Oregon
Kate Brown, Governor

Department of Consumer and Business Services
Workers' Compensation Division
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INDUSTRY NOTICE

Sept. 21, 2018

To: Workers' compensation insurers, self-insured employers, and service companies

Subject: **Application of OAR 436-060-0025(3) through (7)**

This notice provides a discussion of Oregon Administrative Rule (OAR) 436-060-0025(3) through (7) and examples for insurers and self-insured employers. It is intended to apply to the wage calculation for dates of injury on or after Feb. 21, 2018.

This notice is not an all-inclusive guide of the rule and does not change the language within the rule. The facts of each case should be evaluated separately with the rule applied to those facts.

UNDERSTANDING THE STRUCTURE OF THE ADMINISTRATIVE RULE (OAR 436-060-0025)

There are three basic steps to understanding the structure of OAR 436-060-0025.

- **Identify the wage category or categories** that apply to the worker's wages with the employer (for a period of up to 52 weeks before the date of injury or verification of disability caused by occupational disease). The categories are:
  - **Regular wages** (except sole proprietor, partner, officer of a corporation, or limited liability company member)
    - Regular wages are defined in OAR 436-060-0005(17)(b)
    - Workers employed through a union hiring hall are considered to have regular wages under OAR 436-060-0025(5)(d)
  - **Irregular wages** (except sole proprietor, partner, officer of a corporation, or limited liability company member)
    - Irregular wages are defined in OAR 436-060-0005(17)(a)
  - **Assumed wages** (employees with no wages, sole proprietors, partners, officers of a corporation, and limited liability company members)

- **Perform the calculation for each category identified**. OAR 436-060-0025(4) through (7).

- **Add the wages calculated within each category together** to get the worker's weekly wage.

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- **Example:** If a worker has regular wages and irregular wages, you would calculate the average weekly regular wages and the average weekly irregular wages. Then, you would add the two together to get the worker's average weekly wage.

UNDERSTANDING IRREGULAR WAGES

Get the wage records as soon as possible.

- When you get the wage records, **ensure the employer sends *all* of the wage records you need**. Some employers may inadvertently exclude less frequent payroll records, such as in-kind considerations, vacation pay, overtime, special pay, and bonuses. Please see OAR 436-060-0005(17) for the definition of wages.
- You will frequently need wage records for the **52 weeks** before the date of injury or verification of disability caused by occupational disease. This full 52-week history may not be necessary if the worker was employed less than 52 weeks or if the worker entered into a new wage earning agreement during that 52-week time period.
- ***Tip:*** The division has developed a statement about the employer's obligations on its webpage at https://wcd.oregon.gov/employer/Pages/worker-files-claim.aspx

Don't forget to inquire into the following:

- **New Wage Earning Agreements** during the 52-week period.
  - The new wage earning agreement is defined in OAR 436-060-0025(4)(a)(A). Examples:
    - A worker who changed job duties, perhaps due to a promotion or demotion.
    - A worker who changed hours worked, such as moving from part-time to full-time, or full-time to part-time.
  - ***Tip:*** An employer will likely not be aware of the definition of a new wage earning agreement under workers' compensation laws. Be sure to ask the right questions.
- **Pay Rate Change:** If the worker had a **pay rate change** during the relevant period, get the pay rates in effect on the date of injury or date of verification of disability caused by occupational disease.
  - ***Tip***: If the worker has numerous pay rates (such as a pay rate for regular time worked, a pay rate for overtime, a pay rate for shift differential, or pay rates for different job duties), you need to get the pay rate in effect on the date of injury for each of those categories. This is further demonstrated in Example C below.
- **Gaps:** If the worker had a **gap in earnings** of more than 14 consecutive calendar days that was not anticipated in the wage earning agreement, exclude this time when calculating the average irregular wages.
  - ***Tip:*** If you have a worker who has a break in employment, *Tye v. McFetridge*, 342 Or. 61, 149 P.3d 1111 (2006) may be helpful in determining whether it is a gap in earnings or a new wage earning agreement.

