

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules,
OAR 436-050, Employer/Insurer Coverage Responsibility
OAR 436-060, Claims Administration

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	Aug. 25, 2021, 1:30 p.m. https://www.zoomgov.com/j/1607109044?pwd=YytPNGU5Qmgxd0xmWIFsWGhzeEk1UT09 Meeting ID: 160 710 9044 Passcode: 352917 One tap mobile +16692545252,,1607109044# US (San Jose) +16692161590,,1607109044# US (San Jose) Dial by your location +1 669 254 5252 US (San Jose) +1 669 216 1590 US (San Jose) +1 551 285 1373 US +1 646 828 7666 US (New York) 833 568 8864 US Toll-free Meeting ID: 160 710 9044 Find your local number: https://www.zoomgov.com/u/acT3b3toMq Join by SIP 1607109044@sip.zoomgov.com Join by H.323 > 161.199.138.10 (US West) 161.199.136.10 (US East) Meeting ID: 160 710 9044 Passcode: 352917
Facilitators:	Aaron Fellman and Fred Bruyns, Workers' Compensation Division
1:30 to 1:40	Welcome and introductions; meeting objectives
1:40 to 3:50	Discussion of issues – see attachment.
3:50 to 4:00	Summing up – next steps – thank you!

Attached: [Issues document](#) | [Draft rules](#) | [Record-keeping under OAR chapters 436 and 438](#).

OAR 436-050 Employer/Insurer Coverage Responsibility

OAR 436-060 Claims Administration

Issues Document

Rulemaking Advisory Committee Meeting

Aug. 25, 2021, 1:30 p.m.

* = See meeting attachments for proposed rule language or additional resources

ISSUE #1

Rule: 436-050-0110 Notice of Insurer's Place of Business in State; Coverage Records Insurers Must Keep In Oregon
436-050-0210 Notice of Self-Insurer's Place of Business in State; Records Self-Insured Must Keep In Oregon

Issue: New statutory language gives the division the authority to allow for telework by rule.

Background: Current law requires an insurer or self-insured employer to maintain an Oregon location where claims are processed. This phrasing does not clearly allow for claims to be processed remotely by teleworking employees.

Under HB 2039, insurers and self-insured employers will be allowed to process claims "remotely from" an Oregon location in accordance with rules adopted by the director. This new phrasing allows the division to specify when telework is allowable and when it is not.

In most cases, the industry's past use of telework has not had a negative impact on the public or the division. Many stakeholders allowed staff to telework before the 2020 COVID-19 pandemic, and both the division and its stakeholders made extensive use of telework during the pandemic.

However, a stakeholder's use of telework could have a negative impact if:

- Injured workers and division staff are not able to reach claims examiners during normal business hours; or
- Claims performance declines due to decreased opportunities for training and collaboration.

Options:

- Adopt rules giving insurers and self-insured employers broad authority to process claims remotely.
 - Adopt rules requiring all insurers and self-insured employers to meet accessibility standards. These standards may include requiring claims examiners to be

available during normal Oregon business hours and/or setting timeframes for responding to calls or emails from injured workers or division staff.

- Adopt rules requiring all insurers and self-insured employers to meet standards for claims processing performance.
- Adopt rules providing that insurers and self-insured employers may not process Oregon claims from places of business located outside the state (except as permitted by OAR 436-050-0230 for self-insured employers.)
- Other.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #2*

Rule: 436-050-0120 Records Insurers Must Keep in Oregon; Removal and Disposition
436-050-0220 Records Self-Insured Employer Must Keep in Oregon; Period to be Retained, Removal and Disposition

Issue: New statutory language requires that claims records be “made available” at a claims processing location. Current rule does not define what it means to make a record available.

Background: Current law requires an insurer or self-insured employer to maintain an Oregon location where complete records of claims are kept. This phrasing does not clearly allow for the common industry practice of storing records on a server and accessing them remotely.

Under HB 2039, insurers and self-insured employers will instead be required to “make records available” at an Oregon location. To implement this change, the division needs to adopt standards for making electronic and physical records available.

Recommendation (see appendix for possible rule language):

- Adopt rules providing that a claim record is “made available” when it can be accessed electronically, in real time, from an Oregon claims processing location.
- Adopt rules providing that if a record is not made accessible electronically, it must be made physically available at an Oregon claims processing location.

