

# **Report to the Legislative Assembly 2019 Annual Rulemaking Report**

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February 2020



## Executive Summary

**TO:** Oregon Legislative Assembly

**FROM:** Lou Savage, Acting Director

**RE:** 2019 Rulemaking Activities

House Bill 4106 (2016) asks state agencies to report annually on permanent and temporary rulemaking actions. In 2019, the Department of Consumer and Business Services adopted, amended, suspended or repealed a total of 233 rules. The department processed 13 temporary rulemakings that adopted, amended, or suspended a total of 21 rules. The following is a synopsis of the department’s temporary rulemaking activities.

Description of Rulemaking	Action Taken	Oregon Administrative Rule (OAR) Numbers
Building program delegation rules (Building Codes Division)	Amend	OAR 918-020-0090, 918-020-0095, 918-020-0105
Prefabricated structure plan review Clarification (Building Codes Division)	Amend	OAR 918-311-0060, 918-780-0040
Aviation Hangar Fire Suppression (Building Codes Division)	Adopt	OAR 918-460-0107
Sleeping lofts and ladders (Building Codes Division)	Adopt	OAR 918-480-0181
Building Permit Process for Existing Buildings without Valid Certificate of Occupancy (Building Codes Division)	Adopt	OAR 918-001-0400
Inspector and Plans Reviewer certification renewal changes (Building Codes Division)	Adopt	OAR 918-098-1026
Standard bronze and silver health benefit plans (Division of Financial Regulation)	Amend	OAR 836-053-0013
Amendment to Oregon Reinsurance Program Payment Parameters for 2018 (Division of Financial Regulation)	Amend	OAR 836-150-0040
Amendment to Insurer Administrative Charge Calculation and Rebate Credit Schedule (Oregon Health Insurance Marketplace)	Amend	OAR 945-001-0002, 945-030-0020
Apportionment of permanent impairment based on a pre-existing condition (Workers’ Compensation Division)	Amend	OAR 436-035-0007, 436-035-0012, 436-035-0014
Adoption of new medical billing codes for 2020 (Workers’ Compensation Division)	Amend	OAR 436-009-0004, 436-009-0010, 436-009-0023, 436-009-0040, 436-009-0080

An electronic version of this report is available at <https://www.oregon.gov/dcbs/news-info/Pages/rule-making.aspx>. For questions, please contact:

Theresa Van Winkle | Legislative Director, Director’s Office  
 (office) 503-947-7867 | (cell) 971-600-4595  
[theresa.a.vanwinkle@oregon.gov](mailto:theresa.a.vanwinkle@oregon.gov)



## For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking

### Building Codes Division

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 2

Amended: 15

Repealed: 28

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 4

Amended: 5

Repealed: 0

(b) A list of the rules:

Adopted: OAR 918-001-0400, 918-098-1026, 918-460-0107, 918-480-0181

Amended: OAR 918-020-0090, 918-020-0095, 918-020-0105, 918-311-0060, 918-780-0040

Repealed:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).

## **1. OAR chapter 918, division 020 – Delegation of Programs to Local Jurisdictions**

918-020-0090, Program Standards  
918-020-0095, Program Assumption Procedures  
918-020-0105, Renewal of Existing Programs

**Need for temporary rules:** The Building Codes Division (the division) adopted temporary rules April 23, 2018, to address program delegation standards based on advice from the Department of Justice (DOJ). Those rules have been repealed. The division was directed to seek a formal opinion from DOJ to clarify program delegation constitutional issues. The division adopted temporary rules while waiting for the formal opinion. The formal opinion has been published, and there are bills being considered by the legislature that address these issues. The division has been directed to maintain the temporary rules that are needed to address those communities that would otherwise need to renew their building program operation period.

**Justification of temporary rules:** The Building Codes Division (the division) adopted temporary rules April 23, 2018, to address program delegation standards based on advice from the Department of Justice (DOJ). Those rules have been repealed. The division was directed to seek a formal opinion from DOJ to clarify program delegation constitutional issues. The division adopted temporary rules while waiting for the formal opinion. The formal opinion has been published, and there are bills being considered by the legislature that address these issues. These rules are justified to address those communities that would otherwise need to renew their building program operation period, and to create clarity for cities and counties while the legislature considers the issues.