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Make sure to carefully review the wage records. *See* OAR 436-060-0005(17) for the definition of wages. The facts in each case can vary, but the following questions may help you identify some of the more common mistakes. **If you respond *no* to any of these questions, follow up with the employer to get the information you need.**

- Did the employer send you the proper time period?
  - ***Tip***: Make sure you look at the period of earnings and not the check dates. Example: Payroll issued on June 30, but it was for earnings from June 12 to June 26. You should view this as earnings only from June 12 to June 26.
- Is there enough information in the pay records to allow you to do the necessary math?
  - Example: Payroll runs through June 30, 2018, but the date of injury was June 28, 2018. You need to exclude June 28-30, 2018, from your calculation.
  - Example: You need to average hours to comply with the rules, but the pay records do not provide the hours worked at each pay rate.
- Did you confirm the wage amounts are gross wages? (Net wages are not used in the calculation of the worker's weekly wage.)
- Did you remember to look for and include other types of wages (including, but not limited to, bonuses that constitute wages, commissions, and tips)?
- Do you understand the circumstances surrounding possible in-kind considerations?
  - You may need to look at the contracts and ask about the intent of extra payments to clarify whether the payments are wages.
- Does the story seen in the pay records match what the employer has told you about the worker's employment?
  - **Example 1:** The employer reported there was not a gap in earnings of more than 14 days that was not anticipated, but the payroll records show three weeks without pay.
    - If you are unaware why this gap is present, you may need to follow up with the employer to confirm whether the gap was or was not anticipated in the wage earning agreement.
  - **Example 2:** The payroll records reflect a big jump in pay without a reported change in job duties.
    - In this situation, you may need to follow up with the employer to confirm whether the worker entered into a new wage earning agreement, such as a promotion, which resulted in the pay increase or if it was just a pay rate change where you need to apply the average hour's method.
  - If you see anything unusual, ask questions.

Complete the weekly wage calculation for your irregular wages. OAR 436-060-0025(4) provides the details for this calculation.

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EXAMPLES OF WAGE CALCULATIONS

Example A: Regular and irregular wages with a new wage earning agreement.

At the time of injury, Ms. Smith earned a salary plus commissions. In reviewing her 52-week employment history, she was initially employed as an assistant sales associate making $1,500 per month plus commissions. Twenty-six weeks before the injury, she was promoted to senior sales associate and was making $2,000 per month plus commissions (which are not paid on an hourly basis). Her commissions since becoming a senior sales associate totaled $10,000.

STEP ONE: Identify the wage category or categories. Ms. Smith earned regular wages (her salary), as well as irregular wages (her commissions).

STEP TWO: Perform the calculations:

<u>Regular Wages</u>
$2,000 (monthly wage) / 4.35 = $459.77

<u>Irregular Wages</u>
$10,000 (commissions earned under her new wage earning agreement) / 26 weeks = $384.62

Note: Twenty-six weeks is used since a change in the wage earning agreement occurred 26 weeks before the work injury.

STEP THREE: Add the wages in each category together.

$459.77 (average regular wages) + $384.62 (average irregular wages) = $844.39

Example B: Hourly employee who works varying hours, no pay rate change.

Mr. Garcia works as a retail clerk, with a regular rate of pay of $11.50 per hour and an overtime rate of pay of $17.25. His hours vary each week, and he occasionally earns overtime. In the 52 weeks before his work injury, he did not have a new wage earning agreement and no changes in his rates of pay. He worked an average of 32 hours per week earning a regular rate of pay and three hours per week earning overtime. His gross wages over the 52 weeks was $21,827.

STEP ONE: Identify the wage category or categories. Mr. Garcia works varying hours at an hourly wage, so he has irregular wages.

STEP TWO: Perform the calculations. Mr. Garcia's pay rate did not change in the relevant 52-week period, so you can average his 52 weeks of wages.

$21,827 / 52 weeks = $419.75

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STEP THREE: Add the wages together in each category.

This worker had wages only in the irregular wage category, nothing to add. $419.75 is the worker's weekly wage.

Example C: Hourly employee who works varying hours, pay rate changes.

Ms. Clark works as a retail clerk who, at the time of her injury, earned a regular rate of pay of $11.50 per hour and an overtime rate of pay of $17.25 per hour. Her hours vary each week and she occasionally works overtime. In the 52 weeks before her work injury, she had two changes in the rate of pay, but no new wage earning agreement. She worked the following:

- Four weeks earning a regular rate of pay of $11 per hour with an overtime rate of pay of $16.50 per hour
- Twenty-six weeks earning a regular rate of pay of $11.25 per hour with an overtime rate of pay of $16.88 per hour
- Twenty-two weeks earning a regular rate of pay of $11.50 per hour with an overtime rate of $17.25 per hour

In the 52 weeks preceding her injury, Ms. Clark worked an average of 35 hours per week at her regular rate of pay and two hours per week of overtime. Her gross wages during that time period were $22,401.26, which consists of irregular wages based on her hourly rates.

