

5-Year Rule Review Report

Rule number: OAR 438-011-0055 (Third Party Election Letter)

Date adopted: December 3, 2013

Advisory committee used? X Yes No

If yes, identify members. After completing its review, the agency must provide advisory committee members a copy of its report. ORS 183.405(3).

Advisory committee members: Nelson Hall, William Replogle, Jennifer Flood, Steven Schoenfeld, Barbara Woodford. Roger Pearson served as facilitator.

1. Did the rule achieve its intended effect? X Yes No

a. What was the intended effect?

OAR 438-011-0055 was promulgated to clarify the parties' respective responsibilities in the Third Party "election/assignment" process, and to better explain the consequences of the events described in ORS 656.593.

Section (1) of the rule requires a carrier ("paying agency") to serve a written demand ("third party election" letter) on the claimant/beneficiaries/legal representative ("the claimant") if the paying agency intends to require the claimant to exercise the right of election in ORS 656.578 to recover damages from a noncomplying employer or third person ("third party"). Section (2) requires the "paying agency" to include with this "third party election" letter a separate enclosure prescribed by Board bulletin that explains the "third party election/assignment" process. If the claimant does not read or understand English, or is otherwise unable to understand written language, the paying agency shall provide this information in a language or other manner that ensures the claimant's understanding. *Id.* Section (3) provides that the "third party election" letter must: (a) contain the information prescribed in ORS 656.583; and (b) include a statement that the claimant has been provided with the informational enclosure prescribed by Board bulletin in section (2).

b. How did the rule succeed or fail in achieving this effect?

OAR 438-011-0055 has provided a vehicle for consistent and accurate communication of Third Party election rights and responsibilities between the paying agency and the claimant. The Board is unaware of any problems associated with the implementation and practice of this rule among the stakeholders. No Third Party disputes have come to the Board in which the requirements of the rule have been an issue.

2. Was the fiscal impact statement ___ underestimated or ___ overestimated or X just about right or ___ unknown? (Check one).
- a. What was the estimated fiscal impact? The Board Members did not identify any significant fiscal impact as a result of the rule.
- b. What was the actual fiscal impact? Precise fiscal impact is not determinable, but there is no reason to believe the estimated fiscal impact was under or over estimated.
- c. If the answer to question 2 is unknown, briefly explain why.
3. Have subsequent changes in the law required the rule be repealed or amended? ___ Yes X No If yes, explain.

The Board received one comment concerning this question from a claims administrator, which pertained to supplemental disability benefits distributed from the Workers' Benefit Fund under ORS 656.210(2)(b) and OAR 436-060-0035(12). This rule only addresses the Third Party Election Letter process, and does not expressly pertain to a paying agency's reimbursement or lien. Furthermore, pursuant to ORS 656.593(4), the Workers' Benefit Fund is included as a "paying agency." Nonetheless, in the future, the Board plans to examine its bulletin (which carriers are required under the rule to include in their "election" notices) to determine whether supplementation/clarification of the bulletin is necessary to address this particular comment.

4. Is the rule still needed? X Yes ___ No Explain.

OAR 438-011-0055 assists the parties in implementing ORS 656.593 by providing clarity and consistency in Third Party election assignments. Based on the absence of "election-related" disputes submitted for Board resolution since the adoption of the rule, the Members believe that the rule is still needed.

Dated this 1st day of April, 2019.

Workers' Compensation Board

by: Constance L. Wold
Constance L. Wold, Board Chair

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Steve Lanning, Board Member

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