

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

PROPOSED OREGON ADMINISTRATIVE RULES

**CHAPTER 436, DIVISION 110
PREFERRED WORKER PROGRAM**

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BEFORE THE DIRECTOR OF THE
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
OF THE STATE OF OREGON

In the Matter of the Amendment of Oregon Administrative)	
Rules, chapter 436, division:)	
)	SUMMARY OF
001, Procedural Rules Governing Rulemaking and Hearings)	TESTIMONY AND
105, Employer-at-Injury Program)	AGENCY RESPONSES
110, Preferred Worker Program)	
120, Vocational Assistance to Injured Workers)	

This document summarizes the significant data, views, and arguments contained in the hearing record. The purpose of this summary is to provide the Director with a record of the agency conclusions about the major issues raised.

The amendment to the rules was announced in the Secretary of State’s Oregon Bulletin dated April 1, 2005. On April 22, 2005, a public rulemaking hearing was held as announced at 10 a.m. in Room F of the Labor and Industries Building, 350 Winter Street NE, Salem, Oregon 97301-3879. Fred Bruyns, Rules Coordinator, acted as presiding officer. Business Support Services audio-recorded the hearing and created a written transcript. The record was held open for written comment through April 29, 2005.

Exhibit #	Oral testimony received from:
14A	Gerald Rutherford, Workers’ Compensation Division
14B	Arin J. Carmack, Cardinal Services, Inc.
14C	Robert J. Malone, Liberty Northwest Insurance
14D	Jennifer O. Frank, Career Transitions
14E	Shirley L. Butcher, SAFECO Insurance

Exhibit #	Written testimony received from:
1	Gerald Rutherford, Workers’ Compensation Division
2	Jennifer Frank, Career Transitions
3	Robert J. Malone, Liberty Northwest Insurance Suzanne Barr, Liberty Northwest Insurance
4	Arin J. Carmack, Cardinal Services, Inc.
5	Grace Smith, Oregon Association of Rehabilitation Professionals
6	Jennifer O. Frank, Career Transitions
7	Linda Jefferson, Oregon Self-Insurers Association
8	Linda Jefferson, City of Portland
9	Carmen Jones, Legacy Health Systems
10	Lisa Wilch, SAIF Corporation
11	Lisa Wilch, SAIF Corporation
12	Shirley L. Butcher, SAFECO Insurance
13	Karlene Westerlund, SAIF Corporation

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The following is a summary of the testimony received and the agency's responses to that testimony.

OAR 436-105 (general comment) Exhibit #8, 12, 14C

Testimony: The changes recommended should make this program easier to use and administer. These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

Response: Thank you for your testimony.

OAR 436-105-0500(6)(e) & (f) Exhibit #1, 14A

Testimony: In order to prevent a lapse in a continuous medical release, the medical provider should have 14 days from a missed appointment or specific end date to provide a new medical release or a statement that the previous release is still in effect. With the current rule language, only missed appointments allow the 14-day period. The division proposes the following additional amendments to rule 0500:

(e) A medical release with a specific end date or follow-up medical appointment date expires on the end date, or the follow-up appointment date, [if the worker does not return to the medical service provider for a follow-up appointment, except as provided in subsection (f) of this section; [and]

(f) If the worker misses a follow-up medical appointment, the medical release will lapse] unless, within 14 days of the **specific end date or** missed appointment, the medical service provider provides a new medical release or a signed and dated statement that the previous medical release is still in effect;

Response: The Workers' Compensation Division (WCD) has found that the wording of these two subsections in the current rules does not achieve the desired outcome, as it pertains to continuous medical releases. WCD wants the worker's medical service provider to have 14 days from a missed appointment or specific end date to provide a new medical release or statement that the previous release is still in effect to prevent a lapse in continuous medical releases. With the current rule language, only missed appointments allow the 14-day period. OAR 436-0500(6)(e) will be reworded to achieve the desired outcome and subsection (f) will be deleted.

OAR 436-105-0500(6)(g) Exhibit #13

Testimony: The proposed rules seem to require the worker to **return** to the provider to get continued work releases and **return** to the referring medical provider after completing treatment with the referral doctor. We recommend that the rules allow the worker to get an updated written work release and not force the worker to return to the doctor every time, as this could cause some unnecessary medical costs. We recommend the following changes:

(g) If the worker's medical service provider refers the worker to another medical service provider for treatment, restrictions specified in the medical release in effect at the time of the referral will not expire until the worker **obtains a continued or updated work release from the** ~~returns to the~~ attending physician, authorized nurse practitioner, or primary care physician with a managed care organization, except:

(A) The insurer may accept updated restrictions and releases from the medical service provider to whom the worker is referred except for a release to regular work, and

(B) If the worker does not ~~return~~ **obtain a continued or updated work release [to the referring] from the attending physician, authorized nurse practitioner, or primary care physician with a managed care**

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organization ~~medical service provider~~ within 30 days from the last referral appointment, the medical release will expire on the date of the last treatment with the referral medical service provider.

Response: The suggested wording changes are in keeping with the desired outcome for maintaining continuous releases without requiring the worker to return to the medical service provider. The permanent rule language will include the suggested changes.

OAR 436-105-0520(1)(a) *Exhibit #9*

Testimony: Although 66 work days may give employers a higher reimbursement, not many payroll systems are set up to calculate based on days. To calculate a daily rate, we would need to hand calculate every day for the entire 66 workdays and then determine the wages for each workday. In addition, this change does not take into consideration the employer that has varying shifts, shift differentials, varying workdays, etc. I do not believe that the intent of the EAIP program was to make the reimbursement request a lengthy process. It was to entice employers to return injured workers to work. With these changes, the process would be too cumbersome for many employers.

Response: The Management Labor Advisory Committee proposed this rule change after conducting a study of return-to-work programs. Their stated purpose was to encourage and support return to work with the employer at injury for as many workers as possible. MLAC proposed that employers be able to combine multiple periods of transitional work to receive the number of days allowed by rule in the aggregate, instead of the employer selecting the three-month period when they would get the most benefit. After considering several options the external advisory committee recommended allowing a maximum wage subsidy of 66 workdays within a two-year period. Sixty-six workdays is the same as the maximum allowed in the current rules for a worker who works five days per week for three months. The rule as proposed gives the employer a great deal of latitude in selecting which days or weeks to include in the EAIP. Of course the employer will have to provide evidence of which days were work days in a week if the employer wants fewer than 7 days counted against the 66 work-day maximum.

The division believes that the proposed rule change will benefit employers and meet MLAC's expectations.

OAR 436-105-0520(3) *Exhibit #13*

Testimony: This rule section is too specific and should allow for any materials required for the worker to participate in the skill building class or course (i.e.: videos, CD, DVD, audio etc). We recommend the following changes:

436-105-0520 (3) (a) Tuition, books, ~~and~~ fees, and/or materials ~~for~~ required for a class or course of instruction to **enhance an** [update] existing skill[s] or **develop a new skill** [to meet the requirements of the transitional work position] **when skills building is used as transitional work or when required to meet the requirements of the transitional work position.** Maximum reimbursement is [\$750] **\$1,000.** Tuition, books, and fees shall be provided under the following conditions:

Response: There are times when taking a class or course of instruction might require floppy disks, CDs or other required materials. The rule currently does not specifically address this but only states that books would be reimbursed. The intent of the program is to reimburse for those things necessary for taking the class or coursework. The suggested change will be incorporated in the permanent rules. OAR 436-105-0520(3)(B) will also be changed to reflect the new wording.

OAR 436-110 (general comment) *Exhibit 8, 14C*

Testimony: These rule revisions generally reflect discussions by the Management Labor Advisory Committee.

Response: Thank you for your testimony.

OAR 436-110-0002(3) *Exhibit #10*

Testimony: We suggest the language say “The employer-at-injury may also request reemployment assistance to modify the worker’s regular employment or develop a suitable, new employment”.

Response: The rule language as proposed is written as it is to cover several types of request for services that the employer at injury can make. One request could be to modify the worker’s regular employment as you suggested, or the request might be for Premium Exemption and Wage Subsidy for the regular employment that has already been substantially modified through job-duty changes. It is certain that services for regular employment will only be provided if the job is modified or for a new job. The proposed rule language will be retained.

OAR 436-110-0320 *Exhibit #10*

Testimony: There is a statement “the rule does not apply to employer activated assistance”. How would the employer at injury know if a worker was eligible for PWP benefits? Wouldn’t the worker have to possess an identification card in order for the employer to access the program? Should you issue a card indicating there is a timeframe for the employer at injury to access the program – possibly similar to the eligibility card?

Response: The division will have no way of knowing when an injured worker is eligible for services prior to claim closure, when the worker settled the claim with a CDA, or when the claim closed with a permanent partial disability award and no Preferred Worker Card was issued because of information submitted by the insurer on the 1503 form at closure. The proposed rules for employer-at-injury use rely on the employer contacting the Preferred Worker Program when they are proposing a return to regular employment or new job for one of their injured workers who has permanent injury-caused-work restrictions. Premium Exemption and Wage Subsidy are approved at the same time with one agreement form, and no card is needed. It may help if the insurer notice to the employer at injury required in OAR 436-110-0240 includes the requirement that requests for assistance be made within 180 days of the worker’s claim closure date. That wording will be added to the permanent rules.

OAR 436-110-0326(1) *Exhibit #10*

Testimony: This rule implies the employer can develop a physically suitable position through use of the employer activated PWP benefits and the worker can refuse to accept it. If the worker refuses to sign the agreement, the employer at injury cannot access PWP benefits. Is that the intent of the rule? From our discussion at the advisory meetings, I believe the intent was to protect the worker’s independent access to their preferred worker benefits and work towards physically and monetarily suitable employment as soon as possible. Allowing the worker the option to reject a suitable position appears to be at odds with the overall intent to return the injured worker to suitable work.

Response: The division feels that Worker Benefit Fund dollars should not be spent on a job the injured worker won’t accept. Both the internal and external advisory committees agreed. Since the worker won’t

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be a party to the actual agreements approved for the employer-at-injury use of the Preferred Worker Program, a job offer as prescribed in 436-110-0290(4) was determined appropriate by the division.

OAR 436-110-0326(3) & 0380(1) Exhibit #12

Testimony: Under sections 0326(3) and 0380(1) the timeframe for benefits to start is when all necessary modifications are in place. This may in fact delay some return-to-work efforts. When the modification is required to perform the entire job this makes sense. However, sometimes part of the job is within the restrictions while part needs modification. The worker may begin the suitable portion of the job and begin the rest when modifications are complete. Does this mean the wage subsidy and premium exemption are delayed also? This seems to discourage an employer from starting a worker sooner. In some cases, an Employer-at-Injury Program wage subsidy may cover the worker during this time, but other workers may be without income for a longer period under these rules.

Response: The rules you have cited were proposed after discussions with internal and external advisory committees. The consensus was that the job should be within the worker’s injury-caused limitations to activate all parts of the employer-at-injury-activated Preferred Worker Program. The requirement is also stated in OAR436-110-0290(3). Worksite modifications are only provided to allow the worker to perform job duties that are required by the employer. The division has long held the position that when regular work is being modified the modified position doesn’t start until all the modifications are completed. OAR 436-110-0380(3) of the current rules states in part that “The modifications provided must be sufficient for the worker to perform all required job duties within these restrictions.” This in effect stays a decision on whether the regular employment has been “substantially modified”, and Premium Exemption and Wage Subsidy are not started until the substantially-modified decision is made. This has actually worked well in the program and has been an incentive for workers and employers to get all the modifications completed.

OAR 436-120-0004(4) Exhibit #11

Testimony: Nowhere under the current rules is the worker advised in writing of the need to get their training plan developed within a specific time frame. Because of the emphasis on development of a training plan within 90 days of training status, we believe the notice to the worker described in (4) of this rule should contain the following statement under new letter (f):

Your counselor is required to submit a copy of your signed training plan to all parties no later than 90 days after the effective date of your training status. Your full cooperation is necessary to submit this plan in a timely manner.

Response: The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

OAR 436-120-0004(10)(b) Exhibit #12

Testimony: Regarding the proposed requirement: **“The notice must also inform the worker that, if the job has not begun by the hire date listed in the job offer letter, the worker can request that the vocational eligibility determination be completed.”** This is too restrictive. There needs to be flexibility because there are reasons things don’t occur ‘on schedule’ ...especially as coupled with worksite modifications. This is a moot point if there will be no Deferral Notice.

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Response: We believe it is proper to revisit the offer of employment and vocational eligibility if the worker is not going to start employment as stated in the job offer letter. The worker in most cases will not have income until the job starts, therefore, we believe the worker should have the option of requesting that a vocational eligibility evaluation be completed.

OAR 436-120-0007 *Exhibit #4, 14B*

Testimony: Regarding the process for calculating the adjusted weekly wage when the employee held multiple jobs at the time of injury or aggravation or held one or more jobs in addition to receiving unemployment insurance benefits.