STEP ONE: Identify the wage category or categories. Ms. Clark works varying hours at an hourly wage, so she has irregular wages.

STEP TWO: Perform the calculations. Ms. Clark's pay rate changed in the relevant 52-week period, so the average hour's method applies. This requires calculation of the wage based on the average hours of each pay rate, and it requires averaging irregular wages paid at something other than an hourly rate.

AVERAGE HOURS CALCULATION: Given that there was no new wage earning agreement, it is appropriate to average hours over the complete 52-week period. Then, the average weekly hours worked at each pay rate must be multiplied by the pay rates at the time of injury.

Average weekly hours at the regular rate of pay: 35

Average weekly hours at the overtime rate of pay: 2

35 x $11.50 = $402.50 = per week average for regular pay

2 x $17.25 = $34.50 = per week average for overtime pay

$402.50 + $34.50 = $437 = per week average for irregular wages

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STEP THREE: Add the wages together in each category.

This worker had wages only in the irregular wage category, nothing to add. $437 is the worker's weekly wage.

Example D: Hourly employee who works varying hours with two rates of pay depending on the job duties being performed, and a pay rate change during the year.

Mr. Jones is employed at a local supermarket. In the morning, he drives a forklift to move merchandise around the store, and in the afternoon, he stocks shelves. His hours vary each week.

At the beginning of the applicable 52-week period, he earned $14.50 per hour while driving a forklift and $11.50 while stocking shelves. The employer subsequently implemented a cost-of-living increase, changing his wages while driving a forklift to $15 per hour and his wages while stocking shelves to $12 per hour. Over the course of the 52 weeks, Mr. Jones worked an average of 14 hours per week driving a forklift and an average of 18 hours per week stocking shelves.

STEP ONE: Identify the wage category or categories. Mr. Jones works varying hours at an hourly wage so he has irregular wages.

STEP TWO: Perform the calculations. Mr. Jones's pay rate did change in the relevant 52-week period, so you must average his hours over the 52-week period. Then, the average weekly hours worked at each pay rate must be multiplied by the pay rates at the time of injury.

Average weekly hours driving forklift: 14

Average weekly hours stocking shelves: 18

14 x $15 = $210 = per week average for driving forklift

18 x $12 = $216 = per week average for stocking shelves

$210 + $216 = $426 = per week average for irregular wages

STEP THREE: Add the wages together in each category.

This worker only had wages in the irregular wage category, nothing to add.

$426 is the worker's weekly wage.

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Example E: Intent of the wage earning agreement.

Ms. Stanford was hired as a caregiver earning $11.50 per hour, with varying hours each week. Three weeks after she was hired, she suffered an injury. During that time, she averaged 20 hours per week.

STEP ONE: Identify the wage category or categories. Ms. Stanford earned an hourly rate with varying hours, so she earned irregular wages.

STEP TWO: Perform the calculations. Ms. Stanford was employed for less than four weeks at the time of her injury, so the rate of compensation must be based on the intent of the worker's wage earning agreement in place at the time of injury, as confirmed by the employer and the worker.

Example F: Assumed wages.

Mr. Davis owns a limited liability company and earned $35,000 in the year preceding his injury. The employer's premium was calculated based on an assumed wage of $30,000.

STEP ONE: Identify the wage category or categories. Mr. Davis is a limited liability company owner, so he has an assumed wage.

STEP TWO: Perform the calculations.

Assumed wage was $30,000 per year.

$30,000 / 12 months = $2,500 per month

$2,500 per month / 4.35 = $574.71 per week

STEP THREE: Add the wages together in each category.

This worker had wages only in the assumed wage category, nothing to add.

$574.71 is the worker's weekly wage.

If you have questions about this notice, contact Audit Manager **Barbara Belcher** at 503-947-7687 or barbara.belcher@oregon.gov.

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Workers' Compensation Division

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