

Agenda

Rulemaking Advisory Committee

Workers' Compensation Division Rules
OAR 436-070, Workers' Benefit Fund

Type of meeting:	Rulemaking advisory committee
Date, time, & place:	<p>Aug. 9, 2021, 10:15 a.m. to noon Virtual meeting – Join ZoomGov Meeting https://www.zoomgov.com/j/1600117973?pwd=Sm8rTitYemxQcWpPbVR6ajdBuHRuZz09 Meeting ID: 160 011 7973 Passcode: 205822 One tap mobile +16692545252,,1600117973# US (San Jose) +16692161590,,1600117973# US (San Jose) Dial by your location +1 669 254 5252 US (San Jose) +1 669 216 1590 US (San Jose) +1 646 828 7666 US (New York) +1 551 285 1373 US 833 568 8864 US Toll-free Meeting ID: 160 011 7973 Find your local number: https://www.zoomgov.com/u/aA8GnzQwW Join by SIP 1600117973@sip.zoomgov.com Join by H.323 161.199.138.10 (US West) 161.199.136.10 (US East) Meeting ID: 160 011 7973 Passcode: 205822</p>
Facilitators:	Aaron Fellman and Fred Bruyns, Workers' Compensation Division
10:15 – 10:25	Welcome and introductions; meeting objectives
10:25 to 11:55	Discussion of issues
11:55 to noon	Summing up – next steps – thank you!

Attached: [Issues document](#), [Form OQ](#), [current OAR 436-070](#)

OAR 436-070 Workers' Benefit Fund Assessment
Issues Document
Rulemaking Advisory Committee Meeting
August 9, 2021, 10:15 a.m.

ISSUE #1

Rule: 436-070-0010 Assessment Rate- Method and Manner of Determining
436-070-0020 Assessment Rate- Manner and Intervals for Filing and Payment

Issue: The method for determining the Workers' Benefit Fund (WBF) assessment for an individual employee sometimes results in amounts of less than a cent being owed.

Background: Current rule provides that to determine the amount of the WBF assessment due for an individual employee, an employer must multiply the number of hours the employee worked in a given pay period by the current assessment rate, then divide the result in half. The employer is then assessed an equal amount.

This method will sometimes result in amounts of less than a cent being due. Since these amounts can't be collected, the department has advised employers to round the employee's contribution down to the nearest cent and "make up the difference" in the employer's contribution¹. For example, if the amount to be retained from an employee's pay is \$100.005, the employer would instead retain \$100.00 and pay \$100.01 itself.

Because rule and statute require the department to assess an employer an amount equal to the amount retained from each employee's pay, the department probably does not have the authority to require an employer to "make up the difference" when amounts of less than a cent are owed. However, any other method creates risk for the employer:

- If the employer rounds the employee's contribution up to the nearest cent, the employee could bring a claim for unlawful wage deduction, exposing the employer to statutory damages and legal fees.
- If the employer rounds down but does not make up the difference, it has underpaid its WBF assessment.

Following the department's guidance mitigates this risk, but creates a fiscal impact on employers. The impact is greater on employers who pay their employees more frequently, because these employers will need to round down more often over the course of a quarter. If an employer pays its employees on a weekly basis, the amount of the difference the employer must "make up" at the end of the quarter may be greater than 1% of the total assessment.

The department is considering removing this burden on the employer by adopting rules (1) providing a method for rounding to the nearest cent and (2) clarifying that the amount of the total assessment to be paid by the employer is equal to the amount retained from workers multiplied by two, rather than the total of employee hours worked multiplied by the assessment rate.

¹ See [Workers' Benefit Fund assessment FAQ](#) Item 16.

(Making the second change would require additional changes to Form OQ, which employers use to report their WBF assessment, as well as the Form OQ instructions and the WBF assessment FAQ.)

The department is also considering adopting rules providing a method for rounding the hours an employee works in a given pay period.

Options:

1. Adopt rules requiring an employer to round the amount to be retained from an employee's pay down to the nearest cent. Clarify that employers are to be assessed an amount equal to what is withheld from employee wages.
2. Adopt rules providing a method for rounding the hours an employee works in a given pay period down to the nearest hour or part of an hour.
 - o Alternately, adopt rules providing that hours should not be rounded, consistent with [Workers' Benefit Fund assessment FAQ](#) Item 18.
3. Other.

