



Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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Salem, OR 97309-0405
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October 15, 2008

Proposed Changes to Workers' Compensation Rules

The Department of Consumer and Business Services, Workers' Compensation Division proposes changes to OAR chapter 436, affecting medical fees, managed care organizations, and claims administration.

Please review the attached documents for more information about proposed changes and possible fiscal impacts.

The department welcomes public comment on proposed changes and has scheduled public hearings.

When are the hearings? Nov. 20, 2008, 5:00 p.m. and Nov. 24, 2008, 1:30 p.m.

Where are the hearings? Labor & Industries Building
350 Winter Street NE, Room 260 (2nd Floor),
Salem, Oregon 97301

How can I make a comment? Come to the hearing and speak, send written comments, or do both. Send written comments to:
Fred Bruyns, rules coordinator
Workers' Compensation Division
350 Winter Street NE (for courier or in-person delivery)
PO Box 14480, Salem, OR 97309-0405
Email - fred.h.bruyns@state.or.us
Phone - (503) 947-7717; Fax - (503) 947-7581

The closing date for written comments is Nov. 26, 2008.

How can I get copies of the proposed rules?

On the Workers' Compensation Division's Web site –
www.wcd.oregon.gov/policy/rules/rules.html#proprules

Or call (503) 947-7627 to get free paper copies

Questions? Contact Fred Bruyns, (503) 947-7717.

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Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING
 A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer and Business Services,
 Workers' Compensation Division

OAD CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

Fred Bruyns
 Rules Coordinator

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Rules Coordinator

Address

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RULE CAPTION

Proposed rules affecting the processing of workers' compensation claims and the payment of medical fees

11/20/08.....	5 p.m.*	Room 260 (2 nd floor) Labor & Industries Building	
11/24/08.....	1:30 p.m.*	350 Winter Street NE, Salem, Oregon	Fred Bruyns
Hearing dates	Time s	Location	Hearings Officer

*NOTE: The hearing will begin at these scheduled times and end when all present who wish to testify have done so. Written testimony will be accepted through November 26, 2008.

The site of the hearing is accessible for individuals with mobility impairments. Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

ADOPT: OAR 436-009-0018, 436-009-0095, 436-015-0007, 436-060-0153

AMEND: OAR 436-009, 436-060, 436-015-0120

REPEAL:

RENUMBER:

AMEND & RENUMBER:

ORS 656.726(4)

Stat. Auth.

Other Authority

ORS ch. 656, primarily 656.248, 656.252, 656.260, 656.262, and 656.264; and ORS ch. 84, primarily 84.013
 Stats. Implemented

RULE SUMMARY

General changes to OAR chapter 436: The agency proposes clarifying and plain-language amendments, in addition to the substantive changes described below. Unless stated otherwise, references to “insurers” include self-insured employers.

The agency proposes to amend OAR chapter 436, division 009, “Oregon Medical Fee and Payment Rules.”

These proposed rules describe the application of provider network contracts, fee discount agreements, and associated procedures and limitations that apply to these contracts and agreements including:

- That provider network contractual discounts may be applied to fees paid to certain medical providers;
- That provider network contractual discounts, except for managed care organization discounts, may not be applied to fees paid to a medical service provider or medical clinic, or to a rural hospital that qualifies for the rural exemption, or to certain examinations or reviews ordered by the director;
- Limitations on application of contractual discounts to a single discount if multiple contracts exist; the primacy of a managed care contract if multiple contracts exist;
- Provision for medical service providers and insurers to enter into “fee discount agreements,” subject to maximum discounts, and related procedures and reporting requirements;

- Notification requirements regarding non-payment, reduced payment, or discounted payment of medical services;
- Requirements for insurers to respond to a medical provider's inquiries about a medical payment; and
- Sanctions and civil penalties to insurers related to the application of contractual discounts.

The agency proposes to amend OAR chapter 436, division 015, "Managed Care Organizations." These proposed rules specify who can manage care and potential sanctions for managing care by a party that is not a certified managed care organization.

The agency proposes to amend OAR chapter 436, division 060, "Claims Administration."

These proposed rules address reporting, notice, payment, and dispute resolution, including:

- The claim processor's address data to be printed on insurer-generated forms;
- The insurer's report to the division when first payment of temporary disability occurs after the insurer has filed Form 1502;
- The time allowed for an insurer to respond to notice from the director that a complaint has been filed about the insurer's release of claim documents;
- That the Hearings Division of the Workers' Compensation Board, not the Workers' Compensation Division, will resolve wage disputes;
- Notice to the attending physician that the worker is engaging in behaviors that may imperil or retard recovery;
- Notice to the division when a worker, whose benefits have been suspended under OAR 436-060-0135, cooperates with the investigation;
- Time frames for payment of fatal benefits;
- Notices to the worker or beneficiaries explaining temporary disability, permanent disability, and fatal payments;
- Criteria for electronic payment of benefits; and
- Information an attorney must send to the director when requesting an attorney fee under ORS 656.262(11).