Employers in industries as diverse as construction, agriculture, temporary services, or our school systems are being unfairly penalized. Seasonal employees should have their wages averaged over 52 weeks, as was true under older division 120 rules. Current rules require considering a school teacher's monthly wage as though it was paid over 12 months rather than nine months. The current system also tries to compensate for those who do not work year round by including unemployment earnings. Using the school teacher example again, the teacher is not eligible for unemployment compensation if he or she worked for a nonprofit or public school. If you want to ensure there is a floor for the adjusted weekly wage, use the Oregon minimum wage at the time of injury or the state average weekly wage to determine the floor as in SB 757 for Permanent Partial Disability.

Response: The proposed changes in 436-120-0007 are "housekeeping" issues that clarify the rule, and were presented as such in the external advisory committee meeting.

The substantive changes suggested by these exhibits were not presented to the advisory committees and will not, at this time, be included in the rule revision. WCD will include this suggestion in the next rule revision and advisory meetings.

OAR 436-120-0008 *Exhibit #11*

Testimony: We agree with the proposed change to define further "extraordinary circumstances" in assessing attorney fees.

Response: Thank you for your comments. The rule will remain as proposed.

OAR 436-120-0320(3)(b) and:

Rule 0004(2)(a)(A)&(F)

Rule 0004(10)(a)&(b)

Rule 0004(12)(f)

Rule 0005(14)(e)(A)(B)(C)&(D)

Rule 0350(4)&(17)

Exhibit # 2, 3, 7, 8, 11, 12, 14C, 14D, 14E

Testimony: Employment is not considered "suitable" for employer-at-injury activated Preferred Worker Program benefits until 12 months after the start of premium exemption, if there are no worksite modifications, or 18 months from the effective date of a worksite modification agreement. These extensive timeframes may be intended to prevent employers from abusing the program. It seems that we are treating a Preferred Worker differently with the employer at injury than we would with a new employer. We are not dealing with the problem, only creating another layer of bureaucracy to counteract the actions of a few.

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The focus of the Preferred Worker Program should be to maintain the employer/employee relationship. Suitability of the position should be determined at the time the employer and employee enter into the Preferred Worker contract. At the advisory committee meeting, we discussed having suitability extended to include a 6-month period. The worker still has the option of activating the Preferred Worker Program with another employer. The proposed rules would make employers less likely to consider Preferred Worker benefits when offering suitable work. We recommend you amend 436-120-0005 (14)(e) (A)&(B) to the discussed length of 180 days.

All other rules state that 60 days of employment is considered suitable. I thought our discussion at the advisory meeting extended this time to 120 days, because this is a new program. We believe 120 days is more than fair to determine if the job is suitable. Insurers may have to hold reserves for the *potential* of vocational assistance for up to 18 months on a worker who is suitably employed. We do not believe this is reasonable or necessary.

The proposed rules require new notice, “Notice of Deferral of Vocational Eligibility Determination,” when the employer at injury provides suitable modified work accessing the Preferred Worker Program benefits. Since there has been no determination of eligibility made because the worker returned to work with the employer-at-injury, there is no refusal of services, so including refusal of vocational assistance because of EAI activation of PWP becomes moot. The issue, if there is one, would always default to suitability or premature end of job without cause. We recommend against requiring a “Notice of Deferral . . .” that extends employer exposure to vocational assistance 12 to 18 months in every case. “Deferral” denotes postponement with a follow-up action. “Follow-up” would occur only if the worker requested review of the suitability or premature ending of the job without cause – these do not require a Notice of Deferral to initiate review.

There is no need to treat the return-to-work situations differently by creating a separate class. This rule is discriminatory. A “new” employer is not subject to the same risks as the employer at injury. Only the employer at injury is required formally to defer vocational assistance, and the effect is to extend exposure for vocational assistance 12 to 18 months beyond the hire date of a worker in a suitable modified job. This would extend the exposure on ALL of the many suitable modified jobs we urge employers to provide for their employees each year. The extension in indemnity reserves will affect the employer’s experience modification rating and even premium costs. Oregon employers will decide not to access Preferred Worker benefits, as the risks outweigh the gains.

Rules for this should be kept in Division 110. The return-to-work and job suitability procedures are adequately covered under the existing Division 120 rules without requiring additional modification. This includes provision for bona fide job offers to be made in accordance with Division 060 rules. The Division 120 rules already contain provisions to make sure a worker has the opportunity to challenge the suitability of a job, complete with appeal rights. This process also provides the employer with the knowledge that services will be based on the injury-caused limitations. Both parties are protected. This would keep the existing criteria that the insurer is not required to determine eligibility if the worker returns to work with the EAI. Preferred Worker Program documents can inform the worker of his or her rights, including what to do if the job is not suitable or ends prematurely without cause.

The insurer is not a party to the PWP contracts. Once the worker has returned to work with the EAI and the claim is closed, there is no reason for the insurer to be involved. We don’t currently track suitable work where the employer is using the Preferred Worker Program. The intent is to provide benefits and

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incentives that serve both the injured worker and employer and that promote an earlier return to work for the injured worker in a suitable job. We understood the Management-Labor Advisory Committee's intent was to increase use of Preferred Worker Program benefits. As this rule is proposed, we think employers will be less inclined to consider accessing Program benefits. We support the current dispute resolution process and workers' access to the Ombudsman's office as sufficient safeguards against the infrequent unscrupulous actions by employers.

Response: Testimony and responses to this proposed rule change covered two primary areas: (1) the requirement of a new notice (Notice of Deferral of Vocational Eligibility) and (2) the requirement that employment that results from the employer at injury activation of Preferred Worker Program benefits would not be considered suitable; (a) until 12 months from the effective date of the premium exemption if there are no worksite modifications, or (b) until 18 months from the effective date of the worksite modification agreement.

The rules require insurers to determine a worker's eligibility for vocational assistance within a specified time frame. Failing that, insurers could be liable for sanctions. The Notice of Deferral is to inform workers and WCD that an eligibility evaluation will not be completed because the employer at injury has activated preferred worker benefits. The notice would protect the insurer from requests for sanctions and requests for further information because the WCD data system would be showing no activity. We believe it is necessary to have a Notice of Deferral issued.

WCD proposed in the definition of suitable employment OAR 436-120-0005(14) that employers who activate preferred worker benefits retain a worker for 12 months if there is no worksite modification and 18 months if there is a worksite modification. Written and oral testimony have raised objections to those time frames offering a variety of opinions with different time frames suggested. The changes in the OAR 436-110 rules that allow the employer-at-injury to activate the preferred worker benefits provide that employer with substantial financial benefits. A worker who is eligible for vocational assistance but forgoes training in order to return to a modified job with the employer-at-injury is returning to a job that does not exist elsewhere in the labor market. If that job were to end 60 days after all modifications were in place, as under the existing rules, that worker would not be eligible for any vocational assistance.

If that eligible worker were to receive training the insurer would need to reserve for the length of the training program *and* pay all the training costs. We have, however, reviewed current data to determine whether the time frames proposed by WCD are too long. We believe 9 months where no worksite modification contract is used and 12 months when a modification contract is used is adequate.

OAR 436-120-0400 *Exhibit #12*

Testimony: The proposed rule requires selection of the category of service (DEP/ATP) prior to referral to vendor...this generally is simultaneous/seamless. The proposed requirement could actually delay services.

Response: The focus of this rule change is to reduce the time required for injured workers to begin receiving vocational services. The Management Labor Advisory Committee (MLAC) recommended that workers be referred "in status" thus eliminating the current 30 day period to determine the category of vocational assistance. The division supports that recommendation.

OAR 436-120-0410 *Exhibit #11, 12*

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Testimony: You propose to eliminate the entire category of vocational evaluation. We should retain this category of vocational assistance. At the advisory meeting we discussed elimination of this as a category of services following a determination of eligibility. We still believe this category would be appropriate in the event you are evaluating a worker's permanent total disability entitlement under 656.206 (5). The proposed legislation on permanent total disability under discussion at the Management Labor Advisory Committee also continues to refer to a vocational evaluation. We recommend retaining the category within these rules, but make clear the intent following eligibility for services is to designate a worker eligible for either direct employment or training.

We recommend vocational evaluation be retained as a category of services but not a choice in the eligibility process. If PTD rules are going to reference this process, we need consistency.

Response: The intent of the Management Labor Advisory Committee (MLAC) was to eliminate the 45-day vocational evaluation option as an allowable category of vocational assistance. However, we agree that a description of the various activities that comprise a vocational evaluation should remain in the rules to provide guidance. Paragraph (1) will be rewritten to remove reference to vocational evaluation as a category of vocational assistance and to remove the 45-day time frame. Paragraphs (7) & (8) would be deleted. These changes will comply with MLAC's recommendation and preserve a section in the rules that provides guidance regarding vocational evaluation.

OAR 436-120-0500(3)

Exhibit #2, 3, 5, 6, 11, 12, 14C, 14D, 14E

Testimony: During the Management-Labor Advisory Committee's subcommittee process, we discussed the use of conferences with the Workers' Compensation Division to identify and remove obstacles to return-to-work plan completion and approval, for those workers not in plan status within 45/90 days respective to the plan type. I attended those meetings and we did not agree on the mandatory meetings. This was discussed and there were opinions on both sides of this issue. The intent was to better integrate the process, and certainly not to sanction the insurers over this matter. Sanctions were never discussed.

Consider requiring a PLAN DELAY summary. This would include what has been done, where the case is headed, and specific time frames when the plan can be expected. If the division does not find the reason for the delay acceptable, it can contact the parties involved (by phone). This makes the process more approachable, open, and "if necessary", and does not micromanage the case. We need to resolve the plan delay reason at the lowest level, and in the least amount of time.

We refer as many as 200 cases a year, of which 100-150 would not have an approved plan within 90 days of referral. Less than 25% of these are contentious. Where the insurer and worker agree on the obstacles to plan and the efforts to overcome those obstacles, a conference would not be required. Mandatory conferences would place a workload burden on the Workers' Compensation Division. This is especially true because we often refer 4-6 months before an anticipated medically stationary date, and many of these cases require more than 90 days to develop a suitable return-to-work plan.

At the advisory meeting, we discussed the *option* of involving the Workers' Compensation Division in situations where the claim is stalled and no plan is forthcoming. This would be optional at the request of the counselor, the injured worker, his or her representative, or the insurer. We strongly oppose making this mandatory.

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Mandatory conferences would give counselors less time than they have traditionally had for plan development. Factors to consider include: testing must occur; multiple barriers to employment such as brain injury, inability to speak English, etc.; many insurers require submittal of a plan within two weeks of the start date (thus compressing the timeframe down to 75 days); and the counselor may not have done the eligibility evaluation and would have to meet the worker, schedule testing, and develop a plan all within approximately 75 days.

The rules do not explain whether these meetings will be in-person or done by phone. In addition, the rules don't outline what happens if concurrence cannot be reached; will the division issue an order in this event?

We support the concept, but the conference should be optional, not mandatory, because mandatory conferences would restrict the process flow. The original goal around the idea of the conference is to insure a speedier process, so workers can get back on time-loss. Giving any concerned stakeholder the *option* of calling a conference has the advantage of moving workers to plan more quickly. The process only becomes cumbersome when it is made *mandatory*.

Response: The respondents providing testimony agree on the need for a conference with the Rehabilitation Review Unit (RRU), however disagree as to whether that conference should be mandatory or optional. Under current rules there exists an optional system, either party can now contact RRU with concerns about the provision of vocational services. RRU is rarely contacted to help with cases where there is difficulty getting injured workers into training plans. The Management-Labor Advisory Committee (MLAC), when reviewing vocational assistance, wanted to find ways to shorten timeframes and move the process along so workers were not in situations where there were periods of time without income. Given those objectives, they recommended requiring a meeting when the worker was not in a training plan within 90 days or a direct employment plan within 45 days. Having said that, we realize that the parties may be satisfied with the progress of plan development even if it extends beyond the established time frames. The proposed rule provides for the parties to agree and postpone the conference for 30 days. RRU has no interest in reviewing a plan development process if the parties are in agreement. We will change the 30 day language to: **“The conference may be postponed for a period of time agreeable to the parties”** or similar language.

The role of RRU in this process is not to issue orders or “take over” the process but to bring a “fresh set of eyes” to the process and assist with removing the obstacles to the completion of the plan development process.

OAR 436-120-0710(10) *Exhibit #11*

Testimony: If you retain vocational evaluation as a category of vocational assistance as described under 436-120-0410, we suggest you retain the ability to pay a living expense during a vocational evaluation.

Response: We agree. Since 0410 has now been retained, 0710(10) will also be retained.

OAR 436-120-0720 *Exhibit #12*

Testimony: You need to update the reference to the date of the fee schedule. Why is the chart included in the rules, when the rules instead could refer to the chart in the bulletin?

Response: We realize the chart in the rules will be out of date after the first of July and that this can cause confusion if a person is not aware of the changes, which occur every July 1st. The chart is placed

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Oregon Administrative Rules, Chapter 436, – public hearing April 22, 2005

in the rules because the division has made an effort to remove prescriptive language from bulletins and place them in the rules. Your comment concerning the date of the chart is noted and we will make changes to the chart to make it more clear as to where the most current costs can be found. A note will be placed, in bold, at the bottom of the chart with language that states:

NOTE: Spending limits listed in this chart are adjusted annually, effective each July 1st, and are published in Bulletin 124.

