

**Oregon Administrative Rule Revision
Chapter 436, Division 070
Stakeholder Rulemaking Advisory Committee Meeting
Aug. 9, 2021, 10:15 a.m.**

Location of meeting: Virtual Zoomgov meeting

Committee members attending:

Jaye Fraser	SAIF Corporation
Jaylee Hlad-Mosgrove	Ombudsman for Injured Workers
Anthony Iraheta	ADP
Shawn Miller	American Property Casualty Insurance Association
Sonia Montalbano	McKeanSmith
Dan Schmelling	SAIF Corporation
Anthony Smith	NFIB
Kathleen Taylor	S D A O (Special Districts)
Gina Wescott	S D A O (Special Districts)

State of Oregon staff attending:

Aaron Fellman, WCD (meeting facilitator)	Dave Dahl, DFR
Adam Breitenstein, WCD	Don Gallogly, CSD
Brian Fordham, DFR	Fred Bruyns, WCD (meeting organizer)
Cara Filsinger, WCD	Heather Williamson, WCD
Chris Mott, DOR	Kim Keeler, CSD
Daneka Karma, WCD	Mark Curry, CSD

WCD is Workers' Compensation Division of DCBS | DFR is Division of Financial Regulation of DCBS | CSD is Central Services Division of DCBS | DOR is Department of Revenue | DCBS is Department of Consumer and Business Services

Meeting summary:

Fred Bruyns welcomed the committee members, described the purposes of the advisory committee, including collection of advice about fiscal impacts of possible rule changes, with an emphasis on any effects on small businesses.

Aaron Fellman guided the committee through the agenda, which has been copied in below. "Minutes" have been added under the main "ISSUE" and at the end.

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. (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.)

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

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

Options:

- 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.
- 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.
 - Alternately, adopt rules providing that hours should not be rounded, consistent with [Workers' Benefit Fund assessment FAQ](#) Item 18.
- 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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Minutes:

Aaron Fellman reviewed the issue, background, options, and fiscal impact (see above). Aaron then opened things up for discussion.

Sonia Montalbano explained that she is an attorney with McKeanSmith and practices employment law and business/commercial transactions. Sonia had a client who had a WBF contribution that was an odd number, 13 cents, that was supposed to be contributed in total. This was divided by their payroll processing company, and it amounted to 0.065 cents. They rounded up to 0.07 and withheld 7 cents from the employee's paycheck, and the employer contributed an equal amount. The employee contacted an attorney who made a demand that this was an unlawful deduction under the wage and hour statute. Because of the rate of hourly pay, about \$22 per hour, the penalty to be paid for inadvertently deducting the penny was \$5,280, plus attorneys' fees. Her client, in an effort to resolve the matter, because the attorneys' fees in these cases can often far outweigh the amount at issue, ended up paying \$10,000 to settle. This was a small business, and this can have a real impact on their ability to continue to employ people. These issues are not covered by insurance. Their contract with the payroll provider excluded them for any claim for indemnification, though it was the payroll company that did the calculation.

Sonia added that clarity on this rule is needed desperately. And, DCBS may want to consider coordinating with the Bureau of Labor and Industries (BOLI) and their administrative rules to see if they would consider exempting amounts of one cent from the unlawful deduction claims. The more clarity and consistency you can get between administrative agencies on issues like this, the better it is going to be for employers and employees going forward. Sonia added that she represents both employers and employees. The FAQs explain that you round down, but they do not say to what place you round down. That is another place where you can clarify.

Shawn Miller noted that we have two options listed and asked if the department is recommending the first one, or is the department asking the committee members which one they prefer?

Aaron Fellman said the department would be looking at adopting both options one and two. They don't work independently of each other. Adopting the rules about rounding would simply be consistent with the advice the department is giving.

Shawn miller added the he was looking at the options of rounding the amount down to the nearest cent that the employee pays. The options are one and two and three (other).

