

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules
OAR chapter 436, divisions 050 & 080

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	Aug. 8, 2018, 8:30 a.m., Pacific Daylight Time Room F (basement), Labor and Industries Building, 350 Winter Street NE, Salem, Oregon You may join meeting from your computer, tablet or smartphone: https://global.gotomeeting.com/join/711178325 You can also dial in using your phone. United States (Toll Free): 1 877 568 4106 Access Code: 711-178-325
Facilitators:	Chris Clark and Fred Bruyns, Workers' Compensation Division
8:30 to 8:40	Welcome and introductions; meeting objectives
8:40 to 10:00	Discussion of issues – see attached
10:00 to 10:15	Break
10:15 to 11:25	Discussion of issues continued; new issues?
11:25 to 11:30	Summing up – next steps – thank you!

Attached: [Issues document](#)

OAR 436-050 and 436-080

Issues Document

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Room F, Labor & Industries Building, 350 Winter St. NE, Salem, Oregon

OAR 436-050, Employer/Insurer Coverage Responsibility

Issue #1514 – Definition of Adult Foster Home

Rule: OAR 436-050-0045(1)(c)

Issue: The rule does not define “adult foster home.”

Background: Under ORS 656.027(19), a person performing foster parent or adult foster care duties pursuant to ORS 430 or 443 is a nonsubject worker.

OAR 436-050-0045 clarifies that a “person performing foster care duties” means:

- “(A) Any person operating an adult foster home licensed under ORS 443.705 to 443.825;
or
- (B) Any person employed by the operator to perform services that assist the residents of the adult foster home.”

The version of OAR 436-050-0045 that was in place prior to January 1, 2017 also defined “adult foster home” as a “any family home or facility, licensed under ORS 443.705 to 443.825, in which room, board, and 24-hour care services are provided, for compensation, to five or fewer adults who are not related to the operator by blood or marriage.” The division proposes to restore the definition to the rule.

Alternatives:

- Make no changes
- Reinstatement the previous definition of adult foster home: “Adult foster home” means any family home or facility, licensed under ORS 443.705 to 443.825, in which *room, board, and 24-hour care services are provided, for compensation*, to five or fewer adults who are not related to the operator by blood or marriage.

Fiscal Impacts, including cost of compliance for small business: None expected.

ISSUE #1532 – Claims processing locations

Rule: OAR 436-050-0110; 436-050-0210

Issue: Rules do not specify what conditions must be met for a claims processing location to satisfy the requirements of ORS 731.475 and 656.455.

Background: ORS 731.475 requires an insurer to maintain a place of business in Oregon where it processes and keeps records of claims for compensation, and makes claims and coverage records available upon request. In lieu of establishing its own place of business for those purposes, the insurer may use places of business operated by service companies. Self-insured employers are subject to a similar requirement under ORS 656.455, but may request permission from the director to keep claim records and process claims from a location outside of the state.

Under OAR 436-050-0110 and 436-050-0210, the place of business maintained by an insurer or self-insured employer, or the places operated by service companies for the purposes of ORS 731.475 and 656.455 are referred to as claims processing locations. Every insurer and self-insured employer is required to register each of its claims processing locations with the division. Insurers are limited to eight claims processing locations, and self-insured employers are limited to three. When an insurer or self-insured employer uses multiple claims processing locations, it must also report which claims are located at each.

The division has interpreted these statutes to require the insurer, self-insured employer, or service company to maintain a brick and mortar business location, such as an office, in this state. Recently, some stakeholders have inquired whether or not the private home of a certified claims examiner could qualify as a claims processing location. The division is considering amending the rules to clarify what conditions must be met for a claims processing location to satisfy the requirements of the statute. The insurer or self-insured employer would be required to register each qualifying claims processing location, and each would count towards the limits on claims processing locations in statute. Some potential conditions are listed below.

The division would appreciate any feedback from stakeholders on what, if any, conditions should be included in rule, and whether or not a private home should qualify as a claims processing location.

Alternatives:

- No changes
- Clarify that a claims processing location must:
 - Be located in Oregon;
 - Be maintained by an insurer or self-insured employer, or operated by a service company;
 - Be the primary office of one or more Oregon certified claims examiners;
 - Be accessible to division staff for examination and audit of records.

Fiscal Impacts, including cost of compliance for small business:

ISSUE #1466 – Definition of “Service Agreement”

Rule: OAR 436-050-0110(2)(b); 436-050-0210(2)(b)

Issue: The rules and statute require the division to review and approve service agreements, but insurers do not always submit all of the parts of the agreement needed for review.