Request for public comment: The Workers' Compensation Division requests public comment on whether other options should be considered for achieving the rules' substantive goals while reducing the negative economic impact of the rules on business.

Address questions to:

Fred Bruyns, Rules Coordinator; phone 503-947-7717; fax 503-947-7581; e-mail fred.h.bruyns@state.or.us

Proposed rules are available on the Workers' Compensation Division's Web site:

<http://wcd.oregon.gov/policy/rules/rules.html#proprules>

or from WCD Publications, 503-947-7627 or fax 503-947-7630.

Nov. 26, 2008

Last Day for Public Comment

(Last day to submit written comments to the
Rules Coordinator)

/s/ Jerry Managhan (for)

Authorized Signer and Date

10/15/08

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

*Hearing Notices published in the Oregon Bulletin must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, upon which the deadline is 5:00 pm the preceding workday. ARC 920-2005

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Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services,
Workers' Compensation Division
Agency and Division

OAR CHAPTER 436
Administrative Rules Chapter Number

In the Matter of the Amendment of OAR:

436-009, Oregon Medical Fee and Payment Rules
436-015, Managed Care Organizations
436-060, Claims Administration

Rule Caption:

Proposed rules affecting the processing of workers' compensation claims and the payment of medical fees

Statutory Authority: ORS 656.726(4)

Other Authority:

Statutes Implemented: ORS ch. 656, primarily 656.248, 656.252, 656.260, 656.262, and 656.264; and ORS ch. 84, primarily 84.013

Need for the Rule(s): The agency is proposing changes needed to promote stable and predictable reimbursements to health care providers to ensure access to quality care for workers' compensation patients. Proposed changes should also improve communication between all parties with an interest in workers' compensation medical care, claims management, processing complaints, and measuring insurer performance. This information sharing should improve medical outcomes and promote earlier return to work. In addition, the proposed changes, including criteria for electronic payment of benefits, should promote faster payment of benefits and attorney fees.

Documents Relied Upon, and where they are available: "Issues" documents presented to stakeholder advisory committees; advisory committee meeting records; written advice from advisory committee members and other interested parties. These records are available for public inspection in the Administrator's Office, Workers' Compensation Division of the Department of Consumer and Business Services, 350 Winter Street NE, Salem, Oregon 97301-3879, upon request and between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Please call (503) 947-7717 to request copies.

Fiscal and Economic Impact, including Statement of Cost of Compliance: Unless stated otherwise, references to "insurers" (below) include "self-insured employers" and the "agency" means the Workers' Compensation Division of the Department of Consumer and Business Services. The following is a list of significant estimated fiscal/economic impacts on persons and organizations affected by OAR chapter 436:

OAR chapter 436, division 009, "Oregon Medical Fee and Payment Rules"

Proposed rules describe the application of provider network contracts, fee discount agreements, and associated procedures and limitations that apply to these contracts and agreements.

- The current rules require insurers to pay medical providers and clinics at varying rates that at no time can exceed the applicable fee schedule established under ORS 656.248. The division requires insurers to report to the agency the amount charged and the amount paid for every service. Payments can be less than both the charged amount and the fee schedule for a number of reasons, however, and reporting of these reasons is not required. Neither the size nor the existence of network discounts is reported. Therefore, we are unable to measure or accurately estimate the magnitude of network discounts currently in the system. This complicates the estimation of the financial impact of the new rule.

Evidence suggests and is supported by stakeholder input that network discounts have long existed in the workers' compensation system. We find no evidence to the contrary and, therefore, make the assumption that this is true in this analysis. Prohibiting the application of discounts will put upward pressure on system costs, primarily affecting insurers, with a corresponding benefit to medical providers. Allowing new types of discounts not currently in use will put downward pressure on system costs.