The temporary rules were in effect until October 15, 2019.

## **2. OAR chapter 918, division 311 – Miscellaneous Electrical Rules**

918-311-0060, Electrical Plan Review for Prefabricated Structures

## **OAR chapter 918, division 780 – Plumbing Fees, Permits, Inspections**

918-780-0040, Plumbing Plan Reviews

**Need for temporary rules:** This temporary rule is needed to clarify when plan review is required for prefabricated structures. The standards across specialty code areas need to be consistently applied throughout the state. The misapplication of the plan review standards for prefabricated structures creates financial harm and causes unnecessary delays for manufacturers and purchasers of prefabricated structures.

**Justification of temporary rules:** Without a temporary rule, plan review standards could be misapplied creating a situation where prefabricated structures would receive unequal treatment throughout the state. The legislature created a system where all building codes are to apply uniformly throughout the state. A failure to act promptly would result in serious prejudice to the public interest or the interest of the parties involved by allowing for the inequitable treatment of prefabricated structures, resulting in financial harm and project delays.

The temporary rules were in effect until October 19, 2019.

**3. OAR chapter 918, division 460 – Structural and Energy Efficiency Specialty Codes**  
918-460-0107, Aviation Hangar Fire Suppression

**Need for temporary rules:** This rule is needed because stakeholders in the aviation industry have indicated there are potential projects depending on a proposed rule change to aviation hangar fire suppression requirements. The Building Codes Structures Board approved the rule at its August 1, 2018, meeting. A public hearing was held on September 18, 2018. The Office of the State Fire Marshal (OSFM) submitted oral testimony at the hearing, and previously submitted written testimony raising concerns about changes to the code requirements. Because the code provisions the rule adopts impact OSFM, the division does not want to move forward absent a clear indication of support on the record from OSFM.

The division has not yet received that written support for the rule change, and therefore is proceeding with a temporary rule to allow projects to move forward while the rulemaking record can be made more complete with regards to the position of OSFM.

**Justification of temporary rules:** This rule is justified because the Building Codes Structures Board approved the rule change, there are pending projects wishing to utilize the code provisions it adopts, and the division wants additional time to develop a complete rulemaking record for a permanent rule, including input from OSFM.

The temporary rule was in effect until December 1, 2019.

**4. OAR chapter 918, division 480 – One- and Two-Family Dwelling Specialty Code**  
918-480-0181, Dwelling Units Containing a Loft

**Need for temporary rules:** This temporary rule is needed to amend the Oregon Residential Specialty Code to comply with the mandate of ORS 455.615 (2017 House Bill 2737). The statute requires the Building Codes Division (the division) to amend the state building code to allow sleeping lofts and ladders or alternating tread devices as the primary means of egress from a sleeping loft for small homes. This rule amends the Oregon Residential Specialty Code to meet this requirement by allowing sleeping lofts with ladder or alternating tread device access.

This statement of need and justification takes into consideration the requirements specified in ORS 183.534 and OAR 813-025-0015 regarding housing impacts for single family dwellings. There is no cost increase for these rules provisions, because the rules create an option for builders to add sleeping lofts with ladder or alternating tread device access. The provisions are not mandatory on any builder.

**Justification of temporary rules:** This rule is intended to meet the requirements of ORS 455.615 (HB 2737 (2017)). These standards have been in effect since January 1, 2018. During the 2019 session the legislature passed HB 2423 (2019) which adopts a Small Home Specialty Code and repeals ORS 455.615. The Small Home Specialty Code becomes effective on October 1, 2019. The division does not want to cause undue disruption to the industry and wants to keep consistent standards in place until the Small Home Specialty Code becomes effective.

The temporary rule was in effect until September 30, 2019.

