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EFFECTIVE JANUARY 1, 2004

**OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 080
NONCOMPLYING EMPLOYERS**

NOTE: Only adopted, amended, and repealed rules are included in this document:

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**OREGON DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
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**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 080**

436-080-0001 Authority for Rules

These rules are promulgated under the [D]irector's authority contained in ORS 656.726 and 656.054.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.726

Hist: WCB 4-1974, f. 2-13-74, ef. 3-11-74; WCB 15-1975, f. 9-22-75, ef. 10-11-75,
WCD 5-1978 (Admin), f. 3-31-78, eff. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0002 Purpose

It is the purpose of the [D]irector that under [the provision of] ORS 656.726([3]4) and ORS 656.054 rules be established to ensure the requirements of ORS 656.017 are met. To meet that responsibility the [D]irector has delegated to the [D]ivision the responsibility of ensuring the requirements of the statutes, rules, and bulletins of the [D]epartment are complied with as they relate to employer coverage.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.726

Hist: Filed 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0003 Applicability of Rules

These rules are effective [January 23, 1998]January 1, 2004 and carry out the provisions of:

- (1) ORS 656.017 - Employer required to pay compensation and perform other obligations and duties.
- (2) ORS 656.052 - Prohibition against employment without coverage; proposed order declaring noncomplying employer; effect of failure to comply.
- (3) ORS 656.054 - Claim of injured worker of noncomplying employers; notice of proposed penalty; recovery of costs from noncomplying employer.
- (4) ORS 656.735 - Civil penalty for noncomplying employers; amount; liability of corporate officers; effect of final order; penalty as preferred claim; disposition of moneys collected.
- (5) ORS 656.740 - Review of proposed order declaring noncomplying employer, proposed assessment or civil penalty; insurer as party; hearing.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.726

Hist: WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90

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Amended 01/10/92 as WCD Admin. Order 3-1992, ef. 2/1/92
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 1/9/98 as WCD Admin. Order 98-051, eff. 1/23/98
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0005 Definitions

For the purpose of these rules unless the context requires otherwise:

(1) ["Compliance" means the Compliance Section of the Workers' Compensation Division of the Department of Consumer and Business Services.

(2)]"Department" means the Department of Consumer and Business Services.

([3]2) "Director" means the [D]director of the Department of Consumer and Business Services or the [D]director's delegate.

(3) "Division" means the Workers' Compensation Division of the Department of Consumer and Business Services.

(4) "Hearings Division" means the Hearings Division of the Workers' Compensation Board.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.726

Hist: WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0006 Administration of Rules

Any order issued by the [D]division in carrying out the [D]director's authority to enforce ORS [c]chapter 656 and the rules adopted pursuant thereto is considered an order of the [D]director.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.052, ORS 656.054, ORS 656.726

Hist: WCB 4-1973 (Temp), f. 12-6-73, ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0010 Initiation of Proceedings; Issuance of Noncomplying Employer Order

If an employer has failed to comply with ORS 656.017, the [D]division [shall] **will** investigate. If the [D]division finds the employer is a subject employer that has failed to file proof of qualification in the manner required by ORS 656.407, as either[:

(1) A] **a** carrier-insured employer[:] or[,

(2) A] **a** self-insured employer[:;then], the [D]division [shall] **will** issue a Proposed and Final Order declaring the employer to be a noncomplying employer, and assess[ing] a civil penalty pursuant to ORS 656.735(1) for violation of ORS 656.052.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.017, ORS 656.052, ORS 656.735

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Hist: WCB 10-1970, f. & ef. 7-24-70;
WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0020 When a Hearing on the Order Is Not Requested

If the employer does not request a hearing on the order within the [20]**60** days allowed by ORS 656.740, the [D]**division** may request the Department of Justice to commence proceedings to enjoin the employer under ORS 656.052(3).

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.052, ORS 656.735, ORS 656.740 (section 9, chapter 170, Oregon Laws 2003)

Hist: WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0030 When a Hearing on the Order Is Requested

(1) A request for hearing on an order issued under OAR 436-080-0010 or 436-080-0040 must specify the grounds upon which the employer contests the order and must be [received by the department at the Workers' Compensation D]**mailed or delivered to the division** [Compliance Section]within [20]**60** calendar days after [service]**the mailing** of the order.

(2) When a person who is served with an order **timely** files a request for a hearing[within the time allowed by ORS 656.740], the [D]**division** [shall]**will** forward the request and other pertinent information to the Hearings Division.