Language in OAR 436-120-0720(1) would be changed to delete the sentence: The amounts in section (3) do not include the adjustment effective July 1, 2005.

When the rules are next opened for revision, we will revisit your concerns and look for a better solution.

Having reviewed and considered all data, views and arguments presented, I hereby submit this report as a summary of statements given and exhibits received. I recommend the adoption of the amendments to the rules consistent with the above responses.

Dated this 1st day of July, 2005.

WORKERS' COMPENSATION DIVISION

/s/ Fred Bruyns

Fred Bruyns, Rules Coordinator
Policy Section
Workers' Compensation Division

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING

A Statement of Need and Fiscal Impact accompanies this form.

Dept of Consumer and Business Services, Workers' Compensation Division	OAR CHAPTER 436
Agency and Division	Administrative Rules Chapter Number
Fred Bruyns	(503) 947- 7717 Fax (503) 947-7581
Rules Coordinator	Telephone
PO Box 14480, Salem, OR 97309-0405; 350 Winter Street NE, Rm 27, Salem, OR 97301-3879	
Address	

April 22, 2005	10:00 a.m..	Room F (basement, Labor & Industries Building 350 Winter Street NE, Salem, Oregon	Fred Bruyns
Hearing date	Time	Location	Hearings Officer

NOTE: The hearing will begin at 10:00 a.m. and end when all present who wish to testify have done so. Written testimony will be accepted through April 29, 2005.

**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 436-110-0290, 436-110-0326, 436-110-0327, 436-110-0336, 436-110-0337, 436-110-0346, 436-110-0347, 436-110-0351, 436-110-0352

AMEND: OAR 436-001-0265, and chapter 436, divisions 105, 110, and 120

REPEAL: OAR 436-120-0410

ORS 656.283, 656.340, 656.622, 656.704, 656.726(4)

Stat. Auth.

ORS 183.335; OAR 137-001; OAR 436-001

Other Authority

ORS chapter 656; ORS 656.340, 656.622

Stats. Implemented

RULE SUMMARY

The agency proposes to amend OAR 436-001-0265, "Attorney Fees." This proposed rule:

- Clarifies that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000. This proposed rule change is consistent with changes to OAR 436-010-0008, proposed January 14, 2005, and to OAR 436-120-0008, proposed March 9, 2005 (see below).

The agency proposes to amend OAR 436-105, "Employer-at-Injury Program." These proposed rules:

- Allow the insurer to request that reimbursement be based on the rules in effect on the date an individual Employer-at-Injury Program began; otherwise the rules in effect at the time of the request apply;
- Clarify that Employer-at-Injury Program benefits are available for "own motion" claim openings under ORS 656.278;
- Extend benefits to include a "skills building," class or course taken to enhance **an existing skill or develop a new skill**;
- Allow the insurer to accept updated restrictions and releases from a medical service provider treating the worker on a referral basis, with the exception of a regular work release;
- Do not require payroll records to show hours worked each day unless the worker has hourly restrictions;
- Provide that if the insurer or the Workers' Compensation Division disallows wage subsidy reimbursement for part of a payroll period, and payroll records do not show individual dates and hours worked, the gross wages will be divided by the number of days in the payroll period, and the prorated value of each day will be multiplied by the number of eligible days to determine the reimbursement amount for the payroll period – currently all reimbursement may be disallowed;
- Provide for the compilation of up to 66 days of wage subsidy during a 24-month period, due to gaps in transitional work;
- Disallow reimbursement for any day during which the worker exceeds his or her injury-caused limitations -- currently this terminates Employer-at-Injury Program benefits; however, if an employer uses a time clock, up to 30 minutes per day will be allowed for the worker to get to and from the time clock and the worksite without exceeding hourly restrictions;
- Allow the insurer or employer to get clarification about the medical worker's release any time prior to submitting the reimbursement request;
- Increase the maximum reimbursement from \$750 to \$1,000 for tuition, books, and fees for a class or course of instruction; provide that accredited on-line or accredited self-study courses qualify for reimbursement; and

Notice of Proposed Rulemaking Hearing

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- Allow reimbursement if the employer in good faith paid for the costs of a class or course after the worker agreed to take part in the training and then refused to attend.

The agency proposes to amend OAR 436-110, “Preferred Worker Program.” These proposed rules:

- Increase access to Preferred Worker Program benefits by allowing the employer at injury to request reemployment assistance for modified regular employment or a new job offered to its worker – up to \$25,000 for a worksite modification, up to six months of wage subsidy, and obtained employment purchases;
- Redefine “hire date” such that requests for reemployment assistance received more than 30 days after the hire date can be processed – the hire date is 12:01 AM the day following the request if the request is sent to the division more than 30 days after the start-work date;
- Delete the requirement that workers submit requests for premium exemption and wage subsidy within 90 days of the hire date and clarify how the effective dates will be determined.
- Clarify that Preferred Worker Program benefits are available for “own motion” claim openings under ORS 656.278;
- Provide that if the worker is not eligible under the most recent disabling claim or claim opening, eligibility may be based on the most recent disabling claim closure where injury-caused permanent restrictions prevented the worker from return to regular employment; and
- Provide that worksite modification may also include the means to protect modifications purchased by the Preferred Worker Program in an amount not to exceed \$2,500.

The agency proposes to amend OAR 436-120, “Vocational Assistance to Injured Workers.” These proposed rules:

- Combine vocational evaluation with eligibility evaluation for vocational assistance, thus shortening the vocational preparation time by up to 45 days;
- Require that if the insurer does not approve a return-to-work plan within 90 days of determining the worker is entitled to a training plan, or within 45 days of determining the worker is entitled to a direct employment plan, the insurer must schedule a conference with the Workers’ Compensation Division, Rehabilitation Review Unit. The insurer or worker may also request a conference when any other delays in the vocational rehabilitation process occur;
- Clarify the process for calculating the adjusted weekly wage when the worker held multiple jobs at the time of injury or aggravation, or held one or more jobs in addition to receiving unemployment insurance benefits;
- Clarify that extraordinary circumstances, for the purpose of determining attorney fees, are not established by merely exceeding eight professional hours or exceeding a benefit to the worker of \$6000; This proposed rule change is consistent with changes to OAR 436-001-0265, proposed March 9, 2005 (see above), and to OAR 436-010-0008, proposed January 14, 2005.
- Require that if the employer at injury has activated Preferred Worker benefits, the insurer must send the worker notice of “deferral of vocational assistance eligibility determination,” to inform the worker that the insurer will not complete the vocational eligibility process;
- Provide that modified or new employment that results from an employer activated use of the preferred worker program, under OAR 436-110, will not be considered “suitable” until: (a) one year from the date of the premium exemption if there are no worksite modifications, or (b) eighteen months from the date the division approves a worksite modification contract – with two exceptions: 1) the worker is terminated for cause; 2) the worker voluntarily resigns for a reason unrelated to the work injury; and
- Require that the notice of eligibility also include a notice of entitlement that informs the worker which type of assistance will be provided, direct employment or training.

Request for public comment:

The agency 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 at 503-947-7627 or fax 503-947-7630.

April 29, 2005

Last Day for Public Comment

/s/ John L. Shilts

Authorized Signer and Date

3/9/05

John L. Shilts, Administrator, Workers’ Compensation Division

Printed name

*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

Distribution: WCD-ID, S, T, U, AT, CE, EG, IA, LU, LL, NM, CI, ML, VR, PW, RE, S0, S3, S5, S6, S8

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

OAD CHAPTER 436

Agency and Division

Administrative Rules Chapter Number

In the Matter of)	
The Amendment of:)	Statutory Authority,
OAR 436-001, Procedural Rules Governing Rulemaking)	Statutes Implemented,
and Hearings)	Statement of Need,
OAR 436-105, Employer-at-Injury Program)	Principal Documents Relied Upon,
OAR 436-110, Preferred Worker Program)	Statement of Fiscal Impact
OAR 436-120, Vocational Assistance to Injured Workers)	

Statutory Authority: ORS 656.704, 656.726(4)

Other Authority: ORS 183.335; OAR 137-001; OAR 436-001

Statutes Implemented: ORS chapter 656; ORS 656.340, 656.622

Need for the Rule(s):

The proposed amendments will increase access to return-to-work assistance by Oregon employers and injured workers. The Employer-at-Injury and Preferred Worker programs are funded by the Workers' Benefit Fund (WBF). Both workers and employers pay into the WBF through payroll deductions. Changes to the vocational assistance rules will expedite training and direct employment services to eligible workers. Minor revisions to OAR 436-001-0265 will make the attorney fee provisions of this rule consistent with OAR 436-010 and 436-120.

The Management-Labor Advisory Committee (established under ORS 656.790) recommended several of the proposed rule changes.

Documents Relied Upon: Rulemaking advisory committee meeting records and issues documents. These records are available for public inspection in the Administrator's Office, Workers' Compensation Division, 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:

Oregon injured workers, employers, and insurers should benefit economically from these changes. Our research shows that workers who use reemployment assistance program benefits have more income over time than workers who are eligible but do not use the available assistance. Early return to work lowers claim costs, and program benefits such as wage subsidies and worksite modifications inject WBF dollars into Oregon businesses. Purchases for tools, clothing, and other items needed in order for a worker to begin a job are a direct benefit to injured workers, who otherwise would have to purchase the items out-of-pocket in order to take the job.

It is not possible to estimate dollar benefits that will result if the proposed rule changes are made permanent, in part because each reemployment program influences the others. However, we do project that benefits will be substantial. There will be increased demands placed on the WBF, but the Fund has adequate reserves to support the proposed changes.

Statement of Need and Fiscal Impact

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We project no net negative fiscal impact to any party, including the Department of Consumer and Business Services, if the proposed changes are made permanent.

Administrative Rule Advisory Committee consulted: Yes, 1/7/2005, 1/18/2005, & 1/20/2005

/s/ John L. Shilts

3/9/05

Signature and Date

John L. Shilts, Administrator, Workers' Compensation Division

Printed name

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310.

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION
PROPOSED PREFERRED WORKER PROGRAM RULES**

**PROPOSED
OREGON ADMINISTRATIVE RULES
CHAPTER 436, DIVISION 110**

436-110-0001 Authority for Rules

The director has adopted OAR Chapter 436, Division 110 under authority of ORS 656.622 and 656.726.

Stat. Auth.: ORS 656.622, 656.726(4)
 Stats. Implemented: ORS 656.622
 Hist: Filed 1/2/73 as WCB Admin. Order 1-1973, eff. 1/15/73
 Amended 3/14/73 by WCB Admin. Order 3-1973, eff. 4/1/73
 Amended 9/29/77 as WCD Admin. Order 2-1977 (Temp.), eff. 10/4/77
 Amended 2/1/78 as WCD Admin. Order 2-1978, eff. 2/1/78
 Amended 12/30/81 as WCD Admin. Order 7-1981, eff. 1/1/82
 Renumbered from OAR 436-63-001, 5/1/85
 Amended 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87
 Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88
 Amended 6/21/90 as WCD Admin. Order 13-1990 (Temp.), eff. 7/1/90
 Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
 Amended 1/21/93 as WCD Admin. Order 93-050, eff. 3/1/93
 Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
 Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0002 Purpose of Rules

(1) These rules explain what assistance and reimbursements are available from the Preferred Worker Program, who is qualified, and how to receive assistance and reimbursements.

(2) The Preferred Worker Program encourages the reemployment of workers whose on-the-job injuries have resulted in permanent disabilities and who cannot return to the employment they had at the time of injury, [or] claim for aggravation, **or own motion opening under ORS 656.278**, because of those disabilities by providing incentives to employers.

(3) The Preferred Worker Program is a worker **and employer-at-injury** [-option and worker]-activated program. The program consists of Premium Exemption, Claim Cost Reimbursement, Wage Subsidy, Obtained Employment Purchases, and Worksite Modification. A Preferred Worker may offer reemployment assistance to an employer. **The employer-at-injury may also request reemployment assistance for modified regular employment or a new job offered to their worker.**

Stat. Auth.: ORS 656.622, 656.726(4)
 Stats. Implemented: ORS 656.622
 Hist: Filed 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87
 Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88
 Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
 Amended 1/21/93 as WCD Admin. Order 93-050, eff. 3/1/93
 Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
 Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97
 Amended and renumbered section (3) from OAR 436-110-0300(1st ¶), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01
Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0003 Applicability of Rules

(1) These rules apply to all requests for Preferred Worker Program reemployment assistance received by the division on or after the effective date of these rules. Reemployment assistance received as a result of a request filed and approved between June 30, 1990 and the

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effective date of these rules counts toward the maximum assistance allowed by these rules.