Fiscal Impacts, including cost of compliance for small business:

The department estimates that making changes to the current method of collecting WBF assessments would result in a decrease in collections of less than 1%.

Recommendation:

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Housekeeping

- Replace references to 'Hearings Division' with references to the board throughout, and delete references to 'the administrator.'
- 436-070-0001 through -0003: Collapse into a single rule 0003.
- 436-070-0005: Include cross-reference to definitions used in ORS chapter 656. Add definition of 'Director.'
- 436-070-0020(7): Add language clarifying that OAR 436-070's provisions for crediting or refunding overpayments are an exception to the more general rules under OAR 436-001.
- Other non-substantive grammatical or formatting changes.

FORM OQ



BUSINESS NAME:

OREGON QUARTERLY TAX REPORT

Business Identification Number **OQ0121** Qtr./Yr.

Date Received

Federal EIN

North American Industry Classification System

If mailing address, name, or Federal EIN is wrong, complete "Change in Status Report" found in the Oregon Combined Payroll Tax Booklet.

For each month, report the number of workers covered for Unemployment Insurance who worked during or received pay for the period which includes the 12th of the month. (See Instruction booklet.)	FIRST MONTH (M1)	SECOND MONTH (M2)	THIRD MONTH (M3)	TOTAL (M1+M2+M3)
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Place a -0- in the "subject wages" box for any program the employer is subject to but for which there was no payroll this quarter.	Unemployment Insurance Column A	State Withholding Column B	TriMet Transit District Column C	Lane Transit District Column D
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- Subject wages
- Excess wages, see instructions
- Taxable wages
(Box 1A minus Box 2A)
- Tax rate
Box 3A times Box 4A Must enter tax for quarter Box 1C times Box 4C Box 1D times Box 4D
- Tax
- Less:** Oregon tax pre-paid this quarter
- Plus:** UI penalty and interest owed
- Total tax due
(Box 5 less Box 6, plus Box 7)

WORKERS' BENEFIT FUND (WBF) ASSESSMENT

Put -0- in Boxes 9 and 11 if there were no subject hours worked in the quarter.

- Number of hours worked
(whole hours only)*
- WBF assessment rate
- Total assessment
(Box 9 times Box 10)
- Less:** Assessment prepaid this quarter
- Total assessment due

* Report only hours subject to WBF assessment. Hours do not need to equal hours reported on Form 132.

14. TOTAL PAYMENT DUE

- Add boxes 8A, 8B, 8C, 8D, and 13.
- Make payments to the Department of Revenue using electronic funds transfer (EFT), or
- Make checks payable to "Oregon Department of Revenue." Mail your checks, **including a payment coupon (Form OTC).**

(Only add amounts due. DO NOT add credits in one program to offset taxes owed in another program.)

SPECIAL PAYROLL TAX OFFSET (To be calculated every quarter)

16. Special Payroll Tax offset (see instructions)

17. Amount Applied to UI Trust Fund
(Box 5A minus line 16)

Use line 16 to calculate the amount of "contributions paid to the state" on Federal Form 940. Worksheet - Line 10. Do not add or subtract this amount from the total in Box 14.

15. MONTHLY SUMMARY OF STATE WITHHOLDING TAX LIABILITY.

Enter amount of state withholding tax withheld by month. Do not complete if you are a quarterly, semi-weekly, or one-banking day depositor.

FIRST MONTH (M1)	SECOND MONTH (M2)	THIRD MONTH (M3)	Total (M1 + M2 + M3) Must equal item 5B
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I certify this report is true and correct and is filed under penalty of false swearing.

Prepared by:

Date

Preparer Telephone Number

Signature
Required X

MAIL TO: OREGON DEPARTMENT OF REVENUE, PO BOX 14800, SALEM OR 97309-0920

OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 070
WORKERS' BENEFIT FUND ASSESSMENT

Effective Jan. 1, 2020

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436-070-0001 Authority for Rules

(1) These rules are adopted under the director's authority contained in ORS 656.726 and 656.506.

