ratings for the different leasing companies and clients difficult.

The division has interpreted this provision to also prohibit worker leasing companies from purchasing a combinable policy, in which two or more worker leasing companies who share common majority ownership are included as named insureds on a policy, but treated as a single entity for discounts and other underwriting purposes. Several worker leasing companies have argued that combinable policies and piggybacking are not the same for several reasons. Under a combinable policy, for example, each worker leasing company is a named insured on the policy, the insurer is aware of the potential exposure, and can underwrite the policy appropriately.

The division is considering amending rules to clarify that combinable policies will be allowed as long as worker leasing companies are each named insureds under a policy, and that the reporting requirements under ORS 737.270 are followed. This would provide worker leasing companies and insurers with more flexibility in how policies are structured and coverage is provided for the worker leasing companies and their clients. The division would appreciate any feedback or concerns about moving forward with this change.

Alternatives:

- No changes.
- Clarify that OAR 436-050-0400(5) does not apply to worker leasing companies who share common majority ownership when each are named insureds under a combinable policy.
- Clarify that worker leasing companies under a combinable policy are not relieved from their individual reporting requirements under ORS 737.270(4).
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1370 - OAR 436-050-0410 - “Leasing notice timeframes”

Issue: The timeframe to submit worker leasing notices is not consistent with the timeframes for insurer notification of coverage.

Background: Under OAR 436-050-0410(1), a worker leasing company must file Form 2465, “Worker Leasing Notice to the Department of Consumer and Business Services,” to notify the division that it is providing workers’ compensation coverage to a client within 14 days after the

effective date of the lease arrangement or contract. The 14-day requirement has been in place since the rule was first adopted in 1994.

The National Association of Professional Employer Organizations (NAPEO) suggested that this 14-day timeframe may be too short, particularly when client employers fail to inform the worker leasing companies of changes in circumstances, such as when a national client moves employees into or out of Oregon. In these cases, NAPEO suggests a 30-day requirement would be appropriate and allow worker leasing companies to provide the state with the most accurate and timely client data.

Alternatives:

- No changes.
- Amend OAR 436-050-0410(1) and to require the worker leasing notice within 30-days after the effective date of the agreement to provide leasing services in Oregon.
- Amend OAR 436-050-0410(1)(b)(F) to require the leasing notice to include the effective date of the agreement to provide leasing services in Oregon.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1330 - OAR 436-050-0410(2) - “Worker Leasing Coverage Terminations”

Issue: The rule does not clearly require the worker leasing company to provide written notice of a termination.

Background: The division would like to clarify the requirements a worker leasing company must meet to terminate coverage under OAR 436-050-0410(2), including that the worker leasing company must provide written notice of the termination, even when the client obtains coverage separately.

Alternatives:

- No changes.
- Amend rule as follows:
 - “(2) A worker leasing company **must provide written notification, using Form 3271, to its insurer, its client, and the director when it** terminates its

obligation to provide workers' compensation coverage **to a client**, by giving to its insurer, its client, and the director written notice of the termination **subject to the following:**

(a) ~~A~~ **The** notice of termination must state **include** the effective date and hour of termination;

(b) **The notice to the client must be sent by mail to the client's last-known address;**

(c) The termination will **not** be effective ~~not less than~~ **until** 30 days after the notice is received by the director, **regardless of the date included in the notice.** Notice to the client under this section must be given by mail, addressed to the client at its last known address.”

“(3) If a client obtains coverage while covered under a worker leasing company's policy:

(a) The worker leasing company's obligation to provide coverage is terminated; and

(b) The worker leasing company must provide notice as described under section (2) of this rule within 30 days after the effective date.”

- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1331 - OAR 436-050-0410 - “Worker leasing coverage termination forms”

Issue: Rules do not reference forms attached to Bulletin No. 273.

Background: In addition to Form 2465, “Worker Leasing Notice,” Bulletin No. 275 requires worker leasing companies to use additional forms to report endorsements (Form 3270 “Endorsement to Worker Leasing Notice”) and terminations (Form 3271, “Termination of Workers’ Compensation Coverage to Client of Worker Leasing Company”) to the division. A new form to reinstate coverage for a previously terminated client is also being developed. The division believes these forms should be referenced in rule.