- Adopt rules providing that physical records may be archived off-site when the denial of a claim has become final by operation of law, or after the expiration of the aggravation rights on a compensable claim, or not less than one year following the final payment of compensation, whichever comes later.
- Adopt rules establishing a timeframe for providing the director access to an archived record.

Fiscal Impacts, including cost of compliance for small business:

ISSUE #3

Rule: 436-060-0017 Release of Claim Documents

Issue: The division currently requires insurers to provide paper copies of claim documents to claimants on request, but the requirement does not exist in rule.

Background: Current rule requires insurers and self-insured employers to provide legible copies of claim documents to claimants and claimants' attorneys upon request.

An insurer may provide electronic files in response to a request. However, some claimants and claimants' attorneys do not wish to receive electronic files because of the expense of printing them.

The division's current position is that an insurer must provide paper copies upon request. However, this requirement does not exist in rule.

Options:

- Amend rules to require insurers and self-insured employers to provide claimants with paper copies of claims files, if requested.
- Take no action.
- Other.

Fiscal Impacts, including cost of compliance for small business:

Taking no action may create additional costs for claimants and claimants' attorneys.

Recommendation:

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ISSUE #4*

Rule: 436-050-0120 Records Insurers Must Keep in Oregon; Removal and Disposition
436-050-0220 Records Self-Insured Employer Must Keep in Oregon; Period to be Retained, Removal and Disposition
436-060-0005 Definitions
436-060-0017 Release of Claim Documents

Issue: Stakeholders have raised concerns about whether electronic recordkeeping and claims reporting will affect claimants' ability to access records.

Background: During hearings on HB 2039 and HB 2040, legislators and stakeholders expressed concerns about how allowing electronic recordkeeping and claims reporting could affect claimants' access to records. A specific concern was that if the division no longer receives paper copies of claims documents, claimants and insurers will not be able to use the division as a resource for reconstructing files that have been lost or destroyed.

The division takes these concerns seriously and is considering options for addressing them. We anticipate further discussions as part of the rulemaking to implement HB 2040, which is not expected to take place this year.

At this time, the division is considering several minor rulemaking changes to clarify recordkeeping requirements or allow the division to collect more information on claim file destruction. These changes primarily affect division 050 rules on records insurers and self-insurers must maintain and division 060 rules requiring insurers and self-insurers to provide copies of records to claimants.

The division is also interested in using this rulemaking as an opportunity to hear directly from stakeholders on the issue.

Options:

1. Amend division 050 rules on recordkeeping requirement to provide that an insurer or self-insured employer must maintain any document that is subject to disclosure under OAR 436-060-0017.

2. Amend division 050 rules to provide that the division may assess civil penalties against an insurer that loses or destroys a claim record it was required to maintain.
3. Amend division 060 rules on documents subject to disclosure to better align with the Workers' Compensation Board's disclosure requirements under OAR 438-007-0015.
4. Amend division 060 rule to require insurers to copy the division when informing a worker that requested documents have been lost or destroyed.
5. Amend division 060 to use the same definition of 'date stamp' as divisions 009 and 010.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

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ISSUE #5

Rule: 436-050-0045 Nonsubject workers (or new rule)

Issue: New statutory language provides that the casual labor threshold must be adjusted annually. Current rule does not provide a method for publishing the adjustment.

Background: Under current law, workers performing casual labor are nonsubject when certain conditions are met. One of these conditions is that the total labor cost for the work being performed is less than \$500 in any thirty day period.

A bill passed in the 2021 legislative session, HB 3188, provides that the threshold below which labor is consider 'casual' is increased to \$1000. HB 3188 further provides that this threshold must be adjusted annually on July 1 by the percentage increase in the state average weekly wage for that year.

To implement HB 3188, the division needs to adopt a rule providing a method for publishing the adjustment.

Recommendation:

- Adopt rules providing that the adjustment will be publicized in a new bulletin.

Fiscal Impacts, including cost of compliance for small business:

ISSUE #6*

Rule: 436-050-0055 Extraterritorial coverage

Issue: Statute provides that some out-of-state employers are exempt from Oregon workers' compensation law, but does not specify that other out-of-state employers are subject to the law.