(3) A [Compliance]**division** officer or employee is authorized to appear (but not make legal argument) on behalf of the [D]**director** in a hearing or in a class of hearings in which the Attorney General or the Deputy Attorney General has given written consent for such representation. A copy of the list of contested case hearings for which the Attorney General or the Deputy Attorney General has given consent is maintained by the [D]**division** and the Department of Justice.

(4) **“Legal argument”** as used in ORS [182.450 (8)]**183.452** and this rule has the same meaning as in the Attorney General's Model Rule of Procedure 137-~~003-0008~~ (1) (c) and (d), which is hereby adopted by reference.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.052, ORS 656.735, ORS 656.740

Hist: WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90
Amended 01/10/92 as WCD Admin. Order 3-1992, ef. 2/1/92
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96

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Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0040 Assessment of Civil Penalties Against Non-complying Employer; Hearing on Proposed Assessment

(1) In accordance with ORS 656.735(1), the amount of penalty for a person's first violation of ORS 656.052(1) shall be the greater of \$1,000 or twice the premium the employer would have paid during the non-complying period if insurance had been provided.

(a) The [D]division may reduce the amount of the penalty due, to 105% of the amount of premium the employer would have paid during the noncomplying period if insurance had been provided if, prior to the penalty order becoming final, the employer:

(A) Agrees to not contest the penalty order;

(B) Provides evidence satisfactory to the [D]division that it is no longer a subject employer or, if it is still a subject employer, that it has now complied with ORS 656.052(1);

(C) Provides adequate payroll information to enable the [D]division to calculate the amount of premium the employer would have paid during the noncomplying period if insurance had been provided; and

(D) Makes arrangements satisfactory to the [D]division for prompt payment of the reduced penalty amount.

(b) If 105% of the amount of premium the employer would have paid during the noncomplying period is less than \$500, the reduced penalty will be \$500.

(2) The amount of penalty, when assessed against the employer pursuant to ORS 656.735(2), shall be \$250 per day for each calendar day the employer has continued to violate ORS 656.052(1), commencing with the first day of such violation:

(a) The [D]division may reduce the amount of the penalty due to 150% of the amount of premium the employer would have paid during the non-complying period if insurance had been provided if, prior to the penalty order becoming final, the employer:

(A) Agrees to not contest the penalty order;

(B) Provides evidence satisfactory to the [D]division that it is no longer a subject employer or, if it is still a subject employer, that it has now complied with ORS 656.052(1);

(C) Provides adequate payroll information to enable the [D]division to calculate the amount of premium the employer would have paid during the noncomplying period if insurance had been provided; and

(D) Makes arrangements satisfactory to the [D]division for prompt payment of the reduced penalty amount.

(b) If 150% of the amount of premium the employer would have paid during the noncomplying period is equal to or greater than \$250 per calendar day of noncompliance, there will be no reduction of the penalty amount.

(c) If 150% of the amount of premium the employer would have paid during the noncomplying period is less than \$1000, the reduced penalty will be \$1000.

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(3) For the purpose of this rule, “premium the employer would have paid during the noncomplying period” means:

(a) If payroll records are available, actual premium using the applicable occupational base rate premium applied to the payroll of the employer during the period of noncompliance; or

(b) If payroll records are not available, estimated premium based upon the number of workers employed during the noncomplying period times the average weekly wage as defined in ORS 656.005(1), using the applicable [A]assigned [R]risk base rated premium during the period of noncompliance.

(4) [If a subject worker of a noncomplying employer receives a compensable injury while in the employ of such employer, the Division shall assess a civil penalty against the employer in accordance with ORS 656.054(2) and 656.735(3) after the order is final and the worker's claim is closed.

(a) For the purposes of this subsection, a claim for a nondisabling compensable injury is considered closed if 30 days elapse during which the worker receives no medical services, as verified by the reports submitted to the Department under OAR 436-080-0070(1);

(b) The amount of penalty shall be ten percent of the total claim cost, reduced to the nearest \$50, but not less than \$100 nor more than the maximum penalty set forth in ORS 656.735(3).

(5) The [D]division [shall] **will mail or otherwise** serve an order assessing a civil penalty, with a notice to the employer of rights under ORS 656.740.

[6] **(5)** When a penalty order becomes final, the [D]division [shall] **will** transfer the matter to the Business Administration Division of the [D]department to collect the penalty.

