



STATE OF OREGON  
Legislative Counsel Committee

January 25, 2021

To: Cara Filsinger, Senior Policy Analyst/Legislative Coordinator  
Department of Consumer and Business Services

From: Sean Brennan, Senior Deputy Legislative Counsel

Subject: Use of “shall” as a form and style change in House Bill 2040

Following our conversation concerning the amendments to House Bill 2040, I wanted to note the reasons for the changes to the language of ORS 656.262, 656.268 and 656.277 other than the substantive provisions in the draft request. When possible, our office tries to update the language of the statutes to reflect our current form and style conventions, which are adopted as rules of the respective chambers of the Legislative Assembly. In making those changes, our intent is **not** to make substantive changes to the legal effect of the statutory language, but rather to make that language more consistent with modern understanding and practice. These form and style conventions include a specific use of “shall” to indicate a command to a particular person or entity to perform a particular function.

As an example, “shall” is appropriate in a legislative command such as, “The insurer or self-insured employer shall classify the claim as disabling or nondisabling within 14 days of the request.” Here, the legislative directive is to require an insurer or self-insured employer to do something—that is, classify the claim as disabling or nondisabling within 14 days after a request.

By contrast, using “shall” to indicate a state of being at which the legislature wishes something to arrive is not the convention. Here, “must” is the appropriate term. For example, the legislature in this command simply states the condition that it intends will come to be: “Permanent disability compensation [*shall*] **must** be redetermined for work disability only.” In this legislative command, the focus is not on any one person or entity’s responsibility to redetermine permanent disability compensation, but rather that permanent disability compensation be redetermined by whichever person or entity is responsible for the redetermination. Using “shall” in this instance would create the false impression that this redetermination will occur without any agent performing the redetermination—that it will happen automatically, without any intervention of any kind, and that its happening is certain. The actual intent of the legislature, however, is to set up a goal and to leave the achievement of that goal to the responsible person or entity.

If a process or result will occur spontaneously, as a matter of course or otherwise without intervention, using “shall” might in that instance be appropriate. For example, “shall” might be appropriate in a statement like “The sun shall rise in the morning.” This is not an instance of the legislature commanding the sun to rise, but rather a reflection of the inevitable fact of the sun’s rising, without the agency or intervention of any person. The instances in which

we have changed “shall” to “must” in the bill draft, however, are of the type discussed in the previous paragraph.

Encl.