Background: When an out-of-state employer assigns workers to Oregon on a temporary basis, statute provides that the employer is exempt from ORS chapter 656 as long as it meets certain conditions. These conditions include (1) having extraterritorial coverage and (2) being from a state that recognizes Oregon extraterritorial coverage.

An out-of-state employer that does *not* meet these conditions is *not* exempt. If the employer employs subject workers in the state, it qualifies as a subject employer and must obtain Oregon coverage or be liable as a noncomplying employer.

However, the rules and statutes specifically addressing out-of-state employers do not make this clear. In order to understand its obligations, a non-exempt out-of-state employer would need to read these rules and statutes in conjunction with the rules and statutes dealing with coverage requirements generally.

Anecdotal evidence suggests that it may be unclear to stakeholders how Oregon coverage law applies to out-of-state employers. These employers may be unaware that they need coverage for temporary or incidental work in Oregon, or may believe that their home-state coverage satisfies this requirement in all cases. Adding explanatory language to current rule could provide clarity.

Options:

- Adopt rule providing that an out-of-state employer that is not exempt under ORS 656.126 is subject to Oregon workers' compensation law while temporarily engaged in Oregon and must obtain Oregon coverage for any subject workers it employs in the state.
- Take no action.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

ISSUE #7

Rule: 436-050-0165(4) Security Deposit Requirements

Issue: Form 1810 can be used to change the name of a self-insured employer on a surety bond, but rule does not require the form to be used for name changes.

Background: When a self-insured employer provides security in the form of a surety bond, rule requires that Form 824 be used for the bond and that Form 1810 be used for any changes in the amount of the penal sum.

Form 1810 can also be used to change the name of the principal on the bond, which would be necessary if a self-insured employer underwent a name change (or, in some cases, a change in ownership.) However, rule does not require Form 1810 to be used for name changes. Adding this requirement would provide clarity for self-insured employers and bond companies.

Options:

- Adopt rule requiring that Form 1810 be used to make changes to the name of the principal on Form 824.
- Take no action.

Fiscal Impacts, including cost of compliance for small business:

Recommendation:

Housekeeping

- 436-050-0040: Incorporate definition of ‘sole proprietor’ used in ORS 656.029.
- 436-050-0005(5): Clarify that ‘default’ includes failure to pay compensation (per statutory definition) and amend later references to ‘default’ to avoid redundancy.
- 436-050-0180(1)(d)(A): Add more specific page citation to rule requiring director to use annual report data when calculating CPACs.
- 436-050-0300(1): Clarify that a self-insured employer group is not required to maintain a common claims fund in a year when the director applies an IBNR factor greater than zero percent.
- Other non-substantive grammatical or formatting changes.

ISSUE #2

436-050-0120 Records Insurers Must Keep in Oregon; Removal and Disposition

(1) Claims records insurers must keep in Oregon.

Each insurer is required to [*keep*] **maintain** the following records of Oregon claims for compensation in this state, [*and*] to make those records available **at an Oregon claims processing location, and to provide** the director **access to those records** [*to the director*] upon request:

- (a) Written records used and relied upon in processing claims;
- (b) A written record of all payments made as a result of any claim including documentation of:
 - (A) The amount of the payment;
 - (B) The date the payment was issued;
 - (C) The date the payment was mailed or delivered; and
 - (D) An explanation of the time period between the date the payment was issued and the date the payment was mailed or delivered, if any;
- (c) Written records of the approval or denial of claims for supplemental temporary disability benefits under ORS 656.210(5);
- (d) Written records that show its insured employers have complied with ORS 656.017; and
- (e) Written records, or copies of records, of claims processed by prior service companies.

(2) [*Removal*] Availability of claims records

An insurer may [*remove the following records from this state, under the conditions described in this section*] **make records available by one or more of the following methods:**

- (a) **By making the records electronically accessible from an Oregon claims processing locations in real time;**
- (b) **By keeping physical copies of the records at an Oregon claims processing location;**
- (c) **By archiving physical copies of the records at a location other than an Oregon claims processing location, under the following conditions:**
 - (A) Records of a denied claim may be [*removed from this state*] **archived** after all the appellate procedures have been exhausted and the denial is final by operation of law; and
 - (B) Records of any claim for a compensable injury, including a denied claim that is found to be compensable, may be [*removed from this state*] **archived** after the expiration of the aggravation rights or not less than one year following the final payment of compensation, whichever is the last to occur.