Background: Before a service company begins processing an insurer’s claims in Oregon, the insurer must submit a service agreement for the director’s review and approval. Sometimes, insurers submit only a part of the agreement, such as an addendum that provides for Oregon specific requirements, or a scope of work.

To ensure that the division receives the information it needs to conduct its review, the division proposes to incorporate a definition of “service agreement” in the rules that explains what is expected, similar to the requirements for an agreement between an insurer and a third party administrator under ORS 744.720(3).

The division would appreciate stakeholder input on what common elements could be required of all service agreements.

Alternatives:

- No changes
- Clarify in rule, that “for the purposes of OAR 436-050-0110, a “service agreement” means a contract between an insurer and a service company that:
 - Describes what services will be provided;
 - Clearly explains what claims will be processed and for how long;
 - Describes fee structures and payment mechanisms;
 - Provides the conditions under which the agreement may be terminated;
 - Does not include services for lines of insurance besides workers’ compensation; and
 - Grants the service company a power of attorney to act for the insurer in workers’ compensation coverage and claims proceedings under ORS chapter 656.

Fiscal Impacts, including cost of compliance for small business: None expected, information required by the rule should already be in the insurer or self-insured employer’s possession.

ISSUE #1244 – Service Agreement Power of Attorney requirements

Rule: OAR 436-050-0110(2)(c); 436-050-0210(2)(c)

Issue: Some service agreements received by the division for review do not clearly grant the service company a power of attorney as required by law.

Background: Before a service company begins processing an insurer or self-insured employer’s claims, the director must approve the service agreement between the service company and the insurer. Some service agreements received by the division for review do not clearly grant the service company a power of attorney as required by law.

An industry notice regarding submission requirements for excess insurance policies, annual financial statements, and claims processing service agreements dated December 22, 2016, expands upon this requirement, explaining:

“The [service] agreement must grant the service company power of attorney to act for the self-insured employer or employer group in workers’ compensation claims proceedings, effective as of the same date of the service agreement. The power of attorney must not have unspecified limitations and must not be revocable before the termination of the agreement. The service agreement must use language that clearly and unequivocally grants power of attorney to the service company, such as the words “power of attorney” or “attorney-in-fact.”

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OAR 436-050-0110(2)(c)(D) and 436-050-0210(2)(c)(D) require the service agreement to “grant the service company a power of attorney to act for the insurer in workers’ compensation coverage and claims proceedings under ORS chapter 656,” but do not include the specific requirements included in the bulletin.

The division proposes to incorporate these requirements into the rule to help clarify expectations for service agreements. The division would appreciate stakeholder input on this proposal.

Alternatives:

- No changes
- Amend paragraph (2)(c)(D) of the rules to provide the service agreement must:
 - “(D) Grant the service company a power of attorney to act for the insurer in workers’ compensation coverage and claims proceedings under ORS chapter 656; ~~and~~, **subject to the following:**
 - (i) The power of attorney must be effective as of the same date of the service agreement;**
 - (ii) The power of attorney must not be revocable before all claims processing services provided under the service agreement has concluded;**
 - (iii) The power of attorney must be applicable to all claims processed under the agreement, and may not have unspecified limitations; and**
 - (iv) The service agreement must use language that clearly and unequivocally grants power of attorney to the service company, such as the words “power of attorney” or “attorney-in-fact;”**

Fiscal Impacts, including cost of compliance for small business: None expected.

ISSUE #1244A – Service Agreement Claims Record Requirements

Rule: OAR 436-050-0110(2)(c)(E); 436-050-0210(2)(c)(E)

Issue: Some service agreements reviewed by the division allow a service company to transfer or refer a claim to an excess insurer or another processing location.

Background: An industry notice regarding submission requirements for excess insurance policies, annual financial statements, and claims processing service agreements dated December 22, 2016, provides that “a service agreement must not require or allow the service company to destroy claim files, even after a specified period of time.” In addition, some service agreements allow a service company to unilaterally transfer or refer a claim to an excess insurer or another processing location.

The division believes this is not allowed under current law and is considering clarifying the prohibition by rule.

Alternatives:

- No changes
- Amend rule to prohibit service agreements from requiring or allowing a service company to destroy claim files or transfer claims.

Fiscal Impacts, including cost of compliance for small business: None expected.

