

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules,

- OAR 436-050, Employer/Insurer Coverage Responsibility;
- OAR 436-085, Premium Assessment

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	Sept. 11, 2019, 1:30 to 4:30 p.m. Room 260 (2 nd floor), Labor & Industries Building 350 Winter Street NE, Salem, Oregon GoToMeeting - to join from computer, tablet, or smartphone: https://global.gotomeeting.com/join/610401405 To dial in: 1-877-309-2073, access code 610-401-405
Facilitators:	Fred Bruyns, Aaron Fellman, Workers' Compensation Division
1:30 to 1:40	Welcome and introductions; meeting objectives
1:40 to 3:00	Discussion of issues – see attachment.
3:00 to 3:15	Break
3:15 to 4:15	Discussion of issues on agenda continued, and request for new issues
4:15 to 4:30	Summing up – next steps – thank you!

Attached: [Issues document, OAR 436-050](#)
[Issues document, OAR 436-085](#)

OAR 436-085 Premium Assessment

Issues Document

Advisory Committee Meeting

Sept. 11, 2019, 1:30 p.m., Room 260, Labor & Industries Building, Salem, Oregon

ISSUE #1

Rule: 436-085-0030(2) and (3): Premium Assessment; Manner and Intervals for Payments: Self-Insured Employers and Self-Insured Employer Groups

Issue: The method for determining assessable premium under current rule may underestimate what self-insured employers would have paid as insured employers.

Background: ORS 656.612 provides that assessments imposed on self-insured employers will be based on the premium they would have paid as insured employers. OAR 436-085-0030(2) provides that this assumed premium will be calculated based on the lowest rates filed by a single insurer.

An insurer's filed rates include base rates, which are applied to payroll and reflect the direct cost of losses; a loss cost multiplier (LCM), which is applied to base premium and provides for the insurer's expenses and profit; and a premium discount rate, which offsets the expense component of premium for larger employers.

$$\begin{array}{ccccccc} \$100k & * & 1.5 & = & \$150k & - & \$13k & = & \$137k \\ \text{Base premium} & & \text{LCM provides} & & & & \text{Premium discount} & & \text{Final} \\ \text{reflects direct cost} & & \text{for expenses} & & & & \text{offsets expense} & & \text{premium} \\ \text{of losses} & & \text{and profit} & & & & \text{component of premium} & & \end{array}$$

Almost all insurers use the same NCCI base rates. Therefore, the insurer that has filed the lowest LCM will generally have the lowest filed rates overall. In the past, the lowest LCM has usually been 1.0 or lower.

LCMs currently on file range between roughly 0.98 to 2.1. In general, LCMs at the lower end of that range are available only to "preferred" employers that have some combination of high premium, better than average loss history, and strong loss control programs. LCMs of 1.0 or lower are available to only a handful of Oregon employers; at this time, insurers who have filed such LCMs represent less than 0.01% of the market.

The rates used to calculate assessable premium under current rules would not be available to most self-insured employers. Thus, these rules do not appear consistent with the statutory requirement that assessments be based on the premium a self-insured employer would have paid as an insured employer.

Proposal:

1. Adopt provision that for each fiscal year, assessable premium will be calculated using:
 - a. The manual rates published by the National Council on Compensation Insurance;
 - b. Modified by a multiplier no greater than the average of all loss cost multipliers filed with the Division of Financial Regulation, weighted by market share; and,
 - c. The director may consider additional factors when determining the multiplier.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #2

Rule: 436-085-0030(7): Premium Assessment; Manner and Intervals for Payments: Self-Insured Employers and Self-Insured Employer Groups

Issue: The process for waiving a self-insured employer's reporting requirement is not described in rule.

Background: Self-insured employers are required to report and remit a premium assessment each quarter. However, the director may waive this requirement after confirming that an employer has had no Oregon payroll for four quarters.