(2) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

Stat. Auth.: ORS 656.622, 656.726(4)
 Stats. Implemented: ORS 656.622
 Hist: Filed 1/2/73 as WCB Admin. Order 1-1973, eff. 1/15/73
 Amended 3/14/73 by WCB Admin. Order 3-1973, eff. 4/1/73
 Amended 9/29/77 as WCD Admin. Order 2-1977 (Temp.), eff. 10/4/77
 Amended 2/1/78 as WCD Admin. Order 2-1978, eff. 2/1/78
 Amended 12/30/81 WCD Admin. Order 7-1981, eff. 1/1/82
 Renumbered from OAR 436-63-005, 5/1/85
 Amended 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87
 Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88
 Amended 6/21/90 as WCD Admin. Order 13-1990 (Temp), eff. 7/1/90
 Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
 Amended 1/21/93 as WCD Admin. Order 93-050, eff. 3/1/93
 Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
 Amended 8/28/97 as WCD Admin Order 97-057, eff. 9/12/97
 Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0005 Definitions

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

(1) "Administrator" means the Administrator of the Workers' Compensation Division, or the administrator's delegate for the matter.

(2) "Client" means a person to whom workers are provided under contract and for a fee on a temporary or leased basis.

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

(4) "Disability" means permanent physical or mental restriction(s) or limitation(s) caused by an accepted disabling Oregon workers' compensation claim which limits the worker from performing one or more of the worker's regular job duties.

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

(6) "Division approval" means a Preferred Worker agreement signed by an authorized division representative.

(7) "Employer[-]at[-]injury" means the organization in whose employ the worker sustained the injury or occupational disease.

(8) "Exceptional disability" means a disability equal to or greater than the complete loss, or loss of use, of both legs. Exceptional disability also includes brain injury which results in impairment equal to or greater than a Class III as defined in OAR 436-035. The division shall determine whether a worker has an exceptional disability based upon the combined effects of all of the worker's Oregon compensable injuries resulting in permanent disability.

(9) "Fund" means the Workers' Benefit Fund.

(10) "Hire date" means the date the worker started work for the employer in the employment for which benefits are requested[.] **if the request for Preferred Worker Program**

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assistance is sent to the division prior to or within 30 calendar days after the start-work date. In calculating the 30-day period under this section, the hire date is not included, and if the 30th day falls on a Saturday, Sunday, or legal holiday, the next business day will be considered the end of the 30-day period. [When a worker returns to regular or substantially similar employment where worksite modifications are required, the hire date means the date that all modifications are in place and verified by a representative of the division.] **The hire date is 12:01 AM the day following the request if the request is sent to the division more than 30 days after the start-work date.**

(11) "Premium" means premium which results from a calculation which takes payroll multiplied by applicable rates of the employer's individual insurer multiplied by the employer's experience rating modification less any discounts, assessments, surcharges, or taxes.

(12) "Regular employment" means the employment the worker held at the time of the injury, [or] claim for aggravation, **or own motion opening under ORS 656.278**. Regular employment which has been substantially modified as described in OAR 436-110-0380 is not regular employment for purposes of the Preferred Worker Program.

(13) "Reimbursable wages" means the money rate paid a worker for services performed including paid leave, overtime, commission, and reasonable value of board, rent, housing, lodging, and similar advantage received from the employer, as determined by the division in accordance with OAR 436-060. Bonus pay shall be considered reimbursable only when provided as part of the written or verbal employment contract as a means to increase the worker's wages. End-of-the-year and other one-time bonuses paid at the employer's discretion, and safety bonuses, are not reimbursable. Wages do not include tips, discretionary bonuses, paid leave cash-outs, employee insurance or benefits programs, employee discounts, or other forms of remuneration not included as part of the worker's gross wages. Benefits paid as wages or cash, even if reported as part of a worker's gross wages, are not subject to reimbursement.

(14) "Worksite" means a primary work area which is in Oregon, already constructed and available for a worker to use to perform the required job duties. The worksite may be the employer's, worker's, or worker leasing company's client's premises, property, and equipment used to conduct business under the employer's or client's direction and control. A worksite may include a worker's personal property or vehicle if required to perform the job. If the "worksite" is mobile, it must be available in Oregon for inspection and modification.

Stat. Auth.: ORS 656.622, 656.726(4)
 Stats. Implemented: ORS 656.622
 Hist: Filed 1/2/73 as WCB Admin. Order 1-1973, eff. 1/15/73
 Amended 3/14/73 by WCB Admin. Order 3-1973, eff. 4/1/73
 Amended 9/29/77 as WCD Admin. Order 2-1977 (Temp.), eff. 10/4/77
 Amended 2/1/78 as WCD Admin. Order 2-1978, eff. 2/1/78
 Amended 12/30/81 as WCD Admin. Order 7-1981, eff. 1/1/82
 Renumbered from OAR 436-63-010, 5/1/85
 Amended 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87
 Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88
 Amended 6/21/90 as WCD Admin. Order 13-199 (Temp), eff. 7/1/90
 Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
 Amended 1/21/93 as WCD Admin. Order 93-050, eff. 3/1/93
 Amended 12/7/95 as WCD Admin. Order 95-068 (Temp), eff. 1/1/96
 Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
 Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97
 Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01
Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
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436-110-0006 Administration of Rules

(1) Orders issued by the division to enforce ORS 656.622 or these rules are orders of the director.

(2) The department maintains the financial integrity of the fund and all reimbursement is subject to the availability of funds. If the funds are too low for all reimbursements, the director has final authority to determine how the funds will be disbursed.

(3) The director may use moneys from the fund for activities to provide information about and encourage reemployment of injured workers. A maximum of \$250,000 may be used in a fiscal year, July 1 to June 30. The director must approve all expenditures. Activities include, but are not limited to:

(a) Advertisements and promotion of reemployment assistance programs and associated production costs; and

(b) Public reemployment assistance program conferences and workshops.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Filed 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87

Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88

Amended 6/21/90 as WCD Admin. Order 13-1990 (Temp.), eff. 7/1/90

Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90

Amended 1/21/93 as WCD Admin. Order 93-050, eff. 3/1/93

Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96

Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97

Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0007 Reconsideration/Appeal to the Director

(1) The division will deny any request for Preferred Worker Program assistance it finds is in violation of these rules. The division has the discretion to deny a request it determines is not reasonable, practical, or feasible, or considers an abuse of the program.

(2) Parties directly affected by a division reemployment assistance decision may request a reconsideration by sending a written request for reconsideration to the administrator no later than 60 days after the date the decision is issued. Facsimiles that are legible and complete are acceptable and will be processed the same as originals. Reconsideration must precede a director's review.

(3) The request for reconsideration shall specify the reasons why the decision is appealed. No reconsideration shall be granted unless the request meets the requirements of this subsection.

(4) The division will reconsider the decision prior to a director's review and will notify all affected parties of its decision upon reconsideration.

(5) If, upon reconsideration, the division upholds the original decision, the director's review shall begin.

(6) The director may require any affected party to provide information or to participate in the director's review. If the party requesting the director's review fails to participate without reasonable cause as determined by the director, the director may dismiss the review.

(7) The director's review decision will be issued in writing. The director's review

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decision is final and not subject to further review by any court or other administrative body.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Filed 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87

Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88

Amended 6/21/90 as WCD Admin. Order 13-1990 (Temp), eff. 7/1/90

Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90

Renumbered from OAR 436-110-080, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93

Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96

Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97

Amended and renumbered section (1) from OAR 436-110-0540(11), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0240 Insurer Participation in the Preferred Worker Program

(1) The insurer of the employer at injury shall be an active participant in providing reemployment assistance. Participation includes issuing notices of the assistance available from the Preferred Worker Program.

(2) The insurer shall notify the worker and employer at injury in writing of the reemployment assistance available from the fund. A notice shall be issued:

(a) Within five days of a worker's release for work after the worker has been declared medically stationary by the attending physician;

(b) Upon determination of eligibility or ineligibility of the worker for vocational assistance under OAR 436-120; and

(c) Upon approval of a Claim Disposition Agreement.

(3) Pursuant to section (2) of this rule, the Notice to the Worker shall appear in bold type and contain the following language:

The Preferred Worker Program helps Oregon's eligible injured workers get back to work. If you have permanent limitations as a result of an Oregon compensable injury, and your medical care provider has determined you will not be able to return to the employment you held at the time of your injury or aggravation because of those limitations, you may qualify as a Preferred Worker and receive reemployment assistance. To find out whether you qualify, contact the Preferred Worker Program at one of the telephone numbers, fax numbers, or addresses listed below.

For the Salem office call: (503) 947-7588, 1-800-445-3948 (toll-free from Oregon only), (503) 947-7993 (TTY), or FAX (503) 947-7581.

For the Medford office call: (541) 776-6032, 1-800-696-7161 (toll-free from Oregon only), or FAX (541) 776-6246.

Or write the Preferred Worker Program at: 350 Winter Street NE, Rm 27, Salem, Oregon 97301-3879; or 1840 Barnett Road, Suite C, Medford, Oregon 97504.

(4) [Pursuant to] **Under** section (2) of this rule, the Notice to the Employer shall appear in bold type and contain the following language:

If your worker is unable to return to regular work because of injury-caused limitations, [he or she] you may be eligible for the Preferred Worker Program[. A

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Preferred Worker may offer you] incentives including Premium Exemption, Claim Cost Reimbursement, Wage Subsidy, and Worksite Modification, which you may use to re-employ [the] your worker. To find out about the Preferred Worker Program, contact the program at one of the telephone numbers, fax numbers, or addresses listed below.

For the Salem office call: (503) 947-7588, 1-800-445-3948 (toll-free from Oregon only), (503) 947-7993 (TTY), or FAX (503) 947-7581.

For the Medford office call: (541) 776-6032, 1-800-696-7161 (toll-free from Oregon only), or FAX (541) 776-6246.

Or write the Preferred Worker Program at: 350 Winter Street NE, Rm 27, Salem, Oregon 97301-3879; or 1840 Barnett Road, Suite C, Medford, Oregon 97504.

(5) The insurer shall provide the division with Preferred Worker information in the form and format the director prescribes in **OAR 436-030** [Bulletin 139, Form 440-1503], upon the following:

(a) Claim closure [pursuant] **according** to ORS 656.268;

(b) Within 30 calendar days from the insurer's receipt of the earliest Opinion and Order of an Administrative Law Judge, Order on Reconsideration, Order on Review by the Board, decision of the Court of Appeals, or stipulation which grants initial permanent disability after the latest opening of the worker's claim; and

(c) Approval of a Claim Disposition Agreement according to ORS 656.236 and documented medical evidence indicates permanent disability exists as a result of the injury or disease, and the worker is unable to return to regular employment.

Stat. Auth.: ORS 656.340, 656.622, 656.726(4)
Stats. Implemented: ORS 656.340(1), (2), (3); 656.622; 656.726(4)
Hist: Filed 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
Renumbered from OAR 436-110-017, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93
Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97
Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01
Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0290 Employer at Injury Use of the Preferred Worker Program

The conditions for the employer at injury to activate the Preferred Worker Program include:

(1) The employer at injury must request Preferred Worker Program assistance from the division within 180 days of the worker's claim closure date, with the following exception. When worksite modifications are provided, and the modifications are completed and verified by the division more than 150 days after the worker's claim-closure date, the employer at injury will have 30 calendar days from the verification date to request other assistance.

(2) In calculating the 180-day period under this rule, the claim closure date will not be included, and if the 180th day falls on a Saturday, Sunday, or legal holiday, the next business day will be considered the end of the 180-day period.

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(3) The employment for which benefits are requested must be within the worker's injury-caused restrictions, unless worksite modifications are requested to comply with this section. In this case no other Preferred Worker Program benefits will be approved until all the modifications are in place and verified by a representative of the division.

(4) The worker must agree to accept the new or modified regular job in writing. The job offer must include:

(a) The start date. If the job starts after the modifications are in place, so note;

(b) Wage and hours;

(c) Job site location; and

(d) Description of job duties.

(5) If the employer at injury uses worksite modification assistance and the employer or worker later requests additional modifications for the same job, the employer's worksite modification benefit will be exhausted before using the worker's worksite modification benefits.

(6) All other provisions under OAR 436-110 apply unless otherwise indicated.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0310 Eligibility and End of Eligibility for the Preferred Worker Program

(1) The eligibility requirements for an employer, except as provided in OAR 436-110-0345(1) for Obtained Employment Purchases, are:

(a) The employer has and maintains Oregon workers' compensation insurance coverage;

(b) The employer complies with the Oregon Workers' Compensation Law;

(c) The employer must offer or provide employment to an eligible Preferred Worker who is a subject Oregon worker [pursuant] **according** to ORS 656.027;

(d) If the employer is a worker leasing company, it must be licensed with the division;
and

(e) The employer is not currently ineligible for Preferred Worker benefits under OAR 436-110-0900.

(2) The eligibility requirements for a worker are:

(a) The worker has an accepted disabling Oregon compensable injury or occupational disease. Injuries covered by the Injured Inmate Law do not qualify;

(b) Because of injury-caused limitations, medical evidence indicates the worker will not be able to return to regular employment as defined in OAR 436-110-0005 under the most recent disabling claim **or claim** opening. [If the latest opening is a new condition opening, the entire claim will be considered for the purpose of eligibility; and] **If the worker is not eligible under the most recent disabling claim or claim opening, eligibility may be based on the most recent disabling claim closure where injury-caused permanent restrictions prevented the worker from return to regular**

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employment. If the worker was previously found eligible under that claim, the worker will not be eligible again on that claim closure. Subsequent eligibility determination will be based on claim openings that occur after the date that the most recent Preferred Worker Identification Card is issued; and

(c) Medical documentation indicates permanent disability exists as a result of the injury or disease, whether or not an order has been issued awarding permanent disability.