Housekeeping Issues:

ISSUE #1347 – Insurer Contact Forms

Rule: OAR 436-050-110; 436-050-0210

The division proposes to add references to the following optional insurer registration forms:

- Form 1352, “Insurer’s notification of place of business in Oregon”
 - Form 5042, “Claim Move Notice: Changing locations of processing or storing of claims”
 - Form 5188, “Insurer Contact Update”
 - Form 4929, “Service company’s notification of business in Oregon”
 - Form 5215, “Service Company Contact Update”
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ISSUE #1353 – Insurer contact information

Rule: OAR 436-050-0110(1)(c)(B); 436-050-0210(1)(c)(B)

The rules request a claim referral contact, a coverage contact, and a general email for each location where an insurer’s claims are processed, but the division only needs this information for the insurer or self-insured employer’s primary business location. To clarify, the division proposes to move the information required under OAR 436-050-0110(1)(c)(B) and (C) into separate subsections.

OAR 436-080, Noncomplying Employers

ISSUE #1243 – Amount of penalties under ORS 656.735(2)

Rule: OAR 436-080-0040(2)

Issue: The rule requires the division to issue the maximum penalty amount under ORS 656.735(2).

Background: An employer must provide workers’ compensation coverage for its subject workers by purchasing workers’ compensation insurance or becoming certified as a self-insured employer.

If an employer fails to provide the required coverage, the division may issue an order declaring it to be a noncomplying employer (NCE), and assess a civil penalty. Under ORS 656.735(1), the initial penalty is the greater of \$1,000 or twice the premium that would have been due for the period of noncompliance, as determined by the director.

ORS 656.735(2) provides “the director shall assess any person who continues to violate ORS 656.052 (1), after an order issued pursuant to ORS 656.052(2) has become final, a civil penalty, in addition to any penalty assessed under subsection (1) of this section, of *not more than* \$250 for each day such violation continues.” (Emphasis added.)

Under OAR 436-080-0040(2), the division has established that all such penalties will be assessed at the maximum \$250 per day, with the possibility of reductions if the employer obtains coverage and agrees to certain other conditions before the penalty order becomes final.

In addition to civil penalties, a noncomplying employer may be liable for any claims costs that arise from a compensable claim that occurs during the period of noncompliance.

Civil penalties under OAR 436-080-0040(2) are typically assessed when the subject of a noncomplying employer order is found to have failed to provide coverage or to have allowed coverage to lapse in a follow-up investigation. The penalty amounts can be large, sometimes reaching several hundred thousand dollars. The division believes in some cases these large penalties may deter employers from working with the division to come into compliance. In addition, if an employer fails to timely respond to a penalty order, the opportunity for reductions may be limited.

To provide more discretion in the way penalty amounts are calculated, the division is considering amending the rule to provide that a penalty under OAR 436-080-0040(2) may be *up to* \$250 per day. Factors the division may consider when determining a penalty amount may include the number of employees, the nature of the employer's business, and the employer's history of compliance.

Alternatives:

- No Changes
- Amend OAR 436-080-0040(2) to provide a penalty under ORS 656.735(2) may be *up to* \$250 per day, based on factors including, but not limited to, number of employees, nature of the business, and history of compliance.

Fiscal Impacts, including cost of compliance for small business: This change could reduce the amount of civil penalties assessed against some employers for subsequent violations of coverage requirements.

ISSUE #1267 – Calculation of premium for the period of noncompliance

Rule: OAR 436-080-0040(3)

Issue: The methods used to estimate premium for noncomplying employer penalties may not reflect the amount of premium the employer would have paid if insurance had been provided.

Background: Under OAR 436-080-0040(1), the amount of a civil penalty issued for a violation of ORS 656.052(1) provides that the amount of the first NCE penalty will be the greater of \$1,000 or twice the premium the employer would have paid during the non-complying period if insurance had been provided. Reduced penalty amounts under OAR 436-080-0040 are also tied to the amount of premium avoided.

Section (3) provides two options for how the division will calculate the "premium the employer would have paid during the noncomplying period":

“(3) For the purpose of this rule, ‘premium the employer would have paid during the noncomplying period’ means:

- (a) If payroll records are available, actual premium using the applicable occupational base rate premium applied to the payroll of the employer during the

period of noncompliance; or

(b) If payroll records are not available, estimated premium based upon the number of workers employed during the noncomplying period times the average weekly wage as defined in ORS 656.005(1), using the applicable assigned risk base rated premium during the period of noncompliance.”

Subsection (3)(a) calls for use of occupational base rates; however, in the voluntary market, rates are set by individual insurers based on advisory loss costs published by NCCI. Loss costs do not include expense provisions, and using them does not accurately calculate the premium the employer would have paid.