Current rule does not describe the process for granting or revoking a waiver. This creates two areas of uncertainty:

1. It is not clear from the rule whether a self-insured employer must request a waiver; and,
2. It is not clear whether a self-insured employer must resume reporting premium assessments if it resumes having Oregon payroll.

Options:

- Take no action.
- Amend rule to read that "The director may waive the self-insured reporting requirement on the self-insured employer's request after confirming that the self-insured employer has had no Oregon payroll for four consecutive quarters. The waiver will remain in effect until the self-insured employer has Oregon payroll."

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #3

Rule: 436-085-0030(3)(b): Premium Assessment; Manner and Intervals for Payments: Self-Insured Employers and Self-Insured Employer Groups

Issue: Current rule does not explain how the basic premium factors used in the division's retrospective rating plan are determined.

Background: Under OAR 436-085-0030, self-insured employers may choose to have their assessable premium calculated using a retrospective rating plan developed by the director.

Under a retrospective rating plan, an employer's final premium is adjusted based on its actual losses during the policy period. Accordingly, its base premium is lower than it would be under the normal method of calculating premium, in which premium is based solely on expected losses.

To determine an employer's base premium under the division's retrospective rating plan, its payroll is multiplied by a base rate and a basic premium factor that is less than 1.0. An employer's basic premium factor is based on its size and the hazard group of its governing classification.

In the past, the division's methodology was compatible with the methodology used under NCCI's retrospective rating plan. Because of this compatibility, the division's basic premium factors could be based on the factors used by NCCI.

However, in 2019, NCCI adopted a new methodology in which an employer's basic premium factor is not based on its hazard group. Because NCCI's methodology is no longer compatible with the division's, the division's basic premium factors can no longer be based on NCCI factors.

Staff have suggested that the division's basic premium factors should be determined by the Division of Financial Regulation in future years. In the interest of transparency, the method used to determine these factors should be reflected under OAR 436-085-0030(3)(b).

Proposal:

- Amend rule to provide that the retrospective rating plan will be developed by the Division of Financial Regulation and approved by the Director.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #4

Rule: 436-085-0030(7): Premium Assessment; Manner and Intervals for Payments: Self-Insured Employers and Self-Insured Employer Groups

Issue: Current rule does not require premium assessment forms to be signed.

Background: Under OAR 436-085-0030(7), self-insured employers must report and remit premium assessment quarterly using Form 900 or Form 937. These forms include a signature field, but current rule does not require that they be signed.

The financial data reported on these forms is used to determine the amount of premium assessment owed by self-insured employers. Because the accuracy of this data is important, rule should require the forms to be signed.

Proposal:

- Amend rule to require assessment forms to be signed by an authorized representative of the self-insured employer.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

“HOUSEKEEPING” CHANGES

Division 85

- Wording changes for plain language throughout.
- **436-085-0001, 0002, 0003** Repeal rule 0001 and consolidate rules 0002 and 0003 into a new “purpose and applicability” rule, to be consistent with other divisions of rules in chapter 436.
- **436-085-0002** (1008) Replace “guidelines” with “requirements.”
- **436-085-0005** (1387) Incorporate by reference chapter 656 definitions, to be consistent with other divisions of chapter 436.
- **436-085-0005(1), (2), and (5)** Move substantive language about determining assessable premium to a new rule.

- **436-085-0005(3)** (1578) Standardize definition of “director”, to be consistent with other divisions of rules in chapter 436.
- **436-085-0005, 0025, 0030** (1266) Replace references to “Insurance Division” with “Division of Financial Regulation.”
- **436-085-0008** (1411) Replace references to “Hearings Division” with references to the board and references to “administrator” with “director”, to be consistent with other divisions of rules in chapter 436.
- **436-085-0025(1), 0030(7)** (1317) Revise language on premium assessment due dates for clarity.
- **436-085-0030(10)** (1176, 1177, 1178) Incorporate NCCI rating plan by reference and advise where copies may be obtained.
- **436-085-0060(2)** (1175) Delete comma in second sentence.