(3) A worker may not use Preferred Worker benefits for self-employment unless the injury which gave rise to the worker's eligibility for the Preferred Worker Program occurred in the course and scope of self-employment. In that case, the worker may use the benefits to return to the same self-employment or for employment other than self-employment.

(4) A worker **or employer-at-injury** may not use Preferred Worker benefits, except Worksite Modification, for regular employment or substantially similar employment except as specified in OAR 436-110-0380.

(5) Reasons for ending Preferred Worker Program eligibility include, but are not limited to, the following:

(a) Misrepresentation or omission of information by [the] **a** worker or employer to obtain assistance;

(b) Failure of [the] **a** worker or employer to provide requested information or cooperate;

(c) Falsification or alteration of a Preferred Worker card or a *Preferred Worker Program Agreement*;

(d) Conviction of fraud in obtaining workers' compensation benefits;

[e] The worker releases all claim rights through a Disputed Claim Settlement in accordance with ORS 656.289;]

[f] **(e)** The claim upon which eligibility was determined is subsequently denied in accordance with ORS 656.262;

[g] **(f)** The worker or employer is sanctioned from receiving reemployment assistance in accordance with OAR 436-110-0900;

[h] **(g)** The employer does not maintain Oregon workers' compensation insurance coverage, except as provided in OAR 436-110-0345(1) for Obtained Employment Purchases; [or]

(h) The current Preferred Worker Identification Card expires without being activated, with the following exception. If the worker's card expired and the worker's job modification is determined to be "substantial" under OAR 436-110-0380, the worker can activate Premium Exemption within 30 calendar days from the date the division determines the modification is "substantial," unless any of subsections (a) through (f) apply; or

(i) The current Preferred Worker Eligibility Card expires, with the following exception. When Premium Exemption has expired and the worker's job modification is determined to be "substantial" under OAR 436-110-0380, the worker will be eligible to request Wage Subsidy and Obtained Employment Purchases within 30 calendar days from the date the division determines the modification is "substantial," unless any of subsections

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(a) through (f) apply.

[(i) An action by the employer or worker that warrants a sanction under OAR 436-110-0900.]

(6) If there is an active *Preferred Worker Program Agreement*, the division will not end Preferred Worker Program eligibility until termination of the agreement if a Disputed Claim Settlement [pursuant] **according** to ORS 656.289 settles that portion of the claim from which eligibility arose or the claim is subsequently denied [pursuant] **according** to ORS 656.262. **Under an employer-at-injury activated agreement Premium Exemption ends when the job ends, or three years from the effective date of Premium Exemption, whichever occurs first. Under a worker-activated agreement, Premium Exemption ends either at the expiration date shown on the *Preferred Worker Eligibility* [c]Card or when the job ends, whichever occurs first. When this occurs, the division will issue written notification to the worker if the assistance was worker activated. The worker must notify all affected parties. If the job ends before the expiration date shown on the card, the Preferred Worker card must be surrendered to the division. If the assistance was employer activated, the division will issue written notification to the employer.**

(7) The division retains the right to reinstate Preferred Worker Program eligibility if eligibility was ended prematurely or in error, or the employer has reinstated or obtained workers' compensation insurance coverage.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Filed 1/2/73 as WCB Admin. Order 1-1973, eff. 1/15/73

Amended 3/14/73 by WCB Admin. Order 3-1973, eff. 4/1/73

Amended 9/29/77 as WCD Admin. Order 2-1977 (Temp.), eff. 10/4/77

Amended 2/1/78 as WCD Admin. Order 2-1978, eff. 2/1/78

Amended 12/30/81 as WCD Admin. Order 7-1981, eff. 1/1/82

Renumbered from OAR 436-63-020, 5/1/85

Amended 2/20/87 as WCD Admin. Order 1-1987, eff. 3/16/87

Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88

Amended 6/21/90 as WCD Admin. Order 13-1990 (Temp.), eff. 7/1/90

Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90

Renumbered from OAR 436-110-020, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93

Amended 12/7/95 as WCD Admin. Order 95-068 (Temp.), eff. 1/1/96

Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96

Amended and renumbered from OAR 436-110-0280 and 0400, 8/28/97 as WCD admin. Order 97-057, eff. 9/12/97

Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0320 Preferred Worker Cards**This rule does not apply to employer-activated assistance.**

(1) The division may issue two types of Preferred Worker cards to eligible workers. The cards identify the worker as being eligible to offer an employer Preferred Worker Program assistance. Conditions for using the Preferred Worker cards include:

- (a) A worker can have only one valid Preferred Worker card at a time;
- (b) A Preferred Worker card is valid for three years from the date of issue. The three-year period cannot be interrupted or extended; and
- (c) A Preferred Worker card may be reissued upon loss of the original card during and for the three-year period the original card was issued.

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(2) The first card issued is a *Preferred Worker Identification Card*. The worker and employer use this card to start Premium Exemption by completing the card and returning it to the division. When worker eligibility criteria are met, the division issues this card as follows:

(a) Automatically at the time of claim closure based upon insurer submission of Preferred Worker information as specified in OAR 436-110-0240(5);

(b) Prior to claim closure when the worker has available, immediate employment with an employer who meets the eligibility criteria under OAR 436-110-0310(1). Workers or their representatives may contact the division directly to request an eligibility determination and a Preferred Worker card;

(c) When notified by the worker or their representative that there is a claim closure by a Claim Disposition Agreement, a Board's Own Motion or insurer's own motion;

(d) Upon request by the worker or their representative any time after claim closure; or

(e) If, as a result of a new claim or claim reopening, a Preferred Worker meets the Preferred Worker Program eligibility criteria, the division shall issue a new *Preferred Worker Identification Card*. The later card shall be used for subsequent benefits.

(3) The second card issued is the *Preferred Worker Eligibility Card*. The division sends the Preferred Worker this card upon approval of Premium Exemption. This card shows the three-year Premium Exemption period. The worker may offer other employers Preferred Worker benefits for the remainder of the time shown on this card.

(4) The division may inactivate a Preferred Worker card if:

(a) The Preferred Worker card was issued in error; or

(b) Any reason for ending Preferred Worker Program eligibility as specified in OAR 436-110-0310(5) applies.

(5) If the division finds that a worker who has requested a Preferred Worker card is ineligible, the division shall notify the worker in writing. Such notice shall give the basis for the decision, the relevant rule(s), and the worker's appeal rights as given in OAR 436-110-0007.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622

Hist: Filed 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90

Renumbered from OAR 436-110-022, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93

Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96

Amended 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97

Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0325 Premium Exemption General Provisions

(1) Premium Exemption releases an employer from paying workers' compensation insurance premiums and premium assessments on a Preferred Worker during the time Premium Exemption is in effect, up to a maximum of three (3) years. [from the date of first use by the worker during the Preferred Worker eligibility period.] Premium Exemption may not be extended. [Premium Exemption allows the following:]

[^(a)] While actively using Premium Exemption, the employer does not report, and the insurer cannot use, the Preferred Worker's payroll for the calculation of insurance premiums or

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premium assessments. However, the employer is required to report and pay workers' compensation employer assessments and withhold employee contributions as required by OAR 436-070. The employer shall start paying insurance premiums and premium assessments when Premium Exemption ends₂]; and

(b) While Premium Exemption is active, the worker may provide a new eligible employer Premium Exemption for the remainder of the three-year Premium Exemption period.]

(2) Premium Exemption must be activated in order to use Claim Cost Reimbursement and Wage Subsidy **unless OAR 436-110-0310(5)(i) applies.** Requirements regarding Premium Exemption and Obtained Employment Purchases are provided in OAR 436-110-[0345(5)] **0346 and OAR 436-110-0347.**

(3) If the division does not approve Premium Exemption, the division will notify the party who requested the assistance in writing. Such notice will provide the basis for the decision, the relevant rule(s), and the appeal rights as given in OAR 436-110-0007.

(4) Upon approval of Premium Exemption, the division will issue a Notice of Premium Exemption to the employer, employer's insurer, and the insurer of the employer at injury.

(5) If a worker covered under Premium Exemption incurs a compensable injury or occupational disease during the Premium Exemption period, the employer must notify its insurer of the injury. If the employer fails to note the Preferred Worker status when the Form 801 was filed with the insurer, the employer must notify the insurer as soon as possible that the injury or disease was incurred by a Preferred Worker.

[(3) Premium Exemption is activated as follows:

(a) When a worker issued a *Preferred Worker Identification Card* accepts employment with Premium Exemption requested, the worker and employer shall complete the *Preferred Worker Identification Card*. The card must be completed by the worker and the employer and sent to the division within 90 days of the worker's hire date. Upon division approval, Premium Exemption will begin on the hire date;

(b) When a potentially eligible worker without a *Preferred Worker Identification Card* accepts employment with Premium Exemption requested, the worker shall send a written request to the division, or call the division, within 90 days of the worker's hire date. Upon the division determining the worker eligible as specified in OAR 436-110-0310, the division will issue a *Preferred Worker Identification Card*. The card must be completed by the worker and employer and sent to the division within 90 days of the date of issue. Premium Exemption will begin on the hire date as defined in OAR 436-110-0005;

(c) If a worker returns to regular or substantially similar employment, the job for which Preferred Worker benefits are requested must meet "substantial modification" criteria as determined by the division in accordance with OAR 436-110-0380. The *Preferred Worker Identification Card* must be completed by the worker and employer and sent to the division within 90 days of the date the division determines the job to be substantially modified. The worker will be notified of the determination date. Upon division approval, Premium Exemption will begin on the hire date as defined in OAR 436-110-0005; and

(d) In calculating the 90-day period under this section, the hire date will not be included, and if the 90th day falls on a Saturday, Sunday, or legal holiday, the next business day will be considered the end of the 90-day period.

(4) If the division does not approve Premium Exemption, the division shall notify the worker and employer in writing. Such notice shall provide the basis for the decision, the relevant rule(s), and the appeal rights as given in OAR 436-110-0007.

(5) Upon approval of Premium Exemption, the division will issue the worker a *Preferred Worker Eligibility Card* which shows the Premium Exemption start and end dates. The division will also issue a *Notice of Premium Exemption* to the employer, the employer's insurer, and the insurer of the employer at injury.

(6) The worker may use a *Preferred Worker Eligibility Card* to obtain new employment and to provide subsequent employers with Premium Exemption for the remainder of the three-year Premium Exemption period.

(7) Employers who subsequently employ a Preferred Worker shall photocopy the *Preferred Worker Eligibility Card* as evidence of Premium Exemption, and distribute copies as follows:

(a) Send one copy to their insurer as notice that a Preferred Worker is employed using Premium Exemption;

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- (b) Keep one copy on file; and
(c) Return the card to the worker.

(8) If a Preferred Worker incurs a compensable injury or occupational disease during the Premium Exemption period, the employer shall notify its insurer of the injury and either check the appropriate box on *Form 801* or write "Preferred Worker" in the left-hand margin of the form, and provide a copy of the worker's *Preferred Worker Eligibility Card*. If the employer fails to note the Preferred Worker status on *Form 801*, or fails to send a copy of the *Preferred Worker Eligibility Card*, the employer shall notify the insurer as soon as possible that the injury or disease was incurred by a Preferred Worker.]

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Amended and renumbered section (1) from OAR 436-110-0300(1); (2)-(8) from OAR 436-110-0340(1), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0326 Premium Exemption - Employer at Injury Activated

Premium Exemption is activated by the employer at injury as follows:

(1) A completed and signed *Employer at Injury, Premium Exemption and Wage Subsidy Agreement* must be sent to the division. The worker's agreement in writing to accept the new or modified regular job must accompany the agreement or the request will not be accepted.

(2) When approved by the division, the effective date for Premium Exemption is the "hire date" as defined in OAR 436-110-0005.

(3) If worksite modification is needed for the worker to perform all the required job duties within the injury-caused restrictions, the employer at injury is not eligible for Premium Exemption until all modifications are in place and verified by a representative of the division. The date of the verification will be considered the date the worker started work for the employer in employment for which benefits are requested.

(a) If the date of the verification done by the division is more than 150 days after the worker's claim closure, the employer at injury will have 30 days to send the completed and signed agreement to the division; and

(b) If the worker returns to regular or substantially similar employment, the job for which Premium Exemption is requested must meet "substantial modification" criteria as determined by the division in accordance with OAR 436-110-0380.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0327 Premium Exemption – Worker Activated

Premium Exemption is activated by the worker as follows:

(1) When an eligible Preferred Worker issued a *Preferred Worker Identification Card* accepts employment with Premium Exemption requested, the worker and employer must complete the *Preferred Worker Identification Card* and send it to the division. Upon approval by the division the effective date will be the hire date as defined in OAR 436-110-0005.

(2) If the worker returns to regular or substantially similar employment, the job for which Premium Exemption is requested must meet "substantial modification" criteria as

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determined by the division in accordance with OAR 436-110-0380 before Premium Exemption can be activated.

