



# Oregon

Theodore R. Kulongoski, Governor

Department of Consumer and Business Services  
Workers' Compensation Division  
350 Winter St. NE  
PO Box 14480  
Salem, OR 97309-0405  
1-800-452-0288 or 503-947-7810  
[www.wcd.oregon.gov](http://www.wcd.oregon.gov)

Sept. 15, 2009

## Proposed Changes to Workers' Compensation Rules

The Department of Consumer and Business Services, Workers' Compensation Division proposes changes to OAR chapter 436.

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 a public hearing.

**When is the hearing?** Oct. 26, 2009, 9:00 a.m.

**Where is the hearing?** Labor & Industries Building  
350 Winter Street NE, Room F (basement)  
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](mailto:fred.h.bruyns@state.or.us)  
Phone: 503-947-7717; Fax: 503-947-7514

**The closing date for written comments is Oct. 29, 2009.**

**How can I get copies of the proposed rules?**

On the Workers' Compensation Division's Web site –

<http://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.

Secretary of State  
**NOTICE OF PROPOSED RULEMAKING HEARING**

A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer & Business Services,  
Workers' Compensation Division

OAR CHAPTER 436

Agency and Division	Address	Telephone
Fred Bruyns	PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879	Administrative Rules Chapter Number 503-947-7717 Fax 503-947-7514

**RULE CAPTION**

**Workers' compensation claims administration, medical services and billing, reemployment assistance, and attorney fees**

Hearing date	Time	Location	Hearings Officer
10-26-2009	9:00 a.m.*	Room F (basement), Labor & Industries Building 350 Winter Street NE, Salem, Oregon	Fred Bruyns

\*NOTE: The hearing will begin at 9:00 a.m. and end when all present who wish to testify have done so.  
Written testimony will be accepted through Oct. 29, 2009.

**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 436-001-0420; 436-001-0430; 436-001-0440

**AMEND:** OAR 436-030; 436-060; 436-105; 436-110; 436-120; and  
OAR 436-001-0003; 436-001-0019; 436-009-0010; 436-009-0070; 436-010-0008; 436-010-0240; 436-010-0265;  
436-010-0280; 436-140-0005; 436-150-0005; 436-150-0010; 436-150-0030; 436-160-0310; 436-160-0340

**REPEAL:** OAR 436-075-0110

**AMEND AND RENUMBER:** From OAR 436-001-0265 to 436-001-0400; from 436-001-0265 to 436-001-0410

ORS 656.726(4)

Stat. Auth.

Other Authority

ORS chapter 656, as amended by Oregon Laws (OL) 2009: House Bill (HB) 2045 – OL 2009, ch. 32; HB 2195 – OL 2009, ch. 35; HB 2197 – OL 2009, ch. 36; HB 2705 – OL 2009, ch. 312; HB 2707 – OL 2009, ch. 313; HB 3345 – OL 2009, ch. 526; and ORS chapter 656, as amended by OL 2007, Senate Bill 559, ch. 241

Stats. Implemented

**RULE SUMMARY**

NOTE: "Insurer" in this summary includes self-insured employers. The agency proposes to amend OAR chapter 436 to improve organization, clarity and consistency, and to eliminate redundancy. More specifically:

**The agency proposes to amend OAR chapter 436, division 001, "Procedural Rules Governing Rulemaking and Hearings." These proposed rules:** Implement House Bill 3345 by raising the maximum attorney fee payable under ORS 656.385 from \$2,000 to \$3,000, and making corresponding changes to the attorney fee matrix. The proposed rules consolidate rules related to attorney fees into OAR 436-001 and remove them from OAR 436-010, 060, and 120.

**The agency proposes to amend OAR chapter 436, division 009, "Oregon Medical Fee and Payment Rules." These proposed rules:** Clarify the types of identification numbers providers must include on their medical bills; allow a medical service provider to submit bills for independent medical examinations in the form or format agreed to by the insurer and the medical service provider.

