

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules
OAR chapter 436, division 060, rules 0005 & 0025

Worker's Weekly Wage Calculation and Rate of
Temporary Disability Compensation

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	April 30, 2018, 9:00 a.m., Pacific Daylight Time Durham Plaza, 16760 SW Upper Boones Ferry Rd, Tigard, Oregon 97224, Training Room (ground floor) Join meeting from your computer, tablet or smartphone: https://global.gotomeeting.com/join/155801389 You can also dial in using your phone: United States (Toll Free): 1 866 899 4679 United States: +1 (312) 757-3117 Access Code: 155-801-389 First GoToMeeting? Let's do a quick system check: https://link.gotomeeting.com/system-check
Facilitators:	Fred Bruyns and Julia Hier, Workers' Compensation Division
9:00 to 9:10	Welcome and introductions; meeting objectives; timeline
9:10 to 10:30	Review and discuss issues – attached
10:30 to 10:45	Break
10:45 to 11:45	Discussion continued
11:45 to 11:55	Summing up – thank you!

Attached: [Rulemaking timeline](#)
[Issues document](#)

**Timeline for rulemaking
OAR 436-060**

Actual

Temporary rules effective2/21/18
Permanent rulemaking begins (to replace temporary rules).....2/21/18
Request for advisory committee members and agenda items3/5/18
Advisory committee meeting (scheduled)4/30/18

Projected (may change)

File proposed rules with Secretary of State and publishmid-May 2018
Public rulemaking hearing..... middle to end of June 2018
Closing date for written testimonyseveral days after hearing
File final rules with Secretary of State and publish.....mid-July 2018
Permanent rules effective (day after expiration of temporary rules).....8/20/18

**OAR 436-060-0005 &
OAR 436-060-0025
CLAIMS ADMINISTRATION
Definitions & Rate of Temporary Disability Compensation
Issues Document
for advisory committee meeting on 4/30/18**

ISSUE #1

Rule: 436-060-0005 and 436-060-0025

Issue and Background: The Workers' Compensation Division recently issued temporary rules related to OAR 436-060-0005 and 436-060-0025. These temporary rules are [posted here](#). The changes altered the definition of wages and changed the method for determining a worker's average weekly wage if the worker has irregular wages and has experienced an increase or decrease in the rate of pay during the 52 weeks before the date of injury.

The effective date of the rules was Feb. 21, 2018. Temporary rules may only remain in effect for 180 days, so we must adopt "permanent" rules to replace them before they expire on Aug. 19, 2018.

Should we make the changes outlined in the temporary rules permanent? Or, should these rules be modified in some way? Please take note issue #2 below outlines concerns articulated by stakeholders relating to seasonal employees.

Options:

- Adopt the changes made in the temporary rules as permanent
- Modify the changes which were made in the previous temporary rules

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

-

ISSUE #2

Rule: OAR 436-060-0025(4)

Issue and Background: Stakeholders have expressed concerns related to the rate of temporary disability benefits for seasonal workers and workers with large extended gaps. Please see the [attached documents](#) which outline all of the details of the stakeholders' concerns.

Under the current rules, there are no special calculation methods for these workers. If the worker has irregular wages and was employed for four weeks or more, their weekly wage is determined by averaging their irregular wages since entering into a new wage earning agreement, but not to exceed 52 weeks, unless that worker had a change in their wage earning agreement due only to an increase or decrease in their pay rate during that period. If the worker had an increase or decrease in their pay rate during the relevant period, the insurer must calculate the worker's average weekly hours worked at each pay rate since a new wage earning agreement went into place, but not to exceed 52 weeks. Extended gaps of more than 14 days are not included in the calculations if that gap was not anticipated in the wage earning agreement.

In the case of school employees, a stakeholder reported they work as few as 37 weeks during the school year, as they are reportedly often unable to work during breaks. Since these breaks are anticipated, they are included in the calculation of the weekly wage. This means a school employee who was employed under the same wage earning agreement year round will have their wages, or hours, averaged over the previous 52 weeks. If their wage earning agreement ended during an extended break (i.e. summer), then the averaging would be for a lesser period. Under statute and separate rules relating to payment of temporary disability, the worker may receive temporary disability benefits year round when the claim is open and the time is authorized by the attending physician. One stakeholder has asked that the benefit to these workers reflect the actual number of hours worked per week during the school year.