(3) Upon approval of Premium Exemption, the division will issue the worker a Preferred Worker Eligibility Card that shows the Premium Exemption start and end dates.

(4) The worker may use a Preferred Worker Eligibility Card to obtain new employment and to provide subsequent employers with Premium Exemption for the remainder of the three-year Premium Exemption period.

(5) Employers who subsequently employ a Preferred Worker must photocopy the Preferred Worker Eligibility Card as evidence of Premium Exemption, return the card to the worker, and distribute copies as follows:

(a) Send one copy to its insurer as notice that a Preferred Worker is employed using Premium Exemption; and

(b) Keep one copy on file.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0330 Claim Cost Reimbursement

(1) Claim Cost Reimbursement provides reimbursement to the insurer for claim costs when a Preferred Worker files a claim for injury or occupational disease while employed under Premium Exemption as follows:

(a) Reimbursements will be made for the life of the claim;

(b) Reimbursable claim costs include disability benefits, medical benefits, vocational costs in accordance with OAR 436-120-0720⁽⁹⁾, Claim Disposition Agreements in accordance with ORS 656.236, Disputed Claim Settlements in accordance with ORS 656.289, stipulations, as well as attorney fees awarded the worker or the worker's beneficiaries, and administrative costs;

(c) Reimbursable claims costs for denied claims include costs incurred up to the date of denial, but are limited to benefits the insurer is obligated to pay under ORS 656 and diagnostic tests, including insurer medical examinations necessary to determine compensability of the claim;

(d) The administrative cost factor to be applied to claim costs will be as published in *Bulletin 316*; and

(e) The claim shall not be used for ratemaking, individual employer rating, dividend calculations, or in any manner that would affect the employer's insurance premiums or premium assessments with the present or a future insurer. The insurer must be able to document that claim data will not affect the employer's rates or dividend.

(2) The insurer shall request Claim Cost Reimbursement as follows:

(a) All requests for reimbursement shall be made within one year of the quarter within which payment was made;

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(b) Quarterly reimbursement requests must be in the format the director prescribes by bulletin; and

(c) Reimbursement documentation shall include, but not be limited to:

(A) Net amounts paid. "Net amounts" means the total compensation paid less any recoveries including, but not limited to, third party recovery or reimbursement from the Retroactive Program, Reopened Claims Program, or the fund;

(B) Payment certification statement; and

(C) Any other information the division deems necessary.

(3) Requests for reimbursement shall not include:

(a) Claim costs for any injury which did not occur while the worker was employed with Premium Exemption;

(b) Costs incurred for conditions completely unrelated to the compensable claim;

(c) Costs incurred due to inaccurate, untimely, unreasonable, or improper processing of the claim;

(d) Penalties, fines or filing fees;

(e) Disposition amounts in accordance with ORS 656.236 (CDA) and 656.289 (DCS) not previously approved by the division;

(f) Costs reimbursed or outstanding requests for reimbursement from the Reopened Claims Program, Retroactive Program, or the fund; or

(g) Reimbursable Employer-at-Injury Program costs.

(4) Periodically, the division will audit the physical file of the insurer to validate the amount reimbursed. Reimbursed amounts shall be refunded to the division and, as applicable, future reimbursements denied if, upon audit, any of the following is found to apply:

(a) Reimbursement has been made for any of the items specified in section (3) of this rule;

(b) If claim acceptance as a new injury rather than an aggravation is questionable and the rationale for acceptance has not been reasonably documented;

(c) The separate payments of compensation have not been documented;

(d) The insurer included claim costs in any dividend or retrospective rating or experience rating calculations;

(e) The insurer is unable to provide applicable records relating to experience rating, retrospective rating, or dividend calculations at the time of audit or within 14 working days thereafter.

(5) If the conditions described in subsections (4)(a) through (e) of this rule are corrected and all other criteria of the rules are met, eligibility for reimbursement may be reinstated. If reimbursement eligibility is reinstated, any moneys previously reimbursed and then recovered will be reimbursed again according to these rules.

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(6) If an employer fails to not[^e]**ify its insurer of** the “Preferred Worker” status [on] **when the Form 801[.] is submitted** or fails to send its insurer a copy of the *Preferred Worker Eligibility Card*, and later notifies its insurer that the injury or disease was incurred by a Preferred Worker, the insurer shall correct all records previously filed which include claim costs in any dividend, retrospective rating, or any claim valuation for experience rating performed.

(7) A Claim Disposition Agreement according to ORS 656.236, a Disputed Claim Settlement according to ORS 656.289, or any stipulation or agreement of a claim subject to claim cost reimbursement from the fund must meet the following requirements for reimbursement:

(a) The insurer must obtain prior written approval of the disposition from the division. The proposed disposition shall be submitted to the division prior to submitting the disposition to the Workers’ Compensation Board for approval;

(b) A claim’s future liability and the proposed contribution from the fund must be a reasonable projection, as determined by the division, in order to be approved for reimbursement from the fund; and

(c) A request for approval of the proposed disposition shall include:

(A) The original proposed disposition, containing appropriate signatures and appropriate signature lines for division and Workers’ Compensation Board approval, which specifies the proposed assistance from the fund;

(B) A written explanation of how the calculations for the amount of assistance from the fund were made; and

(C) Other information as required by the division.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Amended and renumbered section (1) from OAR 436-110-0300(2); (2)-(7) from OAR 436-110-0260, 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0335 Wage Subsidy General Provisions

[1] Wage Subsidy provides an employer with partial reimbursement of a worker’s gross wages for a specified period. Wage Subsidy benefits are subject to the following conditions:

(1) Premium exemption must be activated to use Wage Subsidy, unless OAR 436-110-0310(5)(i) applies;

[a] **(2)** A Wage Subsidy is limited to a duration of 183 calendar days and a monthly reimbursement rate of 50 percent, except for a worker with an exceptional disability as defined in OAR 436-110-0005. For a worker with an exceptional disability, the Wage Subsidy duration is limited to 365 calendar days and a monthly reimbursement rate of 75 percent;

[b] **(3)** A *Wage Subsidy Agreement* may be interrupted once for reasonable cause and extended to complete the *Wage Subsidy Agreement* on a whole workday basis. Reasonable cause includes, but is not limited to, personal or family illness, death in the worker’s family, pregnancy of the worker or worker’s spouse, a compensable injury to the worker, participation in an Employer-at-Injury Program, or layoff. A layoff must be a minimum of 10 consecutive work

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days. A period of time during which the employer is without workers' compensation insurance coverage is not "reasonable cause," and no extension will be granted;

[(c)] **(4)** A Preferred Worker's pay structure must be the same as the pay structure for other workers employed in similar jobs by the employer;

[(d)] **(5)** Wages subject to reimbursement must be within the prevailing wage range for that occupation. The prevailing wage range is determined by the following method:

[(A)] **(a)** First, examine the wages paid by the employer for other workers doing the same job;

[(B)] **(b)** If no other workers are doing the same job, a labor market survey of the local labor market may be conducted; and

[(C)] **(c)** If the labor market survey does not support the wage rate requested, the division will determine the wage subject to reimbursement;

[(e)] **(6)** Preferred Worker Program Wage Subsidies may not be combined with subsidies from other sources;

[(f) Except as otherwise provided in these rules, a Preferred Worker may use Wage Subsidy twice during an eligibility period, once with one employer and once with a different employer; and]

[(g)] **(7)** If the worker's employer changes during the *Wage Subsidy Agreement* period due to a sale of the business, incorporation, or merger, the agreement can be transferred to the new employer by an addendum to the agreement approved by the division as long as the worker's job remains the same and the new employer is eligible under OAR 436-110-0310[.];

(8) Upon approval of the *Wage Subsidy Agreement*, the division will send a copy of the agreement to the worker if it is worker activated, and will always send a copy of the agreement with a *Wage Subsidy Reimbursement Request* form to the employer;

(9) If the division does not approve the *Wage Subsidy Agreement*, the division will notify the party who made the request, in writing. Such notice will give the basis for the decision, the applicable rule(s), and the appeal rights as given in OAR 436-110-0007;

(10) The employer may request reimbursement of wages paid to the worker, based on the amount agreed to on the *Wage Subsidy Agreement* form or the amount paid to the worker, whichever is less. An employer may request reimbursement, interruption, or extension of a Wage Subsidy for a part of a day the worker worked, but the part of the day reimbursed or interrupted will be counted as a whole workday toward the total duration of the Wage Subsidy;

(11) Requests for reimbursement must not be submitted more frequently than once every two weeks. A completed and signed *Wage Subsidy Reimbursement Request* form must be submitted to the division with a copy of the worker's payroll records. The payroll record must state the dates (daily or weekly), hours, wage rate, and the worker's gross wage. Payroll records must be a legible copy and compiled in accordance with generally accepted accounting procedures; and

(12) All requests for reimbursement must be made within one year of the *Wage*

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Subsidy Agreement termination date.

[(2) A Wage Subsidy may be requested by a worker and employer and the employer reimbursed as follows:

(a) A Wage Subsidy Agreement must be completed and signed by the worker and employer and submitted to the division. The agreement must be sent to the division within 90 days of the worker's hire date, except when Premium Exemption is activated under OAR 436-110-0325(3)(b). In calculating the 90-day period, the hire date will not be included, and if the 90th day falls on a Saturday, Sunday, or legal holiday, the next business day will be considered the end of the 90-day period. Upon division approval, the Wage Subsidy will begin on the worker's hire date;

(b) Upon approval of the Wage Subsidy Agreement, the division will send a copy of the Agreement to the worker and a copy of the agreement with a Wage Subsidy Reimbursement Request form to the employer;

(c) If the division does not approve the Wage Subsidy Agreement, the division shall notify the worker and employer in writing. Such notice shall give the basis for the decision, the applicable rule(s), and the appeal rights as given in OAR 436-110-0007;

(d) The employer may request reimbursement based on the wage agreed to on the Wage Subsidy Agreement form or the wage paid the worker, whichever is less. Wages subject to reimbursement must have been paid the worker. An employer may request reimbursement, interruption, or extension of a Wage Subsidy for a part of a day the worker worked, but the part of the day reimbursed or interrupted will be counted as a whole workday toward the total duration of the Wage Subsidy;

(e) Requests for reimbursement shall be made no more frequently than once every two weeks. A completed and signed Wage Subsidy Reimbursement Request form must be submitted to the division with a copy of the worker's payroll records. The payroll record shall state the dates (daily or weekly), hours, wage rate, and the worker's gross wage. Payroll records shall be a legible copy and compiled in accordance with generally accepted accounting procedures; and

(f) All requests for reimbursement shall be made within one year of the Wage Subsidy Agreement termination date.]

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered section (1) from OAR 436-110-0300(3); (2) from OAR 436-110-0340(2), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

Hist.: Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0336 Wage Subsidy – Employer at Injury Activated

Wage Subsidy is activated by the employer at injury as follows:

(1) The Wage Subsidy is combined with Premium Exemption.

(2) When Premium Exemption is approved, Wage Subsidy is also approved and is effective on the same date.

(3) The employer at injury may use Wage Subsidy once during an eligibility period.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0337 Wage Subsidy – Worker Activated

A Wage Subsidy may be requested by a worker and employer and the employer reimbursed as follows:

(1) The worker must be eligible for wage subsidy on the hire date.

(2) A Wage Subsidy Agreement must be completed and signed by the worker and employer and submitted to the division.

(3) When approved by the division, the effective date for the wage subsidy is the "hire date" as defined in OAR 436-110-0005.

(4) Except as otherwise provided in these rules, a Preferred Worker may use Wage Subsidy twice during an eligibility period, once with one employer and once with a

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different employer.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX**436-110-0345 Obtained Employment Purchases – General Provisions**

(1) An Obtained Employment Purchase is assistance necessary for a worker to accept a job or **to** continue employment **within three years of the hire date**. If the employer pays for the same assistance for other workers performing the same job, it does not qualify as an Obtained Employment Purchase. These purchases may be provided for a job with a non-subject employer in Oregon, as long as that employer complies with the appropriate workers' compensation law. All purchases become the worker's property upon employment in the job for which they are required.