- **Medical Service Providers and medical clinics:** The proposed rule prohibits network discounts to medical service providers and clinics for professional services, for example – evaluation and management, surgery, anesthesiology, radiology, medicine and physical medicine. In 2007, these services accounted for 55.5 percent of total medical payments, or 174.6 million dollars. The fee schedule maximum is estimated to be between 105 and 116 percent of payments. Prohibiting network discounts without some form of replacement discount (see the section on “Fee Discount Agreements”) could increase costs perhaps as high as the fee schedule maximum. Insurers, and ultimately employers and consumers, would assume increased costs, and medical service providers and clinics would experience a corresponding increase in revenue. Any impact will be mitigated by the fact that SAIF Corporation, Oregon’s largest workers’ compensation insurance company, has not applied provider network discounts to payments to Oregon medical providers.
- **Hospitals:** Hospitals are paid a percentage of charges sufficient to recoup their costs, as specified in OAR 436-009-0020. This percentage is referred to as the adjusted cost/charge ratio (CCR). Currently, 30 of 57 Oregon hospitals qualify for the rural hospital exemption from the CCR based on their status as a critical access hospital or on financial need. The adjusted CCR for exempted hospitals is 1.0, or pay as charged. The proposed rule specifically prohibits network discounts, other than managed care organization discounts, from being applied to payments to hospitals that qualify for the rural exemption from the CCR. Since the current and proposed rules concur on the amount to be paid hospitals that qualify for the rural exemption, the fiscal impact is expected to be very limited. Under the assumption that network discounts exist in the workers’ compensation system currently, prohibiting network discounts for hospitals exempt from the CCR would increase costs to insurers and revenue to these hospitals.
- **Medical Arbitrator and Physician Review Examinations:** The proposed rule would prohibit discounting fees for medical arbitrator and physician review examinations. These services account for a small percentage of total costs. To the extent that these services are being discounted by the provider networks, prohibiting the discounts is expected to increase costs.
- **Fee Discount Agreements:** Under the proposed rule, medical service providers and clinics may enter into Fee Discount Agreements with insurers to reduce the cost of medical services. These Fee Discount Agreements are intended to lower costs in those services for which the proposed rule prohibits network discounts. Because the nature and extent of these agreements is currently unknown, it’s not possible to estimate the size of the impact, however, it is assumed that it will offset, at least partially, the increased costs of prohibiting network discounts. If fee discount agreements are not used, there would be no effect. The procedural requirements associated with these agreements would have small associated administrative costs for insurers and the medical providers and clinics that choose to make such agreements.
- **Provider Networks:** The proposed rule is expected to decrease revenue to provider networks. To the extent that the proposed rule prohibits provider networks from participating in the workers’ compensation system, that revenue can be expected to decline. Provider networks that wish to continue participating in the workers’ compensation system have the option of becoming certified managed care organizations.
- **Pharmacies, Ambulatory Surgical Centers, Durable Medical Equipment Vendors:** Evidence suggests that network discounts are currently being taken from payments for these services. The proposed rule would allow them to continue to be taken. The impact on the system overall would be expected to be minimal or, if prevalence of discounting increases as a result of the new rule, rule changes could reduce income for these providers and vendors and lower costs to insurers.

The Director will continue to monitor the system and make adjustments to the fee schedule or premium rates as required to maintain the sustainability of the system.

OAR chapter 436, division 015, “Managed Care Organizations”

The agency projects that proposed changes to chapter 436, division 015, would not have a significant economic impact on any persons or businesses, including small businesses.

OAR chapter 436, division 060, “Claims Administration”

Proposed rules require insurers to file an additional Form 1502 upon making the first payment of temporary disability when first payment occurs after the insurer has met current Form 1502 filing requirements. Some insurers already report “late” first payments using Form 1502.

- The additional reporting required by this rule would increase insurers’ reporting costs. Because very few accepted, disabling claims have not had temporary disability paid by the time the insurer files the initial Form 1502 with the agency, the volume of new 1502s would be very small, but we do not have a basis to estimate how many additional 1502s will be reported. The associated cost increase, for those insurers that do not already report late first payments, should be very small.

Proposed rules require the insurer to send a copy to the worker’s attending physician of any written demand that the worker cease behaviors that may imperil or retard recovery.

- The required postage and handling for this letter copy would be an increased cost for insurers (that do not already inform the attending physician), though the volume of these warning letters is very low. However, the attending physician may be instrumental in getting the worker to cooperate, improving medical outcomes and promoting return to work. Therefore, the agency estimates the proposed change would have, overall, a small positive fiscal impact on insurers and workers.

Proposed rules specify when the insurer must give the worker or beneficiaries a written explanation about temporary disability, permanent disability, and fatal payments. Existing rules require explanations with every benefit payment, while proposed rules require explanations to accompany only the initial payment of permanent disability or fatality benefits.

- The proposed change would reduce insurers’ costs for notices to workers and beneficiaries receiving permanent disability and fatal benefits. Because the explanations generally accompany the payments, savings for existing “paper” payment processes would be very small. However, this change should ease any transition to electronic payment, which could bring more substantial savings to insurers.

Proposed rules provide criteria for electronic payment of benefits. Insurers may elect to pay electronically if the worker agrees.

- The proposed change could reduce insurers’ costs associated with payment of benefits and reduce costs for those workers who currently pay a fee to cash time-loss checks. The extent of savings would depend upon how many insurers and workers choose to participate.