OAR 436-050 Employer/Insurer Coverage Responsibilities

Issues Document

Advisory Committee Meeting

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ISSUE #5

Rule: 436-050-0200: Self-Insured Certification Cancellation; Revocation

Issue: Rulemaking is needed to implement HB 3003.

Background: Current statute requires the director to retain a former self-insured employer's security for at least 62 months to secure any remaining liability from the period of self-insurance. At the end of the 62-month period, the director may accept a paid-up insurance policy covering the employer's remaining liability in lieu of its security.

[HB 3003](#) allows the director to accept a paid-up policy in lieu of security before the end of the 62-month period, effective Jan. 1, 2020.

To implement HB 3003, the division needs to adopt rules specifying the conditions a paid-up policy must meet to be acceptable, as well as the process for releasing security. The division's primary interest in this rulemaking is ensuring that security is only released following a complete and irrevocable transfer of the former self-insured employer's liability to the insurer.

The division also has an interest in ensuring that paid-up policies are only accepted when issued by insurers that are financially sound. In the event of an insurer's insolvency, it is not clear which party would be responsible for liability assumed under a paid-up policy.

Options:

1. Adopt requirement that a paid-up policy assume all of a self-insured employer's responsibilities and liability under ORS 656, known or unknown, for the period of self-insurance.
2. Adopt requirement that a paid-up policy be issued by an insurer authorized to transact workers' compensation insurance in Oregon, or SAIF Corp.
3. Adopt requirement that a paid-up policy be non-cancellable.
4. Adopt provision that security will not be released until the effective date of a paid-up policy.
5. Adopt provision that the release of security will be documented in writing.
6. Adopt provision that the director may consider the relative sizes of an insurer's reserves and a former self-insured employer's security deposit.
7. Adopt provision that the director may consider regulatory enforcement actions taken against an insurer in other states.
8. Other.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #6

Rule: OAR 436-050-0045(1): Non-subject Workers

Issue: Stakeholders have expressed concern that the rule does not make it clear that home health workers employed by private agencies are subject workers.

Background: ORS 656.027(1) provides that a worker engaged in household domestic service by private employment contract, including a home health worker, is not a subject worker. Current rule clarifies that a worker engaged by private employment contract “includes a worker in the direct employment of the owner of [a] private home” (emphasis added).

The division’s understanding is that a worker is only non-subject under ORS 656.027(1) if he or she is directly employed by the owner of a private home. However, because the rule uses the word “includes”, it can be read as providing an example, which would imply that there is a larger category of workers who are non-subject under the statute.

Stakeholders have expressed concern that private home health agencies may believe their employees are not subject workers based on the rule. In response, the division published an [industry notice](#) clarifying that “Home health care workers who are *not* directly employed by the owner of a private home, including workers who are employed by private home health agencies and in-home care agencies, are subject workers.”

Options:

- Amend the rule to read that:
 - a) “‘Private employment contract’ means a contract under which a worker is directly employed by the owner of the private home”; and
 - b) “‘Home health worker’ does not include a worker employed by a home health agency, as defined in ORS 443.014, or in-home care agency, as defined in OAR 333-536-0005.”
- Other.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

“HOUSEKEEPING” CHANGES

Division 50

- **436-050-0165(2)** (1475) Add reference to [Bulletin 147](#), which explains the acceptable forms of security deposit allowed under rule.
- **436-050-0005(9), 0008(1) and (2)** (1411) Replace references to “Hearings Division” with references to the board and references to “administrator” with references to the director, to be consistent with other divisions of rules in chapter 436.
- **436-050-0050** Revise to clarify that (2) applies to employers who are subject to a maximum number of exempt corporate officers under ORS 656.027.
- **436-050-0165** Plain language changes to rules on acceptable forms of security.