Alternatives:

- No changes.
- Reference Form 3270 and 3271 and new reinstatement form in rule.

- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1228 - OAR 436-050-0420(1) - “Temporary Worker Distinguished from Leased Worker”

Issue: The “default leasing” rule does not allow flexibility when the division finds a temporary work placement without the required contemporaneous documentation.

Background: Under OAR 436-050-0420(2) the director considers a person to be leasing unless there is contemporaneous documentation of duration of work and special situation under ORS 656.850. Temporary staffing companies are often not aware of these requirements and are found to be leasing by default, which can transfer responsibility for claims to their clients if the client has proof of coverage on file for their own workers. The division believes the “default leasing” rule is a useful tool for preventing responsibility disputes, but staff have noted that greater flexibility in the rule may produce more fair outcomes when assigning responsibility for claims.

One alternative to provide more flexibility in the rule would be to limit the requirement for contemporaneous documentation to placements that last 30 days or more. Many temping placements only last a day or two, and arise at the last minute. In these cases, the temporary staffing company or client may not have had time to prepare the required documentation. Providing a window when documentation is not required would allow the division to make determinations on whether a worker is leased or temporary on a case-by-case basis for short-term placements.

The division would also like to clarify that “special situations” may include, but are not limited to” the situations described in OAR 436-050-0420(1)(a) through (f). The division believes this may be more consistent with the ORS 656.850(1)(b), which provides in part: “Temporary basis” means providing workers to a client for special situations *such as* to cover employee absences, employee leaves, professional skill shortages, seasonal workloads and special assignments and projects...” (Emphasis added).

The division is also considering several minor revisions to the descriptions of the “special situations” under OAR 436-050-0420(1), including:

- Clarifying that (c) does not apply when workers are provided as a seasonal employer’s normal workforce.

- Amending (e) to provide that educational institutions other than school districts and community colleges may establish work experience programs.
- Clarifying in (f) that the client employer's pre-established probationary period may be established by the service agreement between the temporary staffing provider and the client, as long as the agreement is in place before workers are provided.

Alternatives:

- No Changes.
- One or more of the following:
 - Amend the first sentence of OAR 436-050-0420(1) to provide, "A person who provides a worker to work for a client for 30 days or more will be considered to be providing the worker on a "temporary basis" only if there is contemporaneous written documentation that indicates the duration of the work to be performed and that the worker is provided to supplement the client's regular workforce for a ~~client's~~ special situation under ORS 656.850(1)(b).
 - Clarify in OAR 436-050-0420(1) that a "special situation" includes, but is not limited to, the conditions described in subsection (a) through (f).
 - Amend the descriptions of "special situations" as follows:
 - "(c) To staff a seasonal or sporadic increase in workload, indicated by a temporary increase in demand upon an employer's normal workload that requires additional assistance to meet the demand. When the increased demand ends, the additional positions are eliminated. Documentation must establish include what constitutes the demand establishing why this special situation demand is beyond the norm. This situation does not apply when workers are provided to staff the normal workload of an employer that operates a business that is seasonal in nature;
 - "(e) To hire a student worker that will be provided and paid ~~by a school district or community college~~ through a work experience program. Documentation must include the name of the school and the work experience program; or"
 - "(f) To cover special situations where the worker has a reasonable expectation of transitioning to permanent employment with the client employer and the client employer uses a pre-established probationary period in its overall employment selection program. Documentation must include copies of the client employer's written program, the agreement between the temporary staffing company and the client employer that establishes the probationary period, or other evidence supporting the pre-established probationary period and overall employment selection program.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1060 - OAR 436-050-0440 - “Complete Worker Leasing application required”

Issue: The rule does not clearly describe the process for rejecting an incomplete worker leasing license.

Background: Under OAR 436-050-0440(2), each person applying for initial license or renewal as a worker leasing company must submit a completed Form 2466, “Application for Oregon Worker Leasing License” as well as additional required documentation. Section (4) provides “The director will review complete applications” and subsection (6)(j) provides that the director may refuse to issue or renew a license when an applicant has “failed to provide documents the director has requested.”

