



## Changes and confusion in new Oregon Division 60 rules

By Bin Chen and Laura Newbrough ■ March 2, 2017

Effective January 1, 2017, the amended Oregon OAR 436-060 is intended, according to the Oregon Workers' Compensation Division (WCD), to reduce confusion by streamlining the calculation method for temporary disability (OAR 436-060-0025), as well as eliminating many of the exceptions to what types of wages and other earnings must be included when determining the worker's rate of compensation.

On November 28, 2016, the WCD passed Admin. Order 16-055, which amended OAR 436-060 effective January 1, 2017. The Department believes simplification of the calculation method is necessary to ensure workers receive accurate and predictable benefits.

The new rule aims to streamline the process for calculating the rate of temporary disability benefits by:

- Providing that for all workers with irregular wages, or earnings that are not based on wages alone, the rate of temporary total disability (TTD) must be calculated based on the worker's total earnings for the period up to 52 weeks before the date of injury, with some restrictions;
- Providing the insurer may not include any gap in employment of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average earnings;
- Removing the provision that the rate of TTD for workers employed through union hall call boards must be computed based on a forty-hour work week.

Calculating average weekly wage (AWW) now requires the insurer to first identify regular or irregular wages. The WCD has clarified the definitions for Wage, Irregular Wage and Regular Wage, which must first be considered. Based on the new rule, these are defined as<sup>1</sup>:

**"Wage"** means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and includes the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954, as amended, and the regulations

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promulgated pursuant thereto, or the amount of actual tips reported, whichever amount is greater. (This is actually a statutory definition that has always been there and not new.)

**“Irregular wage”** means a money rate paid at variable rate, or is paid on unscheduled or unpredictable intervals, including but not limited to workers who are seasonally employed, on call, paid hourly, or are paid by piece rate.

**“Regular wage”** means a money rate which is paid at a constant rate at uniform intervals including, but not limited to, wages paid on a daily or weekly basis. Hourly wages may be considered regular if the same number of hours are worked each pay period.

For example: Mary is a school teacher who receives an annual salary of \$52,000.00. The WCD explained at the October 24, 2016 rulemaking hearing that her AWW would be calculated under the new OAR 436-060-0025(5)(c).  $\$52,000.00/52 \text{ weeks} = \$1,000.00$ . You will note that the Department explained that there is no longer a need for the “school teacher” rule because subsection 5(c) should adequately address workers who are paid an annual salary.

However, if Mary also coaches and receives other pay in addition to her annual salary, in which case her pay may be at a variable rate, it is possible that her AWW should be calculated on the “irregular wage” basis.

How does the new rule expand the types of earnings that are included in the calculation of AWW in comparison with the old rule?

- The new term “remuneration” (part of the “total earnings”) arguably does more than simply replace the term ‘consideration’ in 0025(5)(c).<sup>2</sup> According to Webster’s Third New Int’l Dictionary, “remuneration” refers to “pay[ing] an equivalent to (a person) for a service, loss, or expense.”
- The definition of “wage” includes tips (i.e., no need for a separate rule addressing tips).
- Overtime likely should be included even if not worked on a regular basis.
- Incentive pay probably should be considered even if not regularly earned.
- Arguably all bonus pay should be considered, even end-of-the-year and other one-time bonuses paid at the employer’s discretion (e.g., Christmas bonus and bonus for completing job training).

Some improvements in the new rule:

- Clearer definition of what is considered to be an extended gap.
- Workers employed through union hall call boards are no longer treated differently from other workers. The old rule required the AWW for workers employed through union hall call boards to be computed based on a 40-hour work week.

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- In the old rule, where there has been a change in the wage earning agreement due only to a pay increase or decrease during the 52 weeks prior to the date of injury, insurers needed to use the worker's average weekly hours worked for the 52 week period, or lesser period as required in (5)(a)(A) of this section, multiplied by the wage at injury to determine the worker's current average weekly earnings. The new rule eliminates this complex and time-consuming calculation requirement.

There will be a much more detailed explanation of the rule changes at the Oregon Claims School, held March 22, 2017 at McMenamins Kennedy School. [Click here to register.](#)

If you get lost in these new calculation methods, are not sure what a regular or irregular wage is or have other questions about temporary disability calculations, an Oregon-practice attorney at Reinisch Wilson Weier PC can walk you through the details. ■

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<sup>1</sup> ORS 656.005(29)

<sup>2</sup> 436-060-0025(4)(a): "Total earnings" means all wages, salary, commission and other remuneration for services rendered under the worker's wage earning agreement with the employer.

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