## **5. OAR chapter 918, division 001 – Procedural Rules**

918-001-0400, Building Permit Process for Existing Buildings without a Valid Certificate of Occupancy

**Need for temporary rules:** This rule is needed to clarify the process and procedure to obtain a building permit for a building that has been occupied or used without a valid certificate of occupancy. This rule only applies to areas of the state where a Building Codes Division employee is the building official. Currently there is no written process to assist a building owner in these areas of the state that would like to purchase a building permit and obtain a valid certificate of occupancy. The rule is also needed to assist other state and local agencies with regards to the authority to regulate occupied buildings without appropriate certificates of occupancy.

**Justification of temporary rules:** This rule is necessary to avoid serious injury or prejudice to the public interest, members of the public that are users of buildings, and building owners. Without a written process of how to obtain a building permit and subsequently a valid certificate of occupancy for a building without a valid certificate of occupancy, owners of buildings without a valid certificate of occupancy face confusion and uncertainty in how to obtain a building permit and a valid certificate of occupancy. Without a valid building permit and a valid certificate of occupancy, these building owners cannot take advantage of the benefits provided by a valid building permit and a valid certificate of occupancy.

The temporary rules are in effect until February 8, 2020.

## **6. OAR chapter 918, division 098 – Certification Rules**

918-098-1026, 2019 Oregon Inspector Certification Renewal Process

**Need for temporary rules:** In October 2019, the 2019 Oregon Structural Specialty Code (OSSC) will become effective. This code changed significantly, including a new model energy code. The Building Codes Division (BCD) is also undergoing a major change in technology and will be testing its new licensing software this fall. Given the importance of the OSSC code change, as well as the challenge in timing and technology, it is necessary to extend the certification renewal deadline out to February 1, 2020. This rule is necessary clarify the extension of the renewal deadline for certified persons and to clarify renewal requirements for the 2019 Oregon Inspector Certification renewal period.

**Justification of temporary rules:** Current rules do not allow for changes to renewal deadlines and requirements necessary to accommodate adaptation to new technology and necessary code change training. Adoption of this rule will provide clarity regarding renewal deadlines and requirements for certified persons and allow BCD to begin providing education and training to Oregon’s inspectors and plans reviewers.

The temporary rules are in effect until February 27, 2020.

## **7. OAR chapter 918, division 020 – Delegation of Programs to Local Jurisdictions**

918-020-0090, Program Standards

918-020-0095, Program Assumption Procedures

918-020-0105, Renewal of Existing Programs

**Need for temporary rules:** The Building Codes Division (the division) adopted temporary rules April 23, 2018, to address program delegation standards based on advice from the Department of Justice (DOJ). Those rules have been repealed. The division was directed to seek a formal opinion from DOJ to clarify program delegation constitutional issues. The division adopted temporary rules while waiting for the formal opinion. The division has been directed to maintain the temporary rules that are needed to address those communities that would otherwise need to renew their building program operation period.

**Justification of temporary rules:** The Building Codes Division (the division) adopted temporary rules April 23, 2018, to address program delegation standards based on advice from the Department of Justice (DOJ). Those rules have been repealed. The division was directed to seek a formal opinion from DOJ to clarify program delegation constitutional issues. The division adopted temporary rules while waiting for the formal opinion. The formal opinion has been published, and there are bills being considered by the legislature that address these issues. These rules are justified to address those communities that would otherwise need to renew their building program operation period, and to create clarity for cities and counties while legal issues are considered.

The temporary rules are in effect until April 11, 2020.



## For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking

### Director's Office

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 0

Amended: 2

Repealed: 0

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 0

Suspended: 0

(b) A list of the rules:

Adopted:

Amended:

Suspended:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).





## For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking

### Division of Financial Regulation

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 20

Amended: 46

Repealed: 1

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 2

Repealed: 0

(b) A list of the rules:

Adopted:

Amended: OAR 836-053-0013, 836-150-0040

Repealed:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).

## **1. OAR chapter 836, division 053 – Health Benefit Plans**

836-053-0013, Oregon Standard Bronze and Silver Health Benefit Plans

**Need for temporary rules:** ORS 743B.130 requires the Department of Consumer and Business Services (DCBS) to prescribe by rule the form, level of coverage, and benefit design for bronze and silver health benefit plans that must be offered by insurance carriers. These plans must meet federal requirements issued by the Department of Health and Human Services (HHS). Each year, HHS updates the actuarial value (AV) calculator used for determining coverage levels. Changes may include costs, plan designs, populations, developments in the function and operation of the AV calculator and other actuarially relevant factors.