While it is clear that a failure to provide the documentation required by OAR 436-050-0440(2) is sufficient to refuse to approve an application, the division is considering alternatives to clarify the process in rule. One alternative is to adopt provisions describing the review process similar to those found in other rules.

Alternatives:

- No changes.
- One or more of the following:
 - Amend OAR 436-050-0440(4) to provide, “the director will **only** review complete applications...”
 - Amend OAR 436-050-0440(5), to provide:
“After receipt of all information required in section (2) of this rule, the director will review the application and notify the employer that the application is approved or denied.
(a) If the application is denied, the notice will include the reason for denial; or
(b) If the application is approved, the director will issue a license...”
 - Amend OAR 436-050-0440(6) to provide that the director may refuse to issue or renew a license for failure to provide a complete application.
 - Make additional revisions to language and structure for clarity.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1061 - OAR 436-050-0440(2) - “Worker leasing contracts to accompany leasing application”

Issue: Worker leasing contracts do not always adequately establish an employment relationship between the worker leasing company and leased workers.

Background: While reviewing worker leasing records, the division identified several worker leasing contracts that contained phrases limiting the worker leasing company’s obligations as an employer, or stating the worker leasing company was not the employer of the leased workers. The division has concerns that by including this language, the worker leasing contract did not adequately establish a leasing relationship between the worker leasing company and client under ORS 656.850.

To ensure that worker leasing contracts are consistent with Oregon law, the division is considering requiring a sample leasing contract to be included with the initial application for license.

Alternatives:

- No changes.
- Amend OAR 436-050-0440(2) to require a sample leasing contract to be included with the initial application for license.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1360 - OAR 436-050-0440(2) and (3) - “Licensing application requirements”

Issue: The division has identified several areas where the requirements for a worker leasing application can be simplified.

Background: The division proposes the following changes to simplify the worker leasing application process under OAR 436-050-0440(2):

- Amend (c) to require one primary phone number instead of “In-state and out-of-state phone numbers.”
- Amend (d) to only require FEIN, to discourage submission of individual tax identification numbers (e.g. SSNs) that may be confidential.
- Delete (e), because the division obtains type of business from the Secretary of State’s business registry.
- Move (g) “Assumed business names” to associate it with (a) legal name.
- Amend (i) to require names and contact information (phone and email) of a primary and secondary contact that are able to address licensing and coverage issues. (Add name, phone, and email.)
- Amend (j) to only require a list of controlling persons (removing requirement for all owners to be included for privately held entities) and provide an organizational chart or other description of ownership structure and affiliation;
- Amend (k) to remove requirement for initial applicant to provide copies of licenses, registrations, recognitions, or certifications, and only require a list with license numbers and expiration dates and a verifiable statement that all licenses in those states are in good standing, and the remaining states of operation, if any, do not require licensure, registration, recognition, or certification.
- Amend (l) to require a release of information instead of “verification of compliance with tax laws” to be consistent with actual practice;
- Add a subsection requiring evidence of the person’s competency in providing leased workers, to be consistent with OAR 436-050-0440(6)(g). Examples could include education and experience in risk management, payroll processing, accounting, insurance, or other industry related experience.
- Amend (n) to (p) to separate financial risk and criminal background;
 - Include actions regarding foreclosures and collections in the financial section; and
 - Clarify what information is required under each section;
- Amend (q) to require written procedures instead of “a plan of operation” that demonstrates how the worker leasing company will meet the requirements of ORS chapter 654;
- Amend (r) to require written procedures for complying with the reporting requirements of ORS 737.270 or OAR 436-050-0455 in place of a plan of operations; and
- Add a new subsection requiring any other information requested by the director.

The division would appreciate feedback on these proposed changes, along with other suggestions to improve the application process and clarity of the rule.

Alternatives:

- No changes.
- Make amendments to rule as suggested.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1361 - OAR 436-050-0440(5) - “Worker leasing renewals”

Issue: Change due date for supplemental material for renewal application to 30 days before expiration date instead of 45 days.

Background: The worker leasing program has determined that it does not need 45 days to review and process supplemental materials submitted for an application for renewal of a worker leasing license, and recommends allowing supplemental materials to be submitted up to 30 days before the expiration date instead.