In contrast to the school employee example, an example was provided relating to seasonal wildland firefighters and emergency personnel, who appear to be hired only for the fire season. Since the employment period for these employees only extends during the seasonal part of the job, their wages are similarly only averaged during the time worked during that season. In addition, gaps during their employment may not be deemed anticipated in the wage earning agreement and thus, if unanticipated gaps extend more than 14 days, they could be excluded from the calculation of the weekly wage. A concern was expressed that the current method for determining the worker's weekly wage allows these workers to be compensated as if they were to continue on a fire/incident for an undetermined amount of time. This stakeholder has asked for a fair formula/calculation for the lack of wage history for seasonal employees, along with an updated calculation on future time loss benefits once the fire/incident is over.

In analyzing the concerns articulated by the stakeholders, it is important to recognize the restrictions imposed from statute, and the current practice for paying temporary disability. More specifically, once the worker's rate of temporary disability is identified, the worker may receive up to 2/3 of that amount *year round* when their claim is open and time off work is authorized by their attending physician or authorized nurse practitioner. The payment of year-round benefits, regardless of whether the job at injury was seasonal or permanent, is due to the statutory language in ORS Chapter 656.

ORS 656.210(1) states: "When the total disability is only temporary, the worker *shall receive* during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 133 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of \$50 a week..." (Emphasis added).

If that disability is or becomes partial only, and is temporary in character, ORS 656.212(2) states "[t]he payment of temporary total disability pursuant to ORS 656.210 shall cease and the worker *shall receive* that proportion of the payments provided for temporary total disability which the loss of wages bears to the wage used to calculate temporary total disability pursuant to ORS 656.210." (Emphasis added).

Given this statutory language, year-round benefits should be paid on open claims, unless it is found other circumstances existed which allowed for the termination of benefits. The most common scenarios which end temporary disability involve:

1. A release to regular employment (*See* ORS 656.268(4)(b)); or
2. When the attending physician or authorized nurse practitioner ceases or fails to authorize temporary disability (*See* ORS 656.262(4)(g) and (h), OAR 436-060-0020(3)).

Less common examples of when an insurer may end payment of temporary disability include:

1. Withdrawal from the workforce (*See* ORS 656.005(30), OAR 436-060-0020(2));
2. Incarceration (*See* ORS 656.160, OAR 436-060-0045);
3. Suspension of benefits (*See* ORS 656.262, ORS 656.325, OAR 436-060-0020(5));
and
4. After the insurer or self-insured employer asks the attending physician or authorized nurse practitioner to verify the worker's inability to work as a result of the claimed injury or disease and the physician or nurse practitioner is unable to provide this verification, unless the worker has been unable to receive treatment for reasons beyond their control (*See* ORS 656.262(4)(d), OAR 436-060-0020(4)).

Options:

- Create some type of carve out for seasonal workers.
- Do not create a carve out for seasonal workers
- Other

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

-

ISSUE #3

Rule: OAR 436-060-0025(4)(b)(A)

Issue and Background: During prior rulemaking in 2016, a stakeholder suggested the rule be amended to add a standard of reasonableness when assessing if the gap extending more than 14 days was anticipated. Specifically, they asked the rule be amended to add the following bolded word: “The insurer may not include any gap in earnings of more than 14 days that was not **reasonably** anticipated in the wage earning agreement, when calculating the average wages.

The stakeholder reported that, for employers and workers who have been in the same industry for several years, there were typically anticipated gaps in employment that were not specifically discussed as part of the wage earning agreement because such gaps were already anticipated by both parties, based on their experience within that particular field, at the time of hiring.

Options:

- Add the term “reasonably” to the rule
- Do not make changes to this rule
- Other

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

-

ISSUE #4

Request for a Discussion at the External Rulemaking Meeting: A stakeholder has asked us to discuss, at the external rulemaking meeting, the Division’s progress on the request for informational bulletins explaining, in detail, how to accurately calculate average weekly wages under the new rules.

Housekeeping:

- Make the following changes to the following portion of the rule: “The insurer may not include any gap in earnings of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average wages.”
 - Replace the term “may not include” with the term “must exclude”
 - Add the term “consecutive” so it reads “14 consecutive days”