As a result of changes made to the federal AV calculator for 2020, the AV for the standard bronze and silver plans prescribed in OAR 836-053-0013 exceeded federal requirements. Failure to update the rule would result in DCBS requiring carriers to submit plans that are illegal with respect to federal law.

This year, HHS released the AV calculator later than in previous years. As a result, rulemaking would not be able to be completed in time for carriers to submit plans in May for review.

**Justification of temporary rules:** Health insurers are required to submit individual and small group rate filings by May 15, 2019 for DFR to be able to review and approve them in time for open enrollment. In order to file these rates, DCBS must provide insurers with federally compliant standard bronze and silver plan templates.

The federal AV calculator is typically released in December, allowing DCBS enough time to issue permanent rules prescribing federally compliant health benefit plan templates. However, this year, the federal AV calculator was not released until mid-January. The compressed timeline did not allow sufficient time for DCBS to conduct a permanent rulemaking, meeting Administrative Procedures Act requirements, and issue a final exhibit in time for carriers to incorporate it into their filings.

Because DCBS did not have the necessary federal documents to begin the rulemaking process, a temporary rule is needed to provide federally compliant templates to carriers with adequate lead time for the industry to make rate filings for individual and small group plans.

The temporary rule was in effect until September 13, 2019.

## **2. OAR chapter 836, division 053 – Health Benefit Plans**

836-053-0013, Oregon Standard Bronze and Silver Health Benefit Plans

**Need for temporary rules:** ORS 743B.130 requires the Department of Consumer and Business Services (DCBS) to prescribe by rule the form, level of coverage, and benefit design for bronze and silver health benefit plans that must be offered by insurance carriers. These plans must meet federal requirements issued by the Department of Health and Human Services (HHS). Each year, HHS updates the actuarial value (AV) calculator used for determining coverage levels. Changes may include costs, plan designs, populations, developments in the function and operation of the AV calculator and other actuarially relevant factors.

As a result of changes made to the federal AV calculator for 2020, the AV for the standard bronze and silver plans prescribed in OAR 836-053-0013 exceeded federal requirements. Failure to update the rule would result in DCBS requiring carriers to submit plans that are illegal with respect to federal law.

This year, HHS released the AV calculator later than in previous years. As a result, rulemaking would not be able to be completed in time for carriers to submit plans in May for review.

**Justification of temporary rules:** Health insurers are required to submit individual and small group rate filings by May 15, 2019 for DFR to be able to review and approve them in time for open enrollment. In order to file these rates, DCBS must provide insurers with federally compliant standard bronze and silver plan templates.

The federal AV calculator is typically released in December, allowing DCBS enough time to issue permanent rules prescribing federally compliant health benefit plan templates. However, this year, the federal AV calculator was not released until mid-January. The compressed timeline did not allow sufficient time for DCBS to conduct a permanent rulemaking, meeting Administrative Procedures Act requirements, and issue a final exhibit in time for carriers to incorporate it into their filings. Because DCBS did not have the necessary federal documents to begin the rulemaking process, a temporary rule is needed to provide federally compliant templates to carriers with adequate lead time for the industry to make rate filings for individual and small group plans.

The temporary rule was in effect until September 13, 2019.

### **3. OAR chapter 836, division 150 – Oregon Reinsurance Program**

#### **836-150-0040 - Reinsurance Parameters**

**Need for temporary rules:** These rules increase the coinsurance rate that will be used to calculate payments by the Oregon Reinsurance Program for the 2018 benefit year. The rules are necessary to ensure that the program achieves its statutory purposes of stabilizing rates and premiums for individual health benefit plans and providing greater financial certainty to consumers of health insurance in this state.

**Justification of temporary rules:** These rules are necessary to ensure that payments made by the Oregon Reinsurance Program for the 2018 benefit year will align with the assumptions that were used to set 2018 premium rates for Oregon's individual market.