The agency projects that additional proposed changes to chapter 436, division 060, would not have a significant economic impact on any persons or businesses, including small businesses.

How were small businesses involved in the development of this rule?

Small businesses affected by these rules are primarily Oregon medical providers and pharmacies. A number of medical providers participated in the stakeholder advisory committees for OAR 436-009, “Oregon Medical Fee and Payment Rules.” The agency invited a pharmacy representative but that representative did not attend.

Cost of compliance effect on small businesses:

Estimated number of small businesses subject to the proposed rule:

Based on available data, we estimate approximately 12,000 medical providers and 110 pharmacies are small businesses, as defined in ORS 183.310(10).

Identify the types of businesses and industries with small businesses subject to the proposed rule:

Oregon medical providers
Oregon pharmacies

Describe the projected reporting, record-keeping and other administrative activities required for compliance with the proposed rule, including costs of professional services:

Reporting: The proposed changes would not require increased reporting for medical service providers and clinics that qualify as small businesses.

Record-keeping: The proposed changes would require increased record-keeping for providers that qualify as small businesses for medical service providers and clinics that elect to enter into fee discount agreements or provider network contracts.

Other administrative activities and costs of professional services: The proposed changes could increase administrative activities or the costs for professional services for providers that qualify as small businesses. To the extent medical service providers and clinics elect to enter into fee discount agreements or provider network contracts, providers and clinics would assume administrative activities necessary to develop and monitor the agreements or contracts.

Extent of economic impact: There is no basis to say that economic impacts would be “significantly adverse” (under ORS 183.540), but we invite public testimony on the probable extent of the impact.

Identify equipment, supplies, labor and increased administration required for compliance with the proposed rule:

Equipment: The proposed changes would not require the purchase of equipment to achieve compliance.

Supplies: The proposed changes would not require the purchase of supplies to achieve compliance.

Labor: The proposed changes would not require that small businesses hire additional staff to achieve compliance.

Administration: The proposed changes could require increased administration to achieve compliance. See cost analysis under “administrative activities” above.

Extent of economic impact: There is no basis to say that any impacts would be “significantly adverse” (under ORS 183.540), but we invite public testimony on the probable extent of the impact.

Administrative Rule Advisory Committee consulted:

Yes. Advisory committees met on Jun. 27, Aug. 22, and Aug 27, 2008 regarding OAR 436-009 and on Aug. 18, 2008 regarding OAR 436-060. The agency also presented the issues to the Medical Advisory Committee on July 18 and Sept. 19, as well as to the House Business and Labor Committee on Sept. 18, 2008.

The agency asked the rulemaking advisory committees for advice on the economic impacts of the changes discussed, including impacts on small businesses.

/s/ Jerry Managhan (for)

10/15/08

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

Proposed
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 015

Proposed amendments are marked as follows:

Deleted text has a "strike-through" style, as in Deleted
Added text is bold and underlined, as in Added

436-015-0007 Managing Care

Only an MCO may engage in managed care activities as provided in ORS 656.260. An insurer, or someone acting on behalf of an insurer, may not engage in managed care of a worker not enrolled in an MCO.

Stat. Auth.: ORS 656.726(4)
Stats. Implemented: ORS 656.260
Hist: Adopted xx/xx/xx as WCD Admin. Order xx-xxx, eff. xx/xx/xx

436-015-0120 Sanctions and Civil Penalties

(1) If the director finds any violation of OAR 436-015, or if the MCO fails to meet any of the requirements of the certified plan, the director may impose one or more of the following sanctions against any MCO:

(a) Reprimand by the director;

(b) Civil penalty as provided under ORS 656.745(2) and (3). All penalties collected under this section shall be paid into the Department of Consumer and Business Services Fund. In determining the amount of penalty to be assessed, the director shall consider:

(A) The degree of harm inflicted on the worker, insurer, or medical provider;

(B) Whether there have been previous violations; and

(C) Whether there is evidence of willful violation.

(c) Suspension or revocation of the MCO's certification pursuant to OAR 436-015-0080.

(2) If the director determines that an insurer has entered into a contract with an MCO which violates OAR 436-015 or the MCO's certified plan, the insurer shall be subject to civil penalties as provided in ORS 656.745.

(3) If an insurer or someone who is not a certified MCO and is acting on the insurer's behalf engages in managed care activities under ORS 656.260, the director may impose a sanction or civil penalty.

Stat. Auth.: ORS 656.726(4); Stats. Implemented: ORS 656.260 (ch. 423, OL 2007)
Hist: Amended 11/1/07 as Admin. Order 07-058, eff. 1/1/08
Amended xx/xx/xx as Admin. Order xx-xxx, eff. xx/xx/xx