Aaron Fellman said he apologizes for referring to a different copy of the agenda and confirmed that both options one and two are under consideration. The department could go with both of them. The hourly rounding is less of a pressing issue, but it is an area where we thought there might be an opportunity to provide some clarity. "Other" is there to capture suggestions that might come up in the course of this meeting.

Shawn Miller said he agrees with the previous speaker (Sonia Montalbano) and that he thinks coordinating with BOLI makes sense as well.

Jaye Fraser said she also agrees with Sonia in terms of coordinating between BOLI and the Workers' Compensation Division. Jaye asked if there is any prohibition to creating a quarterly assessment, as opposed to per pay period. It sounds as though this is a bigger problem when you have weekly payers, as opposed to monthly and some sort of a true-up provision might be helpful.

Aaron Fellman replied that he thinks the statute would allow the department to explore this. He added that he thinks the statute requires that the assessment is to be collected from the worker at such intervals as the director will direct. Up to this point, we have been saying this should be collected at each pay period. We haven't really discussed the possibility of doing this any other way, but the statute could possibly allow for that.

Anthony Smith said he understands that the current way it works is that employers round down for their employee contributions to the nearest cent, and then they round up on their own contributions to the nearest cent, and the problem is that sometimes those two values don't match. So, option one would correct that, by, essentially, always rounding down both the employee's and the employer's contributions to the nearest cent, which would correct the issue of those two values not being the same. But, the downside is potentially a fiscal impact when

employers are always rounding down. On the agenda it says the department estimates the impact of making these changes to the current method of collecting WBF assessments would result in a decrease in collections of less than one percent. Anthony asked about the outlook and current status of the fund. What does a one percent impact really mean?

Aaron Fellman confirmed that Anthony's description of the issue is accurate. The current rule is going to require the employer to kick in a slightly larger amount than the employee, with the exceptions of situations where no rounding is required at all. Changing the rules as we suggest would result in an impact on the WBF. One percent is probably a worst-case scenario. Aaron referred to a memo he had regarding the fiscal impact, which estimates the actual dollar impact

Anthony Smith replied that he understands Aaron to mean that the impact might be far less than one percent.

Aaron Fellman confirmed that is definitely possible. Aaron added that if someone has the fiscal impact memo, they may jump in.

Anthony Smith added that he knows there have been concerns about over withholding from employees, and he asked if there are concerns about over payments by employers or associated liability.

Aaron Fellman replied that the answer depends on how you read the current rules. This is a concern, that overpayments might have resulted from this.

(Fred Bruyns put up the fiscal impact memo for the committee.)

Aaron Fellman continued that the impact of a one percent increase would be about \$646,000. If the impact is in the one-half percent range, the impact would be closer to \$320,000. This is something we could consider in future discussions about determining the amount of the assessment.

Fred Bruyns said that since this memo has become the subject of discussion, he will post it to the division's website later and when he sends out the minutes he will send this or enough extracted from it that the committee can understand the context. Fred added that he probably should have attached it to our agenda.

Anthony Smith asked if the dollar amounts were per year or per biennium. Anthony also asked how much is coming in in total.

Don Gallogly replied that the figures are annual figures based on the assessment in 2020.

Anthony Smith said he sees the impacts of roughly \$650 thousand or \$323 thousand, but asked how much comes in to the Workers' Benefit Fund per year.

Don Gallogly replied that \$646 thousand is one percent of the assessment revenue, so that's about \$64 million.

Anthony Smith asked about trends on how much is being drawn down per year or paid out in benefits. This line of questions is about whether a one percent or one-half percent impact will affect the health of the fund.

Don Gallogly explained that he does not have that information right now.

Fred Bruyns said there is a good deal more in the fund than the statutorily required amount currently. Fred added that he thinks at one time we were supposed to have eight quarters of expenditures and the required minimum may now be four quarters. There is a lot more than that in the fund now, but trends are more important. Analysis of the assessment rate is ongoing, in terms of whether the assessment rate will remain the same in 2022 as it is currently. Given that the economy has turned out a little better than people thought it would, it is probably not going to be bad news, but aside from that all we have is data that is a little bit old. We will know more in less than a month, and then we may or may not propose an adjustment in the WBF assessment rate.

