



Consumer and  
Business Services

### Common Pitfalls and Emerging Workers' Compensation Trends for Oregon Employers

WCD Ed Conference – Oct. 17, 2019

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### Department of Consumer and Business Services (DCBS)

- Oregon's largest business regulatory and consumer protection agency
  - Oregon OSHA
  - Building Codes Division
  - Division of Financial Regulation
  - Oregon Health Insurance Marketplace
  - Ombudsmen
    - Injured Workers
    - Small Businesses

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### Department of Consumer and Business Services (DCBS)

- Workers' Compensation Division
- Workers' Compensation Board
- Central Services Division
  - Includes DCBS Accounts Receivable Unit

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## Workers' Compensation Division (WCD)



We don't sell insurance,  
we regulate the industry

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## The Grand Bargain

Benefit to Employer:

- **Exclusive remedy**
  - Medical
  - Indemnity
- Litigation reduced

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## The Grand Bargain

Benefit to worker:

- No fault system
  - Course and scope
- **Subject employers** must have coverage

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### What is Coverage?

- Have a workers' comp insurance policy
- Self-insured – Must be authorized by WCD
- Worker leasing coverage

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### Who is an Employer?

Anyone “who contracts to pay a remuneration for and secures the right to direct and control the services of any person.”  
– ORS 656.005(13)(a)

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### Who is a Subject Employer?

- Any employer who has at least one subject worker

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### Who is a Subject Worker?

- All workers are subject, except those exempted in ORS Chapter 656
- **Exemptions include:**
  - Independent contractors
  - Business owners
  - Industry-specific exemptions

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### Who is an Independent Contractor?

- Defined by ORS 670.600
  - Independently established business
  - Free from **direction and control**
  - Tools and equipment
  - Risk of loss
  - Several other criteria
  - **Important distinction** in workers comp law\*\*

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### Nonclaim Investigations

- ECU learns of possible NCE
  - Previous policy cancellation
  - New business match with Employment Department
  - Referral from other agency – (e.g., CCB and Oregon OSHA)
  - Miscellaneous referral

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### Nonclaim Investigations

- If compliance is achieved and there is no claim involved, case is closed with no order issued.
- If employer does not respond and does not come into compliance, an order is issued declaring a noncomplying employer.

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### Claim Investigations

- Worker files a claim
- Coverage not found
- ECU investigates
  - Does employer have coverage?
  - If no coverage, is employer subject?

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### Claim Investigations

- If employer is found to be NCE
  - Order is issued
    - Includes penalty for avoiding premiums
  - If there is a claim, it is referred to assigned claims agent for processing.
    - Currently, Sedgwick Claims Management

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### Penalty Orders

- First penalty is two times the premiums avoided.
  - Payroll during NCE period X assigned risk rate from Scopes Manual X 2
    - Minimum penalty is \$1,000
- If no payroll provided, premiums estimated.
  - Number of workers X AWW X number of weeks NCE X assigned risk rate X 2
    - Could be enormous

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### Subsequent Penalties

- Up to \$250 per day for each calendar day the employer is NCE.
- Can also result in referral to DOJ to seek injunction in circuit court.
- A violation of injunction is contempt of court and could result in incarceration.

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### Claims Costs

- Sedgwick bills DCBS for all claims costs, including:
  - Sedgwick's administrative fee
    - Currently \$1,130 per claim, per year claim is open
  - Medical payments (doctor and rehab)
  - Indemnity payments (time loss, permanent disability, return-to-work costs)
  - Litigation and investigation costs, whether claim is accepted OR denied

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### Claims Costs

- Referral to Sedgwick is to get the claim processed according to Chapter 656
  - Sedgwick will investigate, then either accept or deny claim.
  - If accepted, Sedgwick pays all benefits due **for the life of the claim.**
  - If claim is denied, the worker is given appeal rights.

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### Claims Costs

- All claims costs billed to DCBS are charged to the responsible parties of the NCE:
  - Might include a claim reopening from an injury that occurred many years ago
  - Might include extensive litigation fees from a claim that is ultimately denied

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### Responsible Parties

- All people responsible for the business
  - Sole proprietors
  - Partners
  - Officers and directors of a corporation
  - Members of an LLC
  - Directors of a nonprofit
  - Trustees of an estate or bankruptcy proceeding

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## Responsible Parties

- They are jointly and severally liable for all penalties and claims costs.
  - They are not protected by corporate veil.
  - Claims costs are not dischargeable in bankruptcy.
  - Civil penalties are given preference in bankruptcy proceedings.

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## Horror Stories

- Sandwich shop, cut finger
- Mom and Pop accountants
- Logging crew

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## Summary

- If you are a subject employer, you must have coverage.
  - It's required by law
  - It protects you and your business
  - It ensures a level playing field

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### Miscellany

- Home office might nullify homeowners exemption
- Call WCD or SBO if you need to know
- An "if any" policy will protect you.

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### WCD Contact

Questions about coverage,  
penalties, independent contractors, or  
worker leasing:

Employer Compliance Unit  
**503-947-7815**

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## Agenda

- Background
- Commonly asked questions
- Horror Story
- Lessons learned
- Emerging trends

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## Small Business Ombudsman

- Position created in 1990
- Workers Compensation resource for businesses of all sizes.
- We answer questions about whether you need to buy insurance and how to buy insurance
- We also help handle billing, classification and audit disputes.

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## Commonly Asked Questions

- Do I need to buy workers compensation insurance?
- How do I buy workers compensation insurance?
- Can you help with a dispute with my workers compensation insurer
- How do I appeal my workers compensation premium audit?

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### **HORROR STORY: AN INSURANCE POLICY COMES BACK TO HAUNT THEM**

- Background Ms. Winnie Bago buys a new RV business with 30 employees. They are covered under the workers compensation policy of the previous owner. An old friend offers to handle their payroll administration to relieve their administrative headaches. After a year the old friend says that they are a Employee Leasing Company and that they can take them on as a client and provide workers compensation insurance for her company.

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### **HORROR STORY: AN INSURANCE POLICY COMES BACK TO HAUNT THEM**

- Ms. Bago agrees to this and cancels their policy and is now covered by the leasing company. It is now time for the insurance company to conduct an audit and will need payroll and classification information to complete the audit. The Employee Leasing Company is not responding to requests for this information. Several months go by and the policy is cancelled for non-compliance. They receive a bill for \$65,000 additional premium. A week after the policy is cancelled a claim is filed for a back strain and Ms. Bago gets a call from the Workers Compensation Division that an investigator will be visiting them tomorrow.

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### **HORROR STUDY A CASE STUDY POST-MORTEM**

- The policy of the prior owner cannot be assumed by the new owner. A new policy needed to be issued for the new owner on the date of the change of ownership
- The old friend's payroll company came under investigation for tax fraud.
- The old friend's payroll company was not a licensed employee leasing company
- Because no accurate payroll was ever reported, the audit issued by the insurance company used an inflated estimate of payroll and placed all payroll in the highest rated classification, resulting in an audit bill of \$65,000.
- The business is placed in non-compliance and cannot get new coverage until they pay the bill.
- The WCD investigator determines that the company is in non-compliance and issues an order with a large civil penalty.
- The claims cost plus handling charges are now the responsibility of the business.

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### Employer Lessons Learned

- No Agent or Wrong Agent
- Not getting a policy when ownership changed
- Trusting and not verifying friend's business
- Not calling Small Business Ombudsman earlier

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### SBO Information

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