(C) If the director requests access to archived records, the insurer must make them available at an Oregon claims processing location, or by the method described in (a) of this section, within 30 days of receipt of the request.

(3) Destruction of claims records.

The insurer may destroy claims records when the insurer can verify that all potential for benefits to the worker or the worker's beneficiaries is gone.

(4) Proof of coverage records insurer must keep in Oregon.

The records relating to proof of coverage that insurers are required to [*keep*] **make available** in the state include:

- (a)** A written record of each workers' compensation insurance policy and related endorsements, reinstatements, or cancellations issued as required under the workers' compensation law;
- (b)** Written records of premiums due and premiums collected by the insurer from its insured employers as a result of coverage issued under the workers' compensation law; and
- (c)** Written records that segregate and show specifically for each employer the amounts due from the employer and all money collected and paid by the insurer for premiums for insurance coverage, premium assessments, and any other moneys due the director or required to be paid to the director.

(5) Disposal of proof of coverage records.

If all payments have been made, proof of coverage records may be disposed of after the later of:

- (a)** The next examination of the insurer by the Division of Financial Regulation under ORS 731.300; or
- (b)** January 1 of the year following three calendar years after the cancellation or nonrenewal of the workers' compensation insurance policy.

(Note: Equivalent changes will be made to OAR 436-050-0220, the companion rule for self-insured employers.)

ISSUE #6

436-050-0055 Extraterritorial Coverage

(1) For the purposes of determining whether a worker is temporarily in or out of state under ORS 656.126, the director will use criteria including, but not limited to, the following:

- (a) The extent to which the worker's work within the state is of a temporary duration;
- (b) The intent of the employer regarding the worker's employment status;
- (c) The understanding of the worker regarding the employment status with the employer;
- (d) The permanent location of the employer and its permanent facilities;
- (e) The circumstances and directives surrounding the worker's work assignment;
- (f) The state laws and regulations to which the employer is otherwise subject;
- (g) The residence of the worker;
- (h) The extent to which the employer's work in the state is of a temporary duration, established by a beginning date and expected ending date of the employer's work; and
- (i) Other information relevant to the determination.

(2) Within 30 days after coverage of an Oregon employer is effective, the insurer providing the coverage must notify the employer in writing of the provisions of ORS 656.126 and this rule.

(3) Any worker from another state and the employer of the worker in that other state are subject to the provisions of ORS chapter 656 while that worker is temporarily within this state doing work for the employer, unless the worker and employer are exempted under ORS 656.126. An employer subject to ORS chapter 656 must comply with ORS 656.017 by providing coverage for all subject workers it employs in this state.

Insurer / Self-Insured Employer Recordkeeping Requirements Across Rule Chapters

<p style="text-align: center;">436-060-0017</p> <p style="text-align: center;">(Records that an insurer or self-insured employer must provide to a claimant or claimant's attorney on request)</p>	<p style="text-align: center;">438-007-0015</p> <p style="text-align: center;">(Records subject to disclosure in WCB hearings)</p>
Medical and vocational records	Medical/vocational records, including correspondence back and forth from experts who provide reports or agree to testify
Payment ledgers for TD and med services	Records of all compensation paid *** worker/worker atty must request specifically
Payroll records	Payroll records, records of wages earned by the claimant *** worker/worker atty must request specifically
	Copies of bills from medical and vocational service providers *** worker/worker atty must request specifically
Recorded statements	Investigative statements, investigative summaries
Insurer generated records	
All forms filed with the director	Forms and notices required by Ch. 656, WCD, or WCB
NOCs	
Correspondence between insurer, service providers, worker, director, board	Correspondence to and from WCD and WCB
	Workers or insurer can request further specific discovery of other factual docs relevant to an issue at hearing.
<p><u>Exclude</u> a claims examiner's generated file notes, such as documentation or justification concerning setting or adjusting reserves, claims management strategy, or any privileged communications</p>	<p><u>Exclude</u></p> <ul style="list-style-type: none"> (a) Material protected under the attorney/client privilege (b) Attorney work product, (with exception for correspondence to a medical/vocational expert who writes a report subject disclosure or agrees to testify) (c) Material reflecting the mental impressions, case value or merit, plans or thought processes of the claimant or insurer; (d) Material protected by ORS 656.260; and (e) Material protected from disclosure under OAR 438-007-0017 (impeachment).