Jaye Fraser said that while she understands concerns about impacts to the WBF, we need to make sure there is not disparate treatment between employers. That may be a bigger challenge.

Anthony Smith said he thinks Jaye's concerns are really valid. Though it is absolutely essential that employee and employer contributions be equal going forward, the current system does impact businesses differently, based on their pay periods.

Aaron Fellman confirmed that the main possibility for different treatment of employers is going to be based on disparities in pay period, and that is a factor under the current rules.

Anthony Smith asked if option one is used, and everyone rounds down, would the inverse be true – if you have more pay periods in a year, is that more opportunities to round down, benefiting the employer and negatively impacting the fund?

Aaron Fellman replied that he thinks that understanding is correct. Under the current rules, the shorter the pay period, the more often you will need to round, and the greater the disparity as to the employer contribution. The more often you round, the larger the reduction in payment for employers that pay their workers more frequently. As with now, we would be talking about cents, but that is correct.

Jaye Fraser said this just confirms that there is already disparate treatment happening based on pay period. The division should look at some kind of true up, either quarterly, or half-yearly, or whatever, so we can at least make an effort toward more equitable treatment for employers and workers.

Shawn Miller asked if the Anthony or anyone has data about pay periods and what the disparities may be.

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Anthony Smith said he does not have the answer but he knows the data exists. If the Workers' Compensation Division doesn't have it, the Employment Department certainly has it; they track all of that. It would be helpful to have that information if we are going to do something to try and ensure equity between employers.

Aaron Fellman said that is definitely something we can take a look at.

Anthony Smith said the harder part is trueing things up for employees, because you have to keep the contributions equal. The whole issue is that these are not always in alignment. If we true things up for employers, that begs the question of how to true things up for employees. Anthony added that he speaks for the small business community, but worker representative may have concerns about wanting to true things in terms of additional payroll deductions once per quarter or once per month or however that would work.

Fred Bruyns noted we received Jaye Fraser's chat message that this is not a simple problem – back to the need to work with BOLI.

Anthony Smith said we talked about the requirement for employee deductions to be based on the employee's pay period. Technically, the employer contribution needs to match that. Is the requirement for the employee's wage deduction based on pay period a statutory requirement?

Aaron Fellman replied that it is not. The statute gives us some discretion to determine the intervals at which this would be collected.

Shawn Miller asked about the process and whether the department plans to draft rules and schedule another meeting.

Fred Bruyns said that every year the [DCBS] Director's Office has a premium assessment rate hearing, generally in September. If there are to be changes to the WBF assessment rate, we piggyback with the premium assessment rate hearing and hold our hearing right after theirs. All of the changes are then effective the first of the year. So, we are currently, tentatively on the same track as the premium assessment rate rules, OAR chapter 440, which means we would file proposed rules before the end of August, for a hearing on/around Sept. 16. That would probably mean no second meeting. However, if the issues are weighty enough and we need more time, we'll talk with our administrator, and we could perhaps take these rules off that particular track. Or, if there is going to be a change in the assessment rate, that would go on that track, and these would go forward a little later. It is ultimately up to Sally Coen and Jim Van Ness, our administrator and deputy administrator.

Aaron Fellman asked if anyone has anything further to raise on this issue.

Housekeeping

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- 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.

Minutes:

Aaron Fellman said the housekeeping issues are just that, but that if anyone has concerns to speak up or reach out to him or to Fred. Aaron then thanked the committee members for their contributions.

Fred Bruyns thanked the committee members for their time and said that if anyone joined the meeting late, and we don’t have their contact information, to please just stay connected and he would get the information from them after the meeting. Fred added that we will create meeting minutes, post them to our website, and send a link, probably within a few days. If committee members have additional thoughts after the meeting, please send to the division as soon as possible so we have them as we get the rules ready to file. Then anyone can provide testimony, either at a public hearing or in writing. Fred said the building is supposed to be open in September, so we’ll do our best to provide for an in-person hearing option. There will be the possibility of participation by video and telephone as well.