In the summer of 2017, the Oregon Department of Consumer and Business Services (DCBS) approved premium rates for 2018 individual health benefit plans. The approved rates for each carrier offering individual health benefit plans in 2018 included a six percent reduction to account for the estimated impact of the Oregon Reinsurance Program (ORP). The six percent reduction was calculated based on the assumption that total payments made by the ORP for 2018 would equal \$90 million. DCBS subsequently established payment parameters by rule for the 2018 benefit year that were intended to yield total reinsurance payments of \$90 million for 2018.

DCBS has reviewed the actual reinsurance eligible claims submitted by individual health insurers for 2018 and determined that the currently adopted payment parameters will result in total reinsurance payments of about \$76.7 million, approximately \$13.3 million lower than originally projected. By increasing the coinsurance rate, these rules will ensure that total payments will equal \$90 million.

Because the Oregon Reinsurance Program rules require DCBS to issue 2018 reinsurance payments to eligible insurers by the end of this year, adoption of a permanent rule is impracticable to achieve the statutory aims of the Oregon Reinsurance Program. This timeline does not allow DCBS to adopt these rules using through a full notice and comment rulemaking.

For these reasons, failure to adopt these rules to pay out the total amount of funding budgeted for the ORP will result in serious prejudice to health insurers and consumers, and could prevent the ORP from fulfilling its statutory purpose.

The temporary rule is in effect until April 21, 2020.



## For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking

### Health Insurance Marketplace

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 0

Amended: 1

Repealed: 0

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 2

Suspended: 0

(b) A list of the rules:

Adopted:

Amended: OAR 945-001-0002, 945-030-0020

Suspended:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).

## **1. OAR chapter 945, division 001 – Procedural Rules**

### **OAR chapter 945, division 030 – Administrative Charge for Operational Expenses**

945-001-0002, Oregon Standard Bronze and Silver Health Benefit Plans

945-030-0020, Establishment of Administrative Charge Paid by Insurers

**Need for temporary rules:** The administrative charge calculation in the current rules does not accurately reflect the amount to be refunded to carriers. The amendment ensures that the calculation takes into account the entire ending fund balance and shortens the time to credit the rebate in full from 24 months to 12 months.

The amendment to 945-001-0002 adds the definition of “biennium” to OAR Chapter 945, and the amendment to 945-030-0020 makes changes to the calculation and rebate schedule.

**Justification of temporary rules:** Failure to immediately amend the rule will result in miscalculation of the amount that the Marketplace must refund to carriers.

Consumers who rely on services, education, and outreach provided by the Marketplace would suffer as result because the amount refunded would negatively impact the Marketplace’s budget and could impact services.

OAR 945-030-0020 requires the Marketplace to calculate the refund by September 30, 2019. There is not time to conduct a regular rulemaking prior to September 30, 2019 to fix the calculation error. Filing the amendment via temporary rule will allow the Marketplace to correct the calculation error prior to the September 30, 2019 deadline.

Additionally, as part of this rulemaking, OAR 945-001-0002, which are the definitions for chapter 945, were amended to add the definition for “biennium” to the chapter for clarity. The department intends to conduct a rulemaking seeking to make the changes permanent before the expiration of these temporary rules.

The temporary rules are in effect until March 17, 2020.



## **For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking**

### **Oregon OSHA**

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 0

Amended: 14

Repealed: 1

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 0

Suspended: 0

(b) A list of the rules:

Adopted:

Amended:

Suspended:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).



## **For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking**

### **Workers' Compensation Board**

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 1

Amended: 5

Repealed: 0

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 0

Suspended: 0

(b) A list of the rules:

Adopted:

Amended:

Suspended:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).