Stat. Auth.: ORS 656.052, ORS 656.726, ORS 656.735

Stats. Implemented: ORS 656.052, **656.054 (section 1, chapter 170, Oregon Laws 2003)**, ORS 656.735, ORS 656.740

Hist.: WCB 4-1973(Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978(Admin), f. 3-31-78, ef. 4-1-78;
Renumbered from 436-52-030, 5-1-85; WCD 7-1987, f. 12-18-87, ef. 1-1-88;
WCD 5-1989, f. 12-22-89, cert. ef. 1-1-90; WCD 26-1990, f. 11-29-90, cert. ef. 12-26-90;
WCD 95-057(Temp), f. 7-26-95, er. 7-26-95
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

[436-080-0050 Service of Notice, Order or Assessment

When rules 436-080-0006 through 436-080-0040 require the Division to serve an order or notice on an employer, the Division shall serve the document by delivering a copy to the employer through certified mail or in any manner provided by Oregon Rules of Civil Procedure 7 D.]

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.052, ORS 656.735, ORS 656.740

Hist.: WCB 10-1970, f. & ef. 7-24-70;
WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 11/29/90 as WCD Admin. Order 28-1990, effective 12/26/90
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Repealed 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0060 When a Worker Files a Claim for an Injury

(1) When the [D]division issues an order under OAR 436-080-0010 declaring an employer a noncomplying employer, and a subject worker has filed a claim for an injury sustained during the period of noncompliance while the worker was employed by such employer, the [D]division [shall] **will**:

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(a) Refer the claim with a copy of the order and the results of its investigation to the assigned claims agent for processing as required by ORS 656.054; and

(b) Inform the worker, the worker's representative, if represented, and the employer that the claim has been referred to the assigned claims agent;

([c]2) The notice to the employer [shall] **will** inform the employer of the right to object to the claim.

([d]3) If the employer wishes to object to the claim, the employer shall request a hearing. The request for hearing must be filed within [90] **60** days from the date of the mailing of the Notice of Referral.

([2]4) When the assigned claims agent accepts or denies the claim, it shall notify the worker, employer, and the [D] **d**ivision of its action within the time provided by ORS 656.262.

([3]5) When the [D] **d**ivision finds that at the time of the injury, either the worker was not a subject worker or the employer was not a subject employer, the worker and employer shall be notified of such determination. The worker may request a hearing by filing a hearing request within [30] **60** days [of service] **after the mailing** of the determination. The hearing request must be sent to the Workers' Compensation Division[, Compliance Section, 350 Winter St. NE, Room 330, Salem, OR 97310] **administrator**. The worker and employer shall be parties to any such hearing, and [shall] **will** be notified by the Hearings Division of the time and place set for hearing.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.054

Hist: WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1979 (Admin), f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 11/29/90 as WCD Admin. Order 28-1990, ef. 12/26/90
Amended 4/15/92 as WCD Admin. Order 8-1992, ef. 4/15/92 (Temporary)
Amended 10/13/92 as WCD Admin. Order 16-1992, ef. 10/13/92
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 1/9/98 as WCD Admin. Order 98-051 eff. 1/23/98
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0065 Determination Of Assigned Claims Agent

(1) When selecting an assigned claims agent, the [D] **d**irector [shall] **will** consider claims processing performance data collected by the [Workers' Compensation D] **d**ivision. That data and data provided by potential assigned claims agents [shall] **will** be used to determine which claims agent can deliver the most timely and appropriate benefits to injured workers and can best control claim costs and administrative costs. In addition, the [D] **d**irector may use any other factors the [D] **d**irector considers appropriate.

(2) If no qualified entity agrees to be an assigned claims agent, the [D] **d**irector may require one or more of the three highest premium producing insurers to be assigned claims agents. In addition to the premium consideration, the criteria described in section (1) of this rule will be used to make that determination.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.054

Hist: Filed 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96

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Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0070 Reimbursement of Assigned Claims Agent for Claims Costs for Injured Workers of Noncomplying Employers

(1) When an assigned claims agent pays compensation to a claimant or incurs other costs on a claim referred to it under ORS 656.054, the assigned claims agent shall report the payment to the [D]department [within 30 days. At the end of each calendar quarter, the assigned claims agent shall submit to the Department a request for reimbursement of all expenditures made from the Consumer and Business Services Fund during the quarter covered by the report, itemizing by claimant expenditures made for all claimants of noncomplying employers.] **as established by contract with the assigned claims agent.** [There shall be offset against such expenditures, a] **Any amounts received by the assigned claims agent and reported to the [D]department under subsections (5) and (6) of this rule will be offset against such expenditures.** Subject to section (3) of this rule, costs incurred by the assigned claims agent for which reimbursement will be allowed include:

(a) All compensation paid claimant.