Stat. Auth.: ORS 656.726, 656.506
Stats. Implemented: ORS 656.506
Hist.: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05

436-070-0002 Purpose

The purpose of these rules is to:

- (1) Prescribe the rate of the Workers' Benefit Fund assessment under ORS 656.506;
- (2) Prescribe the manner and intervals in which the assessment rate is to be calculated;
- (3) Prescribe the manner and intervals employers are to withhold, file, and remit assessments; and
- (4) Prescribe the conditions affecting the adjustment of the assessments as authorized by ORS 656.506.

Stat. Auth.: ORS 656.506, 656.726(4)
Stats. Implemented: ORS 656.506
Hist.: Amended 12/7/12 as WCD Admin. Order 12-063, eff. 4/1/13

436-070-0003 Applicability of Rules

- (1) These rules are effective Jan. 1, 2020.
- (2) These rules govern the Workers' Benefit Fund assessment under ORS 656.506.
- (3) These rules apply to all subject employers as defined in ORS 656.005 and any otherwise non-subject employer who elects coverage pursuant to ORS 656.039.
- (4) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.506 (OL 2019, ch. 494), 656.726(4)
Stats. Implemented: ORS 656.506 (OL 2019, ch. 494)
Hist.: Amended 10/1/19 as WCD Admin. Order 19-055, eff. 1/1/20

436-070-0005 Definitions

Except where the context requires otherwise, the construction of these rules is governed by the definitions in the Workers' Compensation Law and as follows:

- (1) "Assessments" means the funds due from employees and employers pursuant to ORS 656.506.
- (2) "Employee" means a subject Oregon worker as defined in ORS 656.005 and any otherwise nonsubject worker for whom coverage is elected under ORS 656.039.
- (3) "Fund" means the Workers' Benefit Fund as created in ORS 656.506.
- (4) "Fund balance" means the balance of the fund after revenue and investment income has been added and expenditures have been subtracted.

Stat. Auth.: ORS 656.506
Stats. Implemented: ORS 656.506
Hist.: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05

436-070-0008 Administrative Review

(1) Contested case hearings regarding sanctions and civil penalties: Any employer as defined by ORS 656.005 aggrieved by a proposed order or proposed assessment of civil penalty of the director issued pursuant to ORS 656.745 may request a hearing by the Hearings Division of the Workers' Compensation Board in accordance with 656.740.

(a) The request for hearing must be sent in writing to the administrator of the Workers' Compensation Division. No hearing will be granted unless the request specifies the grounds upon which the person requesting the hearing contests the proposed order or assessment.

(b) The request for hearing must be filed with the administrator of the Workers' Compensation Division within 60 days after the mailing of the proposed order or assessment. No hearing will be granted unless the request is mailed or delivered to the administrator within 60 days after the mailing date of the proposed order or assessment.

(2) Hearings regarding estimation actions and orders: Under ORS 656.704(2), any employer who disagrees with an action or order of the director under these rules, other than as described in section (1), may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 30 days of the mailing date of the order or notice of action. OAR 436-001 applies to the hearing.

Stat. Auth.: ORS 656.735 and 656.740
Stats. Implemented: ORS 656.704, OL 2005 ch 26, 656.735, 656.740
Hist.: Amended 10/19/05 as WCD Admin. Order 05-064, eff. 1/2/06

436-070-0010 Assessment Rate: Method and Manner of Determining

(1) All subject employers and any employer electing to provide workers' compensation coverage for its employees must pay an assessment rate of 2.2 cents per hour to the Department of Consumer and Business Services, under this rule division and ORS 656.506.

(2) Factors considered in developing the rate include, but are not limited to:

- (a) The estimated annual fund expenditures and revenues;

- (b) The fund balance requirements;
- (c) The estimated annual hours worked per employee;
- (d) The estimated number of employees covered by workers' compensation insurance; and
- (e) Other records relating to fund expenditures and revenues.