As an alternative, the division proposes to amend the rule to use the assigned risk rates published by NCCI for all NCE penalty calculations. Assigned risk rates already contain provisions for loss costs, administrative costs, as well as a differential for the higher risks associated with underwriting assigned risk policies.

In addition, stakeholders have suggested that the terminology in the rule be updated. For example, subsection (3)(a) refers to “actual premium.” The rule does use actual payroll to calculate the amount, however it still does not produce the “actual premium” which, when calculated by an insurer, would include additional factors such as experience rating modification and premium volume discount.

Alternatives:

- No changes (but refer to “loss costs” instead of “base rates” in rule.)
- Calculate all noncomplying premium amounts using the Assigned Risk Rates published by NCCI.
- In addition to one of the above, update rule to use more accurate terminology.

Fiscal Impacts, including cost of compliance for small business: The proposed option would likely lead to increased penalty amounts for some small businesses that violate ORS 656.052(1).

Housekeeping Issues:

ISSUE #1170 – Procedural rules for lay representative.

Issue: The division proposes to delete OAR 436-080-0030(3) and (4), related to the division’s role in hearings under ORS 656.740, and add the following:

“OAR 436-001-0030(2) through (5) apply to hearings requested under this section.”

ISSUE #1172 – Consistent terminology

The division proposes to make a number of nonsubstantive changes to the rules to be consistent with recent revisions to other divisions of rules. These include, but may not be limited to:

- Changing all references to “the division,” “the department,” “FABS”, and other parts of DCBS to “the director,” unless a rule instructs stakeholders to contact a specific unit.
- Change all references to “claimant,” “injured worker,” and other terms to “worker”

- Change all references to the “hearings division” to the “board”

ISSUE #1526 – Combined purpose and applicability

Rule: OAR 436-080-0001, 436-080-0002, 436-080-0003, 436-080-0006

The division proposes to combine rules regarding authority, purpose, applicability, and administration of rules into OAR 436-080-0003, consistent with recent revisions to other divisions of OAR chapter 436.

ISSUE #1171 – Procedural waiver provision

Rule: OAR 436-080-0003

The division proposes to incorporate a procedural waiver provision in rule, similar to what is contained in other divisions of OAR chapter 436:

“The director may waive procedural rules as justice requires, unless otherwise obligated by statute.”

ISSUE #1387 – Incorporation of definitions of ORS chapter 656

Rule: OAR 436-080-0005

The division proposes to incorporate the definitions of ORS chapter 656 into OAR 436-080 by reference, and make them part of these rules by adding the following language to the rule:

“Unless a term is specifically defined elsewhere in these rules or the context otherwise requires, the definitions of ORS chapter 656 are hereby incorporated by reference and made part of these rules.”

ISSUE #1525 – Streamline procedural rules

Rule: OAR 436-080-0010 to 436-080-0030

The structure of these rules has been relatively unchanged since they were first established in the early 1970’s. The division proposes to combine these rules into a single streamlined rule describing all the relevant procedures and processes for issuance, appeal, and enforcement of NCE Orders.

ISSUE #1527 – Penalty discretion

Rule: OAR 436-080-0010

To be consistent with ORS 656.052(2), the division proposes to amend OAR 436-080-0010 to provide that a Proposed and Final Order declaring the employer to be a noncomplying employer will indicate the amount of penalty to be assessed under OAR 436-080-0040, **if any**. NOTE: Rarely, the division may assess an NCE order against a contractor under ORS 656.029 that does not contain a penalty.

ISSUE #1523 – Continues to violate ORS 656.052(1).

Rule: OAR 436-080-0040(2)

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OAR 436-080-0040(2) provides that the amount of a penalty under ORS 656.735(2) “shall be \$250 per day for each calendar day the employer has continued to violate ORS 656.052(1) (emphasis added). To be consistent with statutory language, the division proposes to amend the rule to state that a penalty under ORS 656.735(2) will be assessed when the employer “continues to violate ORS 656.052(1).”

ISSUE #1524 - Reimbursable costs

Rule: 436-080-0070(1)

To incorporate stakeholder advice provided during incomplete rulemaking in 2014, the division proposes to amend the rule to provide that reimbursable costs “include, but are not limited to” the listed items.

ISSUE #1168 – Remove rules describing internal processes.

OAR 436-080-0080(2)

The division proposes to delete this section. It reflects an internal process that does not substantially affect the interests of the public.