Alternatives:

- No changes.
- Allow supplemental materials to be submitted up to 30 days before the expiration date of the current license.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1362 - OAR 436-050-0440(6); OAR 436-050-0460(1) - “License denials, suspension, and revocations”

Issue: Review OAR 436-050-0440(6) and OAR 436-050-0460(1) to ensure that reasons for denial of application are consistent with reasons for suspension or revocation of license.

Background: OAR 436-050-0440(6) provides list of reasons for which the director may refuse to approve or renew a worker leasing license. OAR 436-050-0460(1) provides a list of reasons for which the director may suspend or revoke an existing worker leasing license. These items

listed in these two rules overlap, but are not entirely consistent with each other. For example, OAR 436-050-0460(1) states that a license may be suspended or revoked for insolvency or nonpayment of taxes, but these are not specifically listed in OAR 436-050-0440, even though these items are reviewed during the application process.

Alternatives:

- Add subsections to OAR 436-050-0440(6) to provide that the director may refuse to issue or renew a license if the person has “been the subject of any civil or criminal action involving bankruptcy, liens, default, or insolvency” or “failed to comply with state or federal tax laws.”
- Amend OAR 436-050-0460(1) to provide that “any of the reasons listed under OAR 436-050-0440(6) is reason suspension or revocation of a worker leasing license.”
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

ISSUE #1306 - OAR 436-050-0450 - “In-state leasing records.”

Issue: The current requirement for a leasing company to maintain records at an Oregon location may be overly restrictive.

Background: Issue: OAR 436-050-0455 requires every licensed worker leasing company to give notice to the director of one Oregon location where Oregon leasing records are kept and made available for review by the director. Some stakeholders, including NAPEO, have commented that this requirement is overly restrictive.

Under ORS 656.726(9) and 656.758, the division has the ability to inspect the books, records and payroll, of any employer as pertinent to the administration of ORS chapter 656. This includes the records required under OAR 436-050-0455(3). If a worker leasing company fails to provide requested records, the division can take several actions, including the assessment of penalties and revocation or suspension of a license. The division also may serve an order demanding documents to the worker leasing company’s registered agent in Oregon. The division may be more limited in its ability to compel a worker leasing company to produce records when they are not located in Oregon.

Alternatives:

- No changes.

- Remove the requirement for worker leasing companies to maintain an Oregon location.
- One or more of the following:
 - Establish a process for a worker leasing company to apply for a waiver from the Oregon location requirement.
 - Require any person who maintains leasing records outside of this state to pay costs associated with monitoring and auditing of records.
- Other changes.

Discussion:

Fiscal Impacts, including cost of compliance for small business:

Recommendations:

Housekeeping

- Review all rules for clarity and consistency.
- ISSUE #1329 - OAR 436-050-0410 - "Tax ID Numbers"
 - Rules asks for "FEIN, or other tax reporting number." Recommend removing "other" to discourage submission of SSNs or other individual tax IDs which may be confidential.
- ISSUE #1359 - OAR 436-050-0420(3) - "Temp-or-Leasing Records"
 - Move the first sentence of this rule to OAR 436-050-0450, "Recordkeeping and Reporting Requirements," and amend the second sentence to contain a reference.
- ISSUE #1333- OAR 436-050-0440(1)(a) - "Public worker leasing companies"
 - Current language does not account for public bodies to be considered worker leasing companies. Amend OAR 436-050-0440(1)(a) to provide that an applicant must "Be registered and authorized to do business in this state under ORS chapters 58, 60, 62, 63, 65, 67, 70, and 648, as applicable, or be a municipal corporation as defined in ORS 297.405."
- ISSUE #1363 -OAR 436-050-0460(2) - "Worker leasing suspensions"
 - Rule states that when a suspension expires, the worker leasing company or controlling person may petition the director to resume its worker leasing company activities; however, in many cases the license will have expired. Clean up rule language to allow petition or reapplication if the license expired.
- ISSUE #1388 – OAR 436-050-0470; 436-050-0480 – "Monitoring/Auditing"
 - Clarify that both worker leasing companies and clients are subject to the penalties for failure to meet the requirements of OAR 436-050-0470.