(2) Obtained Employment Purchases are limited to:

(a) Tuition, books, and fees for instruction provided by an educational entity accredited or licensed by an appropriate body in order to update existing skills or to meet the requirements of an obtained job. Maximum reimbursement is \$1000;

(b) Temporary lodging, meals, and mileage to attend instruction when overnight travel is required. The cost of meals, lodging, public transportation, and use of a personal vehicle shall be reimbursed at the rate of reimbursement for State of Oregon classified employees as published in *Bulletin 112*. Lodging, meals, and mileage are limited to a combined period of one month, and the total maximum reimbursement is \$500;

(c) Tools and equipment mandatory for employment, such as starter sets. Purchases shall not include items the worker possesses, duplicate worksite modification items, or vehicles. Maximum reimbursement is \$2,000;

(d) Clothing required for the job, not including clothing the worker already possesses. Clothing does not include accessories such as jewelry, scarves, wallets, purses, or other items which are not basic clothing. Maximum reimbursement is \$400;

(e) Moving expenses for a job if the new worksite is in Oregon and more than 50 miles from the worker's primary residence. When the worker's permanent disability from the injury precludes the worker from commuting the required distance, moving expenses may be provided to move within 50 miles of the worker's primary residence or within the distance the worker commuted for work at claim opening. Moving expenses are limited to one use per eligibility. Reimbursement is limited to:

(A) The cost of moving household goods weighing not more than 10,000 pounds and reasonable costs of meals and lodging for the worker. The cost of meals, lodging, public transportation, and use of a personal vehicle shall be reimbursed at the rate of reimbursement for State of Oregon classified employees as published in *Bulletin 112*. Reimbursement of lodging and meals are limited to a maximum period of two weeks. Reimbursement of mileage for one personal vehicle is limited to a single one-way trip; and

(B) Rental allowance for the worker's primary residence limited to first month's rent as specified in the rental agreement, non-refundable deposit in an amount not to exceed the first

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month's rent, and a required credit check for that residence;

(f) Initiation fees, or back dues and one month's current dues, required by a labor union; and

(g) Occupational certification, licenses, and related testing costs, drug screen testing, physical examinations, or membership fees required for the job. Maximum reimbursement is \$500.

(3) Upon division approval, the division will send a copy of the agreement and, if applicable, a completed *Authorization for Payment* form or other instrument of payment.

(4) A worker, employer, vocational assistance provider, or insurer may request reimbursement by submitting to the division a legible copy of an invoice or receipt showing payment has been made for the item(s) purchased. Reimbursement will be made for only those items and costs approved and paid.

(5) If the division does not approve the Obtained Employment Purchase, the division will notify the party who requested the assistance in writing. Such notice will give the basis for the decision, the relevant rule(s), and the appeal rights as given in OAR 436-110-0007.

(6) Costs of Obtained Employment Purchases may be paid by reimbursement, by an *Authorization for Payment*, or by other instrument of payment approved by the director.

(7) The division will not purchase directly or otherwise assume responsibility for Obtained Employment Purchases.

(8) Reimbursed costs will not be charged by the insurer to the employer as claim costs or by any other means.

(9) All requests for reimbursement must be made within one year of the *Obtained Employment Purchase Agreement* end date.

(10) Once the division provides an Obtained Employment Purchase item, the division will not replace that item unless the item was stolen, or destroyed by nature or an act of God, or in the case of clothing for new employment, the clothing previously provided is no longer usable. The loss must be uninsured and the division may require a police report to verify the loss.

[(3) Conditions for the use of Obtained Employment Purchases are as follows:

(a) Except for moving expenses, the worker and employer must submit a completed *Obtained Employment Purchase Agreement* listing item(s) that are required of all workers performing the job for which the worker is employed. If no other workers are performing the same job, the division may conduct a local labor market survey to determine whether similar employers require the items to perform the job. If the labor market survey does not support the Obtained Employment Purchase item(s) requested, the division will determine the appropriate Obtained Employment Purchase item(s);

(b) Once the division provides an Obtained Employment Purchase item, the division will not replace that item unless the item was stolen or destroyed by nature or an act of God or, in the case of clothing for new employment, the clothing previously provided is no longer usable. The loss must be uninsured and the division may require a police report to verify the loss;

(c) Except as otherwise provided in these rules, a Preferred Worker may use each Obtained Employment Purchase category twice during a period of eligibility, once with one employer and once with a different employer; and

(d) A Preferred Worker who is receiving return-to-work follow-up services under OAR 436-120 may be eligible for Obtained Employment Purchases. This is the only condition under which a worker receiving vocational assistance under OAR 436-120 may be eligible for these purchases.

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(4) Obtained Employment Purchases may be requested by a Preferred Worker as follows:

(a) The worker shall call or write the division directly for assistance in receiving Obtained Employment Purchases; and

(b) The *Obtained Employment Purchase Agreement* form must be completed and signed by the worker and employer and submitted to the division. If the request is for moving expenses only, the employer's signature is not required.

(5) Premium Exemption must be active on the worker's hire date in order to use Obtained Employment Purchases. Obtained Employment Purchases will only be provided after the worker's hire date, except as follows:

(a) If purchase(s) are necessary prior to the worker's hire date and prior to activation of Premium Exemption, the worker and employer must submit the completed and signed *Preferred Worker Identification Card* to the division along with the *Obtained Employment Purchase Agreement* form;

(b) If purchase(s) are necessary prior to the worker's hire date and Premium Exemption has previously been activated, the employer may be required to submit a letter of intent to hire along with the *Obtained Employment Purchase Agreement*;

(c) Subsections (a) and (b) of this section do not apply to workers receiving vocational assistance under OAR 436-120. These workers may only request Obtained Employment Purchases for purchases made after the worker's hire date; or

(d) If Obtained Employment Purchases are to be used with a non-subject employer in Oregon, Premium Exemption is not activated. The employer must comply with the appropriate workers' compensation law.

(6) Upon division approval, the division will send a copy of the agreement and, if applicable, a completed *Authorization for Payment* form or other instrument of payment.

(7) A worker, employer, vocational assistance provider, or insurer may request reimbursement by submitting to the division a legible copy of an invoice or receipt showing payment has been made for the item(s) purchased. Reimbursement will be made for only those items and costs approved and paid.

(8) If the division does not approve the Obtained Employment Purchase, the division shall notify the worker and employer in writing. Such notice shall give the basis for the decision, the relevant rule(s), and the appeal rights as given in OAR 436-110-0007.

(9) Costs of Obtained Employment Purchases may be paid by reimbursement, by an *Authorization for Payment*, or by other instrument of payment approved by the director.

(10) The division shall not purchase directly or otherwise assume responsibility for Obtained Employment Purchases.

(11) Reimbursed costs shall not be charged by the insurer to the employer as claim costs or by any other means.

(12) All requests for reimbursement shall be made within one year of the *Obtained Employment Purchase Agreement* end date.]

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist.: Amended and renumbered sections (1)-(3) from OAR 436-110-0300(4); (4)-(8) from OAR 436-110-0340(3), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0346 Obtained Employment Purchases – Employer at Injury Activated
Conditions for use of Obtained Employment Purchases by the employer at injury
are as follows:

(1) Premium Exemption must be active on the worker's hire date in order to use Obtained Employment purchases.

(2) The employer must submit a completed *Obtained Employment Purchase Agreement* listing item(s) that are required of all workers performing the job for which the worker is employed. If no other workers are performing the same job, the division may conduct a local labor market survey to determine whether similar employers require the items to perform the job. If the labor market survey does not support the Obtained Employment Purchase item(s) requested, the division will determine the appropriate Obtained Employment Purchase item(s).

(3) The employer at injury may use each Obtained Employment Purchase category once during a period of eligibility.

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(4) Obtained Employment Purchases will only be provided after the worker's hire date, except as follows:

(a) If purchases are necessary prior to the worker's hire date, the employer at injury must submit the written job acceptance by the worker with the agreement form.

(b) Subsection (a) of this section does not apply to workers receiving vocational assistance under OAR 436-120. If the worker is receiving vocational assistance, the employer at injury may only request Obtained Employment Purchases for purchases made after the worker's hire date.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0347 Obtained Employment Purchases – Worker Activated

Conditions for use of Obtained Employment Purchases by a worker are as follows:

(1) Except for moving expenses, the worker and employer must submit a completed Obtained Employment Purchase Agreement listing item(s) that are required of all workers performing the job for which the worker is employed. If no other workers are performing the same job, the division may conduct a local labor market survey to determine whether similar employers require the items to perform the job. If the labor market survey does not support the Obtained Employment Purchase item(s) requested, the division will determine the appropriate Obtained Employment Purchase item(s).

(2) Premium Exemption must be active on the worker's hire date in order to use Obtained Employment Purchases, unless OAR 436-110-0310(5)(i) applies. Obtained Employment Purchases will only be provided after the worker's hire date, except as follows:

(a) If purchase(s) are necessary prior to the worker's hire date and prior to activation of Premium Exemption, the worker and employer must submit the completed and signed Preferred Worker Identification Card to the division along with the Obtained Employment Purchase Agreement form.

(b) If purchase(s) are necessary prior to the worker's hire date and Premium Exemption has previously been activated, the employer may be required to submit a letter of intent to hire along with the Obtained Employment Purchase Agreement.

(c) Subsections (a) and (b) of this section do not apply to workers receiving vocational assistance under OAR 436-120. These workers may only request Obtained Employment Purchases for purchases made after the worker's hire date.

(3) If Obtained Employment Purchases are to be used with a non-subject employer in Oregon, Premium Exemption is not activated. The employer must comply with the appropriate workers' compensation law.

(4) Except as otherwise provided in these rules, a Preferred Worker may use each Obtained Employment Purchase category twice during a period of eligibility, once with one employer and once with a different employer.

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(5) A Preferred Worker who is receiving return-to-work follow-up services under OAR 436-120 may be eligible for Obtained Employment Purchases. This is the only condition under which a worker receiving vocational assistance under OAR 436-120 may be eligible for these purchases.

(6) Obtained Employment Purchases may be requested by a Preferred Worker as follows:

(a) The worker must call or write the division directly for assistance in receiving Obtained Employment Purchases. Requests made beyond three years from the hire date will not be considered.

(b) The *Obtained Employment Purchase Agreement* form must be completed and signed by the worker and employer and submitted to the division. If the request is for moving expenses, only the worker's signature is required.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0350 Worksite Modification – General Provisions

(1) Worksite Modification means altering a worksite in Oregon, or available for inspection and modification in Oregon, by purchasing, modifying, or supplementing equipment, or changing the work process, to enable a worker to work within the limitations imposed by compensable injuries or occupational diseases. **Worksite Modification may also include the means to protect modifications purchased by the Preferred Worker Program in an amount not to exceed \$2500.**

(2) Conditions for the use of Worksite Modification assistance are as follows:

[(a) The division must approve, by authorized signature, a completed and signed *Worksite Modification Agreement* form, as specified in section (3) of this rule, prior to any reimbursement or *Authorization for Payment*;

(b) Modifications may be provided for requests received within three years from the following:

(A) The hire date of the Preferred Worker; or

(B) The date the worker returns to regular employment or substantially similar employment if the employment begins prior to claims closure or within three years after claim closure;]

[(c) **(a)** Modifications will be provided to allow the worker to perform the job duties within the worker's injury-caused permanent limitations. In order to determine appropriate Worksite Modifications, the Reemployment Assistance Unit consultants have discretion to use reports by a medical service provider specific to the worker, specific documented "best practices" described by a medical service provider or authority, and their own professional judgement and experience;

[(a) **(b)** A job analysis which includes the duties and physical demands of the job before and after modification may be required to show how the modification will overcome the worker's limitations. The job analysis may be submitted to the attending physician for approval before the modification is performed;

[(c) **(c)** Modifications may be provided to allow a worker to return to regular employment, as described in OAR 436-110-0380;

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[(f)] A worker may use Worksite Modification assistance once with one employer and once with a second employer, or twice with the same employer if there is a job change;

[(g)] Modifications after June 30, 1990, are limited to a maximum of \$25,000 on the claim which qualified the worker for assistance. A modification over \$25,000 may be provided for a worker with an exceptional disability as defined in OAR 436-110-0005;]

[(d)] Modifications are limited to a maximum of \$25,000 for one job. A modification over \$25,000 may be provided if the worker has an exceptional disability as defined in OAR 436-110-0005;

[(h)] **[(e)]** Modifications not to exceed \$1,000 may be provided which would reasonably be expected to prevent further injury or exacerbation of the worker's accepted condition. Appropriateness of this type of modification will be determined by a Reemployment Assistance Consultant based upon his or her professional judgment and experience, reports by a medical **service** provider specific to the worker, or specific documented "best practices" described by a medical **service** provider or authority. Costs of the modification(s) are included in the calculation of the total Worksite Modification costs;

[(i)] **[(f)]** Modifications limited to a maximum of \$2,500 may be provided for on-the-job training under OAR 436-120 or other similar on-the-job training programs including, but not limited to, those administered by the state of Oregon Employment Department and Department of Human Resources, Vocational Rehabilitation Division, except when the employer at injury is the trainer. When the employer at injury is the trainer, a modification of up to \$25,000 may be provided. A modification will not be approved for any other type of training;

[(g)] Modifications limited to \$2,500 may be provided to protect the items approved in the Worksite Modification Agreement from theft, or damage from the weather. Insurance policy premiums will not be paid;

[(j)] **[(h)]** When a vehicle is being modified, the vehicle owner must provide proof of ownership and insurance coverage. The worker must have a valid driver license;

[(k)] **[(i)]** Rented or leased vehicles and other equipment will not be modified;

[(l)] **[(j)]** Modifications must be reasonable, practical, and feasible, as determined by the division. The director shall have final authority to make Worksite Modification decisions involving the use of the fund;

[(m)] **[(k)]** When the division determines the appropriate form of modification and the worker or employer requests a form of modification equally appropriate but with a greater cost, upon division approval, funds equal to the cost of the form of modification identified by the division may be applied toward the cost of the modification desired by the worker or employer;

[(n)] **[(l)]** A modification may include tools, equipment, fixtures, or furnishings not customarily provided by an employer, installation of equipment or machinery, or alteration of permanent structures;