Stat. Auth.: ORS 656.506 (OL 2019, ch. 494), 656.726(4)
Stats. Implemented: ORS 656.506 (OL 2019, ch. 494)
Hist.: Amended 10/1/19 as WCD Admin. Order 19-055, eff. 1/1/20

436-070-0020 Assessments: Manner and Intervals for Filing and Payment

(1) Every employer must compute the total assessment amount due for each employee by multiplying the assessment rate determined in OAR 436-070-0010 by the number of hours or parts of an hour the employee worked in the pay period.

(a) If actual hours worked are not tracked, an employer may either calculate the assessments using a flat rate, use contract information stating the number of hours an employee works, or come up with a reasonable method for calculating hours worked. If the flat rate method is used, the calculation must be based on 40 hours per week for employees paid weekly or biweekly, or 173.33 hours per month for employees paid monthly or semi-monthly.

(b) The employer will retain from the moneys earned by each employee one half (1/2) of the amount due. In addition, the employer will be assessed an amount equal to the amount retained from each employee.

(2) Every employer must file a report of employee hours worked and remit amounts due upon a combined tax and assessment report form prescribed by the Department of Revenue. The report must be filed with the Department of Revenue:

(a) At the times and in the manner prescribed in ORS 316.168 and 316.171; or

(b) Annually as required or allowed pursuant to ORS 316.197 or 657.571.

(3) For employers required to report quarterly, reports and payments are due on or before the last day of the first month after the close of each calendar quarter. For employers that report annually, reports and payments are due on or before the last day of January following the close of each calendar year.

(4) Employers who fail to timely and accurately file and remit assessments may be charged interest on all overdue balances at the rate established by ORS 82.010 and may be assessed civil penalties in accordance with OAR 436-070-0050.

(5)(a) If an employer fails to file a report or the director determines, based on the available data, that the report filed understates assessments, the director may send to the employer a written Failure to File Notice or Notice of Audit Findings. The notice will include a warning that failure to timely and accurately resolve all issues addressed in the written notice may result in the imposition of a civil penalty. The director may coordinate with the Department of Revenue and Employment Department to provide written notice of failure to file.

(b) Within 30 days of the Failure to File Notice or the Notice of Audit Findings, the employer must file an accurate report and remit the assessments due, or otherwise resolve to the satisfaction of the director all issues identified in the written notice. If an employer fails to comply with the notice, the director may estimate the assessments due, including penalties and interest, and send to the employer a Notice of Estimation.

(c) Within 30 days of the Notice of Estimation, the employer must pay the director's estimated assessment or file and remit accurate assessment due. If the employer fails to comply with the notice, the director may send to the employer an Order of Default assessing all amounts due as calculated by the director.

(d) Within 30 days of the Order of Default, the employer must remit the estimated assessment due, unless the order is timely appealed as provided in OAR 436-070-0008.

(6) Employers or the director may initiate activity to resolve reporting errors, omissions, or discrepancies for a period not to exceed the current calendar year plus three prior calendar years. No calendar year limitation applies to cases involving fraud.

(7) When the director determines that the department has received moneys in excess of the amount legally due and payable or that it has received moneys to which it has no legal interest, the director will refund or credit the excess amount. For amounts less than \$20, the director will refund to employers the excess amount only upon receipt of a written request from the employer or the employer's legal representative.

Stat. Auth.: ORS 656.506 and 82.010
Stats. Implemented: ORS 656.506 and 293.445
Hist.: Amended 6/15/06 as WCD Admin. Order 06-057, eff. 7/1/06

436-070-0040 Monitoring/Auditing

(1) Employers must maintain payroll and employment records which reflect the total hours worked by all employees for the current calendar year plus three prior calendar years.

(2) Pursuant to ORS 656.726, the director may inspect the books, records and payrolls of employers pertinent to the administration of these rules. Employers must provide the director with all pertinent books, records and payrolls upon request.

Stat. Auth.: ORS 656.726(8) and 656.758
Hist.: Amended 3/23/05 as WCD Admin. Order 05-053, eff. 4/1/05

436-070-0050 Assessment of Civil Penalties

The director may assess a civil penalty under ORS 656.745(2) against an employer that violates ORS chapter 656, OAR 436-070, or an order of the director.

Stat. Auth.: ORS 656.745(2)
Hist.: Amended 12/17/19 as Admin. Order 19-065, eff. 1/1/20