

OAR 436-080

Noncomplying Employers

Effective January 23, 1998

Administrative Order 98-051

**Oregon Department of Consumer and Business Services
Workers' Compensation Division**

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

NONCOMPLYING EMPLOYERS

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**EXHIBIT "A"
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 080**

NONCOMPLYING EMPLOYERS

436-080-0001 Authority for Rules

These rules are promulgated under the Director'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

436-080-0002 Purpose

It is the purpose of the Director that under the provision of ORS 656.726(3) and ORS 656.054 rules be established to ensure the requirements of ORS 656.017 are met. To meet that responsibility the Director has delegated to the Division the responsibility of ensuring the requirements of the statutes, rules and bulletins of the Department 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

436-080-0003 Applicability of Rules

These rules are effective January 23, 1998 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
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

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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) "Director" means the Director of the Department of Consumer and Business Services or the Director's delegate.

(4) "Hearings" 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

436-080-0006 Administration of Rules

Any order issued by the Division in carrying out the Director's authority to enforce ORS Chapter 656 and the rules adopted pursuant thereto is considered an order of the 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

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

If an employer has failed to comply with ORS 656.017, the Division shall investigate. If the 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 carrier-insured employer; or,

(2) A self-insured employer; then, the Division shall issue a Proposed and Final Order declaring the employer to be a noncomplying employer, and assessing 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

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

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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 days allowed by ORS 656.740, the 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

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

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 Division Compliance Section within 20 calendar days after service of the order.

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

(3) A Compliance officer or employe is authorized to appear (but not make legal argument) on behalf of the 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 Division and the Department of Justice.

(4) Legal argument as used in ORS 182.450 (8) and this rule has the same meaning as in the Attorney General's Model Rule of Procedure 137-03-008 (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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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 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 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 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 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 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 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 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 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.

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

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(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 Assigned 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 Division shall serve an order assessing a civil penalty, with a notice to the employer of rights under ORS 656.740.

(6) When a penalty order becomes final, the Division shall transfer the matter to the Business Administration Division of the Department to collect the penalty.

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

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;
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

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

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

(1) When the 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 Division shall:

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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) The notice to the employer shall inform the employer of the right to object to the claim.

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

(2) When the assigned claims agent accepts or denies the claim, it shall notify the worker, employer, and the Division of its action within the time provided by ORS 656.262.

(3) When the Division 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 days of service 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. The worker and employer shall be parties to any such hearing, and shall 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

436-080-0065 Determination Of Assigned Claims Agent

(1) When selecting an assigned claims agent, the Director shall consider claims processing performance data collected by the Workers' Compensation Division. That data and data provided by potential assigned claims agents shall 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 Director may use any other factors the Director considers appropriate.

(2) If no qualified entity agrees to be an assigned claims agent, the Director 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

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

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on a claim referred to it under ORS 656.054, the assigned claims agent shall report the payment to the 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. There shall be offset against such expenditures, any amounts received by the assigned claims agent and reported to the Department under subsections (5) and (6) of this rule. 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 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 Director.

(2) The Department shall review the request and issue the reimbursement out of the Administrative Fund of the Department.

(3) The Department shall 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 Department.

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

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commencement and termination of such action to the Department. 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 Department the amount of the recovery retained by the assigned claims agent under ORS 656.593(1)(c).

(7) The Business Administration Division of the Department is responsible for collecting from noncomplying employers those costs incurred by the Consumer and Business Services Fund for which the assigned claims agent is entitled to reimbursement from the Department under this rule. The Business Administration Division shall 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

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

(1) When the Division 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 Division and referred to it by the 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