**The agency proposes to amend OAR chapter 436, division 010, "Medical Services." These proposed rules:** Implement HB 2045 by including chiropractors among those health care providers who may make findings of impairment (when serving as the worker's attending physician); implement HB 2197, which allows a medical service provider who is not qualified to be an attending physician to provide compensable medical service to an

injured worker for a period of 30 days or for 12 visits from the date of the first visit on the initial claim (rather than the date of injury), whichever first occurs, without the authorization of an attending physician; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; require use of a release form (in addition to Form 801 or 827) for release of HIV-related information; clarify requirements for collection of the workers' Social Security number on Form 827; allow and describe use of Form 827 to make claims for new or omitted medical conditions; require the health care provider to give the worker a copy of Form 3283 when giving the worker a copy of Form 827. (The agency prints nearly all 827s used by workers and providers, and will print Form 3283 as an attachment to Form 827.)

**The agency proposes to amend OAR chapter 436, division 030, "Claim Closure and Reconsideration." These proposed rules:** Require that a Notice of Closure include information about a worker's right to be represented by an attorney (now stated in ORS 656.270, to be repealed effective 1/1/2010 – HB 2197) and right to request a vocational eligibility evaluation (related to limits to requirements for vocational eligibility evaluations in HB 2705); clarify procedures for administrative claim closure; provide that requests for reconsideration of claim closures may be made by telephone; explain that the 14-day time frames for parties to submit certain records relevant to the reconsideration process begin with the director's notice of the start date of the reconsideration; require that evidence stored by the parties on audio media may be submitted to the director (for the purpose of reconsideration) only in transcribed form.

**The agency proposes to amend OAR chapter 436, division 060, "Claims Administration." These proposed rules:** Specify when and how to issue claim-related notices after a worker is deceased, regardless of the cause of death; clarify requirements for the worker's employer to give the worker a copy of Form 3283, "A guide for workers recently hurt on the job," when the worker files a claim; lengthen the time period that an ongoing request by the claimant's attorney for future claim-related documents remains in effect; specify that time limits for sending most information to the director begin with the mailing date of the agency's letter or order; implement HB 2707 by prescribing notice requirements when the insurer learns that the worker was employed in more than one job at the time of injury; exclude secondary employment by Oregon subject volunteers from the calculation of supplemental disability; require notice to the worker, as part of the notice of claim acceptance, about criteria for reimbursement of claim-related expenses; describe timeliness criteria, notice requirements, and consent requirements related to the electronic payment of benefits to workers and beneficiaries; implement HB 3345 by setting conditions for the payment of penalty assessments to workers and fees to attorneys related to late payment of disputed claim settlement amounts.

**The agency proposes to amend OAR 436-075, "Retroactive Program," OAR 436-140, "Construction Carve-Out Programs," and OAR 436-150, "Workers' Benefit Fund Claims Program." These proposed rules:** Eliminate references to "guaranty contract," because Senate Bill 559 (2007 Session) replaced the guaranty contract with policy-based proof of coverage and reporting.

**The agency proposes to amend OAR 436-105, "Employer-at-Injury Program (EAIP)." These proposed rules:** Define "consumables," as purchases required to support the functioning of newly purchased tools or equipment, and allow purchase of consumables under the EAIP; clarify that a worksite modification must be related to limitations that resulted in the worker's EAIP eligibility or prevent the worsening of an accepted condition; clarify minimum reimbursement thresholds and when administrative costs are reimbursable.

**The agency proposes to amend OAR 436-110, "Preferred Worker Program (PWP)." These proposed rules:** Clarify the definition of "date of hire"; revise definitions of "premium" and "reimbursable wages" to be consistent with the definitions in OAR 436-105; implement HB 2197 by clarifying procedures for use of premium exemption under ORS 656.622; provide a more specific time limit for requesting claims cost reimbursement; create a new employment purchase type – placement assistance provided by a certified vocational counselor or any public or private agency that provides placement services, reimbursable if the assistance results in employment that the preferred worker retains for at least 90 days; provides that placement assistance may not be combined with vocational assistance under OAR 436-120.