# For Department of Consumer and Business Services' annual report to the Legislative Assembly on agency rulemaking

## Workers' Compensation Division

As required by enrolled House Bill 4106 (2016) no later than February 1 of each year, an agency that is subject to ORS 183.335 shall provide a report to the Legislative Assembly, in the manner provided in ORS 192.245, regarding all rules that the agency adopted, amended, repealed, or suspended during the preceding 12-month period. The report must include:

1. The number of rules adopted, amended or repealed in accordance with ORS 183.335(2) and (3), i.e., through permanent rulemaking:

Adopted: 4

Amended: 70

Repealed: 2

2. With respect to rules adopted, amended or suspended using the procedure described in ORS 183.335(5), i.e., through temporary rulemaking:

(a) The number of rules:

Adopted: 0

Amended: 8

Suspended: 0

(b) A list of the rules:

Adopted:

Amended: OAR 436-009-0004, 436-009-0010, 436-009-0023, 436-009-0040, 436-009-0080, 436-035-0007, 436-035-0012, 436-035-0014

Suspended:

(c) A statement of need for each rule and all of the agency's findings that a failure to act promptly would result in serious prejudice to the public interest or the interest of parties concerned, and

(d) For each rule, an explanation of why proceeding under ORS 183.335 (5) was the most appropriate method for adopting, amending or suspending the rule and why it was not appropriate to proceed in accordance with ORS 183.335 (2) and (3).

## **1. OAR chapter 436, division 035 – Disability Rating Standards**

436-035-0007, General Principles

436-035-0012, Social-Vocational Factors (Age/Education/Adaptability) and the Calculation of Work Disability

436-035-0014, Pre-existing Conditions and Combined Conditions

**Need for temporary rules:** Temporary rules are needed to align the Disability Rating Standards with the decision of the Oregon Supreme Court in *Caren v. Providence Health System Oregon*, 365 Or 466 (2019). The court concluded that, before impairment can be apportioned based on a preexisting condition, there must be an accepted and denied combined condition. Some existing provisions in the rules are not consistent with this requirement.

**Justification of temporary rules:** Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. The effects of the Supreme Court decision in *Caren v. Providence Health System Oregon*, 365 Or 466 (2019) were immediate. Current rules include provisions that conflict with *Caren*.

The agency finds that issuing temporary rules under ORS 183.335(5) is appropriate because aligning the rules with the *Caren* decision will minimize confusion, litigation, and potential compliance issues, and promote the accurate rating of permanent impairment.

The agency finds that issuing permanent rules under ORS 183.335(2) and (3) is not appropriate because current rules conflict with the *Caren* decision. Leaving these conflicts in place during the time required for permanent rulemaking could promote confusion and error in the rating of permanent impairment, and possibly increase litigation.

The temporary rules are in effect until February 29, 2020.

## **2. OAR chapter 436, division 009 – Oregon Medical Fee and Payment**

436-009-0004, Adoption of Standards

436-009-0010, Medical Billing and Payment

436-009-0023, Ambulatory Surgical Center (ASC)

436-009-0040, Fee Schedule

436-009-0080, Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

**Need for temporary rules:** Temporary rules are needed to allow health care providers and workers' compensation insurers to use 2020 medical billing codes on and after Jan. 1, 2020.

**Justification of temporary rules:** Failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned. Delay in adoption of up-to-date codes creates procedural friction in workers' compensation billing and payment. Adoption of 2020 codes will keep workers' compensation billing codes consistent with industry standards. The agency finds that issuing temporary rules under ORS 183.335(5) is appropriate because it will avert administrative burdens to health care providers, workers' compensation insurers, and self-insured employers we would expect with delayed adoption of 2020 codes. Without these temporary rule changes: providers and payers would be required to use only 2019 codes until the agency can formally adopt new codes effective April 1, 2020 (projected); workers' compensation bills would have to be processed differently than bills for private health insurance, Medicare, etc.; providers using new codes would be subject to bill rejection; and insurers submitting data containing new codes to the agency would be subject to civil penalties. In addition,

workers' access to quality health care is jeopardized if health care providers perceive workers' compensation care as too burdensome.

The agency finds that issuing permanent rules under ORS 183.335(2) and (3) is not appropriate because updated billing codes are not published by the Centers for Medicare and Medicaid Services and others in time for Oregon to adopt changes using standard (permanent) rulemaking procedures.

The temporary rules are in effect until June 28, 2020.