[(o)] **[(m)]** A modification may include rental of tools, equipment, fixtures, or furnishings to determine the feasibility of a modification, and consultative services consisting of engineering, architectural, ergonomic, and similar services required to determine the feasibility, to recommend, to design, or to perform a Worksite Modification;

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[(p)] **(n)** Rental of Worksite Modification items and consultative services require division approval and are limited to a cost of up to \$3,500 each. The cost for rental of Worksite Modification items and consultative services does not apply toward the total cost of a Worksite Modification;

[(q)] **(o)** Modification equipment shall become the property of the employer, worker, or worker leasing company's client on the "end date" of a *Worksite Modification Agreement* or when the worker's employment ends, whichever occurs first. The division shall determine ownership of Worksite Modification equipment prior to approving an agreement and has the final authority to assign property. When assigning ownership of equipment the division will consider several factors including but not limited to the following:

- (A) Whether it is unique to the worker, employer, or client;
- (B) Whether it is mobile, portable, and easily transferable;
- (C) Whether it is integral to the employer's or client's business operation;
- (D) Whether it is attached to the employer's or client's property, premises, or equipment;

and

- (E) Whether it is installed in or on the worker's personal property or premises;

[(r)] **(p)** The division may request a physical capacities evaluation, work tolerance screening, or review of a job analysis to quantify the worker's injury-caused permanent limitations. The cost of temporary lodging, meals, public transportation, and use of a personal vehicle necessary for a worker to participate in one or more of these required activities shall be reimbursed at the rate of reimbursement for State of Oregon classified employees as published in *Bulletin 112*. The cost of the services described in this subsection does not apply toward the total cost of a Worksite Modification;

[(s)] **(q)** If the property provided for the modification is damaged, in need of repair, or lost, the division will not repair or replace the property;

[(t)] **(r)** The employer shall not dispose of the property provided for the modification or reassign it to another worker while the worker is employed in work for which the modification is necessary or prior to the end of the agreement without division and worker approval. Failure to repair or replace the property, or inappropriate disposal or reassignment of the property, may result in sanctions under OAR 436-110-0900; and

[(u)] **(s)** The worker shall not dispose of the property provided for the modification while employed in work for which the modification is necessary or prior to the end of the agreement without division approval. Failure to repair or replace the property, or inappropriate disposal of the property, may result in sanctions under OAR 436-110-0900.

(3) A Worksite Modification may be requested by a worker **or employer at injury** and costs reimbursed as follows:

(a) The worker [and] **or** employer may develop a Worksite Modification without division assistance or may contact the division directly for Worksite Modification assistance;

(b) Upon contact from the worker or employer, the division will provide instruction on

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how to proceed with the modification. The division may schedule an on-site visit to assist in identifying appropriate forms of modification;

(c) When the cost of the modification is \$2,500 or less, a *Worksite Modification Agreement (Limited to \$2,500)* form may be completed [and signed by the worker and employer] and sent to the division. The division may request additional support information;

(d) When the cost of the modification is over \$2,500, the division will issue a *Worksite Modification Agreement* form upon determination that the modification is appropriate;

(e) Upon division approval, the division will send copies of the agreement to the [employer and worker] **parties to the agreement**. The division will send the party purchasing the modification an *Authorization for Payment* form or other instrument of payment approved by the director;

(f) The worker, employer, **private rehabilitation organization**, or insurer may request reimbursement by submitting to the division [a legible copy of an invoice or receipt indicating "paid"] **proof of payment** for the items purchased. Reimbursement will be made for only those items and costs approved and paid; and

(g) If the division does not approve the Worksite Modification, the division shall notify the [worker and employer] **party who made the request**, in writing. Such notice shall give the basis for the decision, the relevant rule(s), and the appeal rights as given in OAR 436-110-0007.

(4) Costs of Worksite Modifications may be paid by reimbursement, an *Authorization for Payment*, or by other instrument of payment approved by the director.

(5) The division shall not purchase directly or otherwise assume responsibility for Worksite Modifications.

(6) Reimbursed costs shall not be charged by the insurer to the employer as claims costs or by any other means.

(7) If the cost for a single item, except for a chair, is over \$2,500, three (3) competitive quotes shall be obtained. If a chair costs over \$1,000, three (3) competitive quotes shall be obtained. Quotes are competitive when they are from three different vendors and the items being quoted meet the same specifications. If three competitive quotes are not available, documentation of efforts to obtain three competitive quotes shall be provided. The lowest quote shall normally be selected. However, other criteria may be considered including, but not limited to, past vendor performance, delivery time, and vendor availability to service or maintain the item.

(8) All requests for reimbursement shall be made within one year of the *Worksite Modification Agreement* termination date.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Amended and renumbered sections (1)-(2) from OAR 436-110-0300(5); (3) from OAR 436-110-0340(4), 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

Amended XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0351 Worksite Modification – Employer at Injury Activated

Conditions for use of Worksite Modifications by the employer at injury are as follows:

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(1) The employer at injury may use Worksite Modification assistance once for a job provided for their injured worker, or a second time if the worker changes to another job with the employer at injury within allowable timeframes.

(2) Modifications are limited to a maximum of \$25,000 on the claim which qualified the worker for assistance. A modification over \$25,000 may be provided if the worker has an exceptional disability as defined in OAR 436-110-0005.

(3) The division must approve, by authorized signature, a completed and signed Worksite Modification Agreement prior to any reimbursement or Authorization for Payment.

(4) Modifications may be provided for requests received within 180 days from the worker's claim closure date. Additional modifications may be provided under an approved agreement by addendum for requests received within three years from the date the worker started work for the employer in employment for which the Worksite Modification request was made.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed: XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0352 Worksite Modification – Worker Activated

Conditions for use of Worksite Modification assistance by the worker are as follows:

(1) The division must approve, by authorized signature, a completed and signed Worksite Modification Agreement form, prior to any reimbursement or Authorization for Payment.

(2) Modifications may be provided for requests received within three years from the following:

(a) The date the worker started work for the employer in employment for which the Worksite Modification request was made;

(b) The date the worker returned to regular employment or substantially similar employment if the employment began prior to claims closure; or

(c) The date of claim closure.

(3) A worker may use Worksite Modification assistance once with one employer and once with a second employer, or twice with the same employer if there is a job change.

(4) Modifications after June 30, 1990, are limited to a maximum of \$25,000 on the claim which qualified the worker for assistance. A modification over \$25,000 may be provided for a worker with an exceptional disability as defined in OAR 436-110-0005. This maximum is not reduced by the use of worksite modifications by the employer at injury.

Stat. Auth.: ORS 656.726(4), 656.622

Stats. Implemented: ORS 656.622

Hist: Filed: XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0380 Return to Regular Employment

(1) If the worker has an accepted Oregon disabling claim and is unable to return to

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regular employment as a result of permanent restrictions from the accepted conditions of that claim. Worksite Modification may be provided to allow **the** [a] worker to return to regular employment or employment substantially similar in nature, duties, **and** responsibilities, [knowledge, skills, and abilities.] regardless of **whether** the worker['s eligibility for the] **has received a Preferred Worker [Program] Card. The employment for which benefits are requested by the worker or employer at injury will not be considered to have started until all necessary modifications are in place and verified by a representative of the division.**

[1] If the division determines the modification is not substantial as defined in section (3) of this rule, a *Preferred Worker Identification Card* cannot be activated.

[2] If the division determines the modification is substantial as defined in section (3) of this rule and the worker does not have a *Preferred Worker Identification Card*, the division will issue a card after the modification is in place. If the worker already has an Identification Card, it may be activated.]

[3] **(2)** The division shall determine a substantial modification based upon the extent of the modifications necessary to accommodate the worker's permanent limitations from compensable Oregon injuries. The modifications provided must be sufficient for the worker to perform all required job duties within these restrictions. The modification is "substantial" if any one of the factors given in subsections (a), (b), and (c) of this rule apply. When making its decision, the division may consider other factors in addition to whether the modification significantly impacts the following:

- (a) Changes how the worker performs essential job duties;
- (b) Reduces the physical exertion required; or
- (c) Affects the employer's work process.

[4] **(3)** The provision of the following Worksite Modification items or similar items by themselves do not constitute a substantial modification:

- (a) Ergonomic chair;
- (b) Anti-fatigue mat;
- (c) Slant board;
- (d) Anti-vibration wrap for tools;
- (e) Special pen or pencil;
- (f) Footrest;
- (g) Wristrest; or
- (h) Changing the height of a work surface.

(4) If the division determines the modification is not substantial as defined in sections (2) and (3) of this rule, Premium Exemption cannot be activated. If the worker does not have a Preferred Worker Card, none will be issued.

(5) If the division determines the modification is substantial as defined in sections (2) and (3) of this rule the following will occur:

- (a) If the worker does not have a Preferred Worker Identification Card, the division**

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will issue a card after the modification is in place.

(b) If the worker already has a *Preferred Worker Identification Card*, it may be activated. The worker will be notified by the division in writing of his or her rights under these rules.

(c) If the employer at injury requested the assistance the division will notify the employer in writing and provide instructions about activating Premium Exemption.

Stat. Auth: ORS 656.622, 656.726(4)
Stats. Implemented: ORS 656.622
Hist: Filed 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97
Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01
Amended: XX/XX/XX as WCD Admin. Order 05-XXX, eff. XX/XX/XX

436-110-0850 Audits

(1) Insurers and employers are subject to periodic program and fiscal audits by the division. All reimbursements are subject to subsequent audits, and may be disallowed on any of the grounds set forth in these rules. Disallowed reimbursements may be recovered by the division directly or from future reimbursements by way of offset. If the division finds upon audit that procedures which led to disallowed reimbursements are still being used, the division may withhold further reimbursements until corrections satisfactory to the division are made.

(2) An insurer or employer shall maintain claim records, notices, worker payroll records, reports, receipts, and documentation of payment supporting reemployment assistance costs for which reimbursement has been requested or expenditure by *Authorization for Payment* has been made. These records shall be maintained for a period of three years after the last reimbursement request or expenditure by *Authorization for Payment*.

(3) The division reserves the right to visit the worksite to determine compliance with the agreement under which reemployment assistance has been provided.

Stat. Auth.: ORS 656.455, 656.622, 656.726(4), 731.475
Stats. Implemented: ORS 656.455, 656.622, 731.475
Hist: Filed 2/20/87 as WCD Admin. Order 1-1987, eff. 3/1/87
Amended 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88
Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90
Renumbered from OAR 436-110-100, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93
Amended 3/13/96 as WCD Admin. Order 96-056 eff. 4/5/96
Renumbered from OAR 436-110-0450, 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97
Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

436-110-0900 Sanctions

(1) Any person who knowingly makes any false statement or representation to the director or an employee of the director for the purpose of obtaining any benefit or payment from the Preferred Worker Program or who knowingly misrepresents the amount of a payroll, or knowingly submits a false payroll report, is subject to penalties under ORS 656.990.

(2) Reasons for the director to sanction an individual certified under OAR 436-120, a vocational assistance provider authorized under OAR 436-120, an agency of the State of Oregon, an insurer, an employer, or a Preferred Worker include, but are not limited to, the following:

(a) Misrepresenting information in order to obtain reemployment assistance. Two examples of misrepresentation are:

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(A) Changing a job description or job title where there are not corresponding job duty changes in order to obtain benefits; and

(B) Obtaining a worker's signature on an incomplete, incorrect, or blank agreements or reimbursement requests;

(b) Making a serious error or omission which resulted in the division approving a Preferred Worker Program agreement, issuing a Preferred Worker card, or reimbursing claim costs in error;

(c) Failing to abide by the terms and conditions of a Preferred Worker Program agreement;

(d) Failing to abide by the provisions of these rules or ORS 656.990;

(e) Failing to return required receipts or invoices;

(f) Submitting false reimbursement requests or job analyses;

(g) Altering an *Authorization for Payment* form or purchasing unauthorized items; or

(h) Failing to return a Preferred Worker card if requested by the division.

(3) Sanctions by the director may include one or more of the following:

(a) Ordering the person being sanctioned to repay the department for reemployment assistance costs incurred, including the department's legal costs;

(b) Prohibiting the person being sanctioned from negotiating or arranging reemployment assistance for such period of time as the director deems appropriate;

(c) Decertifying an individual or vocational assistance provider under the authority of OAR 436-120;

(d) Ordering an employer [and/] or worker ineligible for reemployment assistance for a specific period of time; and

(e) Pursuing civil or criminal action against the party.

Stat. Auth.: ORS 656.622, 656.726(4)

Stats. Implemented: ORS 656.622, 656.990

Hist: Filed 12/17/87 as WCD Admin. Order 12-1987, eff. 1/1/88

Amended 12/10/90 as WCD Admin. Order 30-1990, eff. 12/26/90

Renumbered from OAR 436-110-110, 1/21/93, WCD Admin. Order 93-050, eff. 3/1/93

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Amended and renumbered from OAR 436-110-0500, 8/28/97 as WCD Admin. Order 97-057, eff. 9/12/97

Amended 8/14/01 as WCD Admin. Order 01-056, eff. 10/1/01

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