**The agency proposes to amend OAR 436-120, "Vocational Assistance to Injured Workers." These proposed rules:** Define several terms used in division 120 – "delivered," "director," "filed," "likely eligible," and "mailed"; defer to OAR 436-001 for awarding attorney fees under ORS 656.385; provide that modified or new employment that results from an employer-at-injury-activated use of the PWP is considered "suitable" 12 months after the department determines a worksite modification is complete; implement HB 2705 by eliminating the requirement to complete a vocational eligibility evaluation if the worker is released to regular or other suitable work with the employer at injury or aggravation; specify that the insurer is not required to do an eligibility evaluation if the worker is deceased or has a permanent total disability award; implement HB 2195 by allowing an insurer, without approval

by the director, to extend time loss up to 21 months; allow further training to a worker who has completed one training plan if there is a reasonable cause to do so; publish vocational fee schedule maximums as percentages of Oregon's state average weekly wage rather than fixed dollar amounts; to implement HB 2195, provide for "registration" rather than "authorization" of vocational assistance providers; require certified counselors who are subject to continuing education requirements under these rules to take at least eight hours (currently 7 ½ hours) of training in ethical practices and at least six hours of training on the vocational assistance and reemployment assistance rules during the five years before certification renewal.

**The agency proposes to amend OAR 436-160, "Electronic Data Interchange." These proposed rules:** Specify whether certain proof-of-coverage data elements should be mandatory or optional.

**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 or written testimony to: Fred Bruyns, rules coordinator; phone 503-947-7717; fax 503-947-7514; e-mail [fred.h.bruyns@state.or.us](mailto: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 at no charge from WCD Publications, 503-947-7627.

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**Oct. 29, 2009**

(Last day to submit written comments  
to the rules coordinator)

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*/s/ Jerry R. Managhan, for*

Authorized Signer and Date

9/15/2009

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**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.

Distribution: WCD-ID, S0, S1, S2, S3, S4, S5, S6, S7, S8, S, U, AT, CE, EG, IA, LU, NM, CI, EC, MR, PW, RE, VR, OH, DC, DO, GR, MD, ND, OT, PY, ML, ME, TT

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

OAR CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

**Workers' compensation claims administration, medical services and billing, reemployment assistance, and attorney fees**

Rule Caption

**In the Matter of:** The Amendment of:

- 436-001, Procedural Rules for Rulemaking and Hearings
- 436-009, Oregon Medical Fee and Payment Rules
- 436-010, Medical Services
- 436-030, Claim Closure and Reconsideration
- 436-060, Claims Administration
- 436-075, Retroactive Program
- 436-105, Employer-at-Injury Program
- 436-110, Preferred Worker Program
- 436-120, Vocational Assistance to Injured Workers
- 436-140, Construction Carve-Out Programs
- 436-150, Workers' Benefit Fund Claims Program
- 436-160, Electronic Data Interchange

**Statutory Authority:** ORS 656.726(4)

**Other Authority:**

**Stats. Implemented:** ORS chapter 656, as amended by Oregon Laws (OL) 2009: House Bill (HB) 2045 – OL 2009, ch. 32; HB 2195 – OL 2009, ch. 35; HB 2197 – OL 2009, ch. 36; HB 2705 – OL 2009, ch. 312; HB 2707 – OL 2009, ch. 313; HB 3345 – OL 2009, ch. 526; & ORS chapter 656, as amended by OL 2007, Senate Bill 559, ch. 241

**Need for the Rules:** To implement legislation passed by the 2007 and 2009 Legislatures; to improve the effectiveness of claims administration, regulatory and dispute resolution functions of the agency, vocational assistance, and reemployment assistance programs under ORS 656.622.

**Documents Relied Upon, and where they are available:** Enrolled House Bills 2045, 2195, 2197, 2705, 2707 and 3345; Enrolled Senate Bill 559 (2007); fiscal impact data; "Issues" document presented to stakeholder advisory committees; other advisory committee meeting records; and written advice. These records are available for public inspection in the 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:** The agency projects fiscal/economic impacts as follows:

NOTE: "Insurer" in this document includes self-insured employers.

The proposed rules will implement HB 3345, which provides for new or increased attorney fees payable by insurers to workers' attorneys and new or increased penalties payable to workers by insurers.