(b) All expenses incurred for medical services.

(c) Attorney fees paid to the claimant in addition to any compensation, and sums assessed under ORS 656.382(3) and paid by the assigned claims agent, but not fees and sums paid under ORS 656.262 (11) and 656.382(1).

(d) A reasonable amount for administrative costs at a rate proposed by the assigned claims agent and approved by the [D]director prior to June 30 of each year. Late requests for increase on the rate of reimbursement, if approved, shall be effective on the date the request was received by the [D]director.

(2) The [D]department [shall] **will** review the request and issue the reimbursement out of the [Administrative] **Workers' Benefit** Fund[of the Department].

(3) The [D]department [shall] **will** conduct an annual audit of the noncomplying employer claim files processed by the assigned claims agent to validate the amount reimbursed pursuant to section (1) of this rule. Reimbursement shall not be allowed, if, upon such audit, any of the following are found to apply:

(a) Compensation has been paid as a result of untimely, inaccurate, or improper claims processing;

(b) Compensation has been paid negligently for treatment of any condition unrelated to the compensable condition;

(c) The compensability of an accepted claim is questionable and the rationale for acceptance has not been reasonably documented in accordance with generally accepted claims management procedures;

(d) The separate payments of compensation have not been documented in accordance with generally accepted accounting procedures; or

(e) The payments were made pursuant to a disposition agreement as provided by ORS 656.236 without the prior approval of the [D]department.

(4) The assigned claims agent may appeal any disapproval of reimbursement made by the

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[D]epartment under this rule pursuant to ORS 183.310 to 183.550 and as provided by OAR 436-080-0008.

(5) When a damage action is brought against a noncomplying employer or an action is brought against a third party by an employee of a noncomplying employer or the employee's beneficiaries, or by the assigned claims agent as the paying agency for such an employee, as authorized by ORS 656.576 to 656.595, the assigned claims agent shall report the commencement and termination of such action to the [D]epartment. Thereafter, at the end of each calendar year, the assigned claims agent shall report the status of all such actions that are pending.

(6) When an action against an employer, or third party is settled or if damages are recovered, the assigned claims agent shall report within (30) days to the [D]epartment the amount of the recovery retained by the assigned claims agent under ORS 656.593(1)(c).

(7) The Business Administration Division of the [D]epartment is responsible for collecting from noncomplying employers those costs incurred by the [Consumer and Business Services] **Workers' Benefit** Fund for which the assigned claims agent is entitled to reimbursement from the [D]epartment under this rule. The Business Administration Division [shall] **will** inform each noncomplying employer of the liability under ORS 656.054(3) and keep the employer advised of costs incurred by the assigned claims agent.

Stat. Auth.: ORS 656.054, ORS 656.726

Stats. Implemented: ORS 656.054

Hist: WCB 10-1970, f. & ef. 7-24-70;
WCB 4-1973 (Temp), f. & ef. 12-6-73;
WCB 4-1974, f. 2-13-74, ef. 3-11-74;
WCB 15-1975, f. 9-22-75, ef. 10-11-75;
WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, effective 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, effective 1-1-90
Amended 01/10/92 as WCD Admin. Order 3-1992, effective 2/1/92
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04

436-080-0080 Collection of Subject Worker's Payment

(1) When the [D]ivision finds the noncomplying employer has withheld monies from subject workers pursuant to ORS 656.506, it will collect such money from the noncomplying employer.

(2) The Business Administration Division is responsible for collecting from noncomplying employers those workers' payments not collected by the **Workers' Compensation** Division and referred to it by the **Workers' Compensation** Division.

Stat. Auth.: ORS 656.726

Stats. Implemented: ORS 656.506

Hist.: WCD 5-1978 (Admin), f. 3-31-78, ef. 4-1-78
Amended 12-18-87 as WCD Admin. Order 7-1987, ef. 1-1-88
Amended 12/22/89 as WCD Admin. Order 4-1989, ef. 1-1-90
Amended 1/2/96 as WCD Admin. Order 95-073, ef. 1/5/96
Amended 12/3/03 as WCD Admin Order 03-065, eff. 1/1/04