ORS 656.262(12) will require payment of penalty assessments to workers and fees to attorneys related to late payment of disputed claim settlement (DCS) amounts. Assessments and fees are only triggered if payment of the DCS is late and the insurer fails to pay the DCS within five days of notice by the worker or the worker's attorney. Therefore, the agency estimates that the overall fiscal impact will be minor.

In 2008, the agency ordered payment of approximately \$189,000 by insurers to worker's attorneys who prevailed in medical and vocational disputes. HB 3345 raised the maximum payable under ORS 656.385 in these cases from \$2000 to \$3000, and the proposed attorney fee matrix increases all amounts payable by 50% - for equivalent results achieved and time devoted by the attorney. The agency projects the maximum fiscal impact of this change is 50% above current costs or less than \$100,000 per year, payable by insurers to workers' attorneys.

Proposed rules explain that the matrix may be used as a guide for awarding attorney fees for prevailing in disputes under ORS 656.262(11), which would add slightly to insurers' costs.

The agency estimates that the overall fiscal and economic impact of proposed rule changes related to attorney fees will be substantially under \$150,000 per year, representing increased costs to insurers and increased payments to workers' attorneys.

The proposed rules will implement HB 2045 by including chiropractors among those health care providers who may make findings of impairment (when serving as the worker's attending physician). The agency estimates that this change will have a small positive fiscal impact on chiropractors and also a positive impact on insurers, because chiropractors will not have to refer workers to other physicians to perform closing medical examinations, which can increase medical costs and delay claim closure.

The proposed rules require that evidence stored by the parties on audio media may be submitted to the director (for the purpose of reconsideration of claim closure) only in transcribed form. Insurers have advised the agency that this will increase their costs substantially. The agency agrees that transcription will entail significant costs, though most insurers do not submit audio files as evidence, so costs will vary according to insurers' business practices.

The proposed rules lengthen the time period that an ongoing request by the claimant's attorney for future claim-related documents remains in effect. At the rulemaking advisory committee meeting, insurer representatives present explained that it has been common practice to continue providing documents longer than the 90 days currently required. The agency projects that this change may slightly increase insurers' costs. However, attorneys and insurers should save some time and money by not having to make and process multiple requests for records.

The proposed rules facilitate the electronic payment of benefits to workers and beneficiaries. For those workers/beneficiaries and insurers that choose to participate, the agency projects that electronic payment will result in faster payment of benefits, as well as cost savings for insurers.

The proposed rules allow purchase of "consumables" under the Employer-at-Injury Program (EAIP). The agency estimates that this will slightly increase costs to the Workers' Benefit Fund, with a corresponding benefit to employers and workers who participate in the EAIP.

The proposed rules create a new employment purchase type for job-placement assistance and will increase costs to the Workers' Benefit Fund. The agency cannot project how much placement assistance will be provided, but does project a significant cost to the Workers' Benefit Fund, with a corresponding positive impact on vocational rehabilitation providers and to the workers who are successfully returned to work.

The proposed rules will implement HB 2705, which eliminates the requirement to complete a vocational eligibility evaluation if the worker is released to regular or other suitable work with the employer at injury or aggravation, thus reducing the number of evaluations required. The agency estimates that this change will have a small positive fiscal impact on Oregon insurers, and a small negative impact on vocational rehabilitation organizations that have conducted the evaluations.

The proposed rules will implement HB 2195 by allowing an insurer, without approval by the director, to extend time loss to 21 months – for a worker engaged in training. The agency estimates this change will streamline the extension process and slightly reduce costs to insurers and the agency.

The proposed rules allow further training to a worker who has completed one training plan if there is a reasonable cause to do so. Although the agency expects this to occur infrequently, this change may slightly increase insurers' costs for vocational assistance, and increase payments to vocational assistance providers and training facilities. Affected worker would benefit from increased wage earning capacity.

Additional proposed rule changes should either have no significant fiscal impact on any party or be slightly positive in effect to the extent the agency achieves its objectives of improved clarity of its rules and general streamlining of requirements affecting claims administration. However, the agency welcomes public input on potential fiscal impacts of any of the proposed rule changes.

#### **Statement of Cost of Compliance:**

##### **1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):**

Proposed rule changes will increase demand on the Workers' Benefit Fund. The agency projects that the fund has sufficient reserves to meet the demand. Otherwise, proposed changes should not have any significant effect

on other state agencies or local governments, and should not affect the general public at all except as described under "Fiscal and Economic Impact" above.

**2. Cost of compliance effect on small business (ORS 183.336):**

- a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:** Primarily, 1) workers' compensation attorneys retained by injured workers; and 2) vocational rehabilitation organizations (registered under OAR 436-120). 190 attorneys from 147 firms represented injured workers in cases before the Workers' Compensation Board during the past year. Bulletin 151 lists 106 vocational rehabilitation providers that have been registered by the Department of Consumer and Business Services. Not all of these providers are small businesses as defined in ORS 183.310, but approximately 100 vocational assistance providers are small businesses.
- b. Projected reporting, record-keeping and other administrative activities required for compliance, including costs of professional services:** None. The agency projects overall positive economic effects of the proposed rule changes on both attorneys and vocational assistance providers.
- c. Equipment, supplies, labor, and increased administration required for compliance:** None. The agency projects overall positive economic effects of the proposed rule changes on both attorneys and vocational assistance providers.

**How were small businesses involved in the development of this rule?** Attorneys who represent injured workers and vocational rehabilitation professionals participated on rulemaking advisory committees and submitted written advice to the agency.

**Administrative Rule Advisory Committee consulted?** Yes, the agency consulted with rulemaking advisory committees on August 7, 10, 11, 25, and 27, 2009.

<i>/s/ Jerry R. Managhan, for</i>	John L. Shilts, Administrator	
<u>Signature</u>	<u>Workers' Compensation Division</u>	<u>9/15/2009</u>
	<b>Printed name</b>	<b>Date</b>

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
 WORKERS' COMPENSATION DIVISION  
*Proposed Rules* CONSTRUCTION CARVE-OUT PROGRAMS



**Construction Carve-Out Programs**  
**Oregon Administrative Rules**  
**Chapter 436, Division 140**

*Proposed Rules*

**Revisions are marked as follows:**

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

~~Deleted~~  
**Added**

**436-140-0005 Definitions**

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

(1) "Alternative dispute resolution system" means a process that exists outside the normal Workers' Compensation system to settle disputes arising from a workers' compensation claim.

(2) "Arbitration" means the hearing and determination of a case in controversy by an arbiter.

(3) "Collective bargaining representative" means a person who represents a union.

(4) "Construction carve-out program" means a program established pursuant to ORS 656.170 and 656.172 for either an alternative dispute resolution system or use of a list of medical service providers, or both, which the director has approved and for which eligibility has been established under these rules.

(5) "Director" means the Director of the Department of Consumer and Business Services, or the director's delegate for the matter.

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

(7) "Employer" is limited to a private employer, or group of employers, engaged in construction; construction maintenance; or activities limited to rock, sand, gravel, cement and asphalt operations; heavy duty mechanics; surveying; or construction inspection.

(8) "Employee" is limited to an employee of an employer defined by section (7) of this rule.

(9) "Insurer" includes "insurer," ~~"guaranty contract insurer,"~~ and "self-insured employer" as defined by ORS 656.005.

(10) "Letter of eligibility" means a letter issued by the director under ORS 656.172(4) indicating that eligibility to participate in a construction carve-out program has been established under ORS 656.170 and ORS 656.172.

(11) "Mediation" means the act or process of intervening between conflicting parties to promote reconciliation, settlement, or compromise.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
WORKERS' COMPENSATION DIVISION  
*Proposed Rules* CONSTRUCTION CARVE-OUT PROGRAMS

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(12) "Plan administrator" means the person responsible for administering the Construction Carve-Out Program.

(13) "Union" means a collective bargaining union that is recognized or certified as the exclusive bargaining representative of employees for an employer or group of employers.

Stat. Auth.: ORS 656.726(4), 656.174

Stats. Implemented: ORS 656.170, 656.172, 656.174

Hist: Adopted 12/11/00 as WCD Admin. Order 00-059, eff. 12/15/00

Amended xx-xx-xx as WCD Admin. Order xx-xxx, eff. xx-xx-xx