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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 836
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE REGULATION

FILED

11/28/2022 3:21 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Revisions to Oregon Employee Counting Methodology

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/22/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Karen Winkel
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/15/2022

TIME: 9:00 AM - 9:45 AM

OFFICER: Michael Schopf

ADDRESS: Labor & Industries Building

350 Winter St. NE

Basement, Conf Rm E

Salem, OR 97301

SPECIAL INSTRUCTIONS:

This is a hybrid meeting conducted in-person and virtually via Microsoft Teams:

Join on your computer, mobile app or room device

Meeting ID: 214 150 748 988

Passcode: WA5fFv

Or call in (audio only)

+1 503-446-4951,,636655626# United States, Portland

Phone Conference ID: 636 655 626#

NEED FOR THE RULE(S)

These rules make a technical correction to the counting methodology used to determine whether an employer is a "large employer" or "small employer" when purchasing a group health benefit plan in Oregon.

ORS 743B.050(26) defines a small employer as an employer with an average of at least one but not more than 50 full-time equivalent employees and gives the Oregon Department of Consumer and Business Services (DCBS) authority to adopt a methodology for determining the number of employees by rule. ORS 743B.020(2) requires that the counting

methodology adopted by DCBS must be consistent with the method the federal Small Business Health Options Program (SHOP) uses to determine whether an employer is a small employer.

45 CFR § 155.20 defines “small employer” for purposes of the SHOP as “an employer who employed an average of at least one but not more than 50 employees on business days during the preceding calendar year and who employs at least one employee on the first day of the plan year.” 45 CFR § 155.20 also states that, for purposes of the SHOP, the number of employees must be determined using the method set forth in section 4980H(c)(2) of the Internal Revenue Code. Importantly, the IRS rules implementing section 4980H(c)(2) generally require an employer to consider all “hours of service,” when determining its number of employees, including any hours worked by temporary or seasonal workers during a calendar year.

DCBS previously adopted OAR 836-053-0015 to define the term “small employer” for purposes of the Oregon Insurance Code. OAR 836-053-0015 requires insurers and producers to follow the guidance titled “Revised Counting Methodology for Determining Small or Large Group,” which is incorporated as Exhibit A to the rule. (Exhibit A).

Despite the statutory requirement for the counting methodology adopted by DCBS to align with the counting methods used by the SHOP, Exhibit A currently instructs insurers and producers not to consider temporary and seasonal employees when determining the number of employees. Excluding these employees does not align with the IRS counting method under section 4980H and thus is not consistent with the counting method used by the federal SHOP as required by ORS 743B.020.

To resolve this conflict, these proposed rules would adopt a revised guidance document titled “Second Revised Counting Methodology for Determining Small or Large Group” as Exhibit B to OAR 836-053-0015. Exhibit B is substantially identical to Exhibit A, except that Exhibit B removes the instruction to exclude temporary and seasonal employees when determining the number of employees. Under the proposed rules, insurance carriers and producers would be required to begin using Exhibit B for plan years beginning on or after July 1, 2023.

DCBS’ Division of Financial Regulation (DFR) convened a Rules Advisory Committee (RAC) to review and provide feedback on the proposed rules. DFR invited representatives of health insurers, insurance producers, consumer groups, the Oregon Health Insurance Marketplace, and the general public to participate. The RAC met on October 11, 2022 via virtual teleconference. RAC participants included representative of insurance producers who work with small businesses, and many of whom are small businesses themselves.

Based on the information available to DCBS, the proposed rules would not have any additional fiscal or economic impact on state agencies, local governments, the public, nor small businesses beyond the underlying statutory requirements.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Draft rules are available from Karen Winkel, Rules Coordinator, Division of Financial Regulation located at 350 Winter St. NE, Salem, OR 97301 and are available on the division’s website:
<https://dfr.oregon.gov/laws-rules/Pages/proposed-rules.aspx>.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

A Rules Advisory Committee (RAC) was consulted regarding this racial equity statement. The rule most directly affects licensed health insurers and insurance producers (including small businesses) who will be required to apply revised guidance when determining an employer’s size for purposes of purchasing group health benefit plans under the Oregon

Insurance Code. It is possible that the changes made under the rule may cause a small number of employers formerly considered "small employers" to be re-classified as "large employers," however the rule is not expected to affect the overall number of employers that offer health insurance, the total number of Oregonians enrolled in group health benefit plans, or the demographic make-up of those enrollees. Therefore, this rule is not anticipated to have any direct impact, positive or negative, on racial equity. We have no information to suggest that the rule will have a disparate impact on any particular group of consumers.

FISCAL AND ECONOMIC IMPACT:

The primary cost of compliance with the proposed rules will fall on licensed health insurers, who may be required to review or revise their business processes and/or application forms to ensure compliance with the revised rules. Based on financial filings made to DFR, no insurers meet the definition of a small business under ORS 183.310, because no insurer is independently owned and operated.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Based on information currently available to DCBS, the proposed rule would not have a fiscal or economic impact on state agencies, or local government units.

The proposed rule could cause a limited number of employers that were considered "small employers" under DCBS' previous counting methodology to be reclassified as "large employers." In particular, employers that averaged just under 50 employees under the previous methodology and that employer significant numbers of temporary and/or seasonal employees could now be considered large employers under the proposed rule.

Employers that are reclassified in this manner could experience higher or lower premiums as a result of different rating rules in the large employer market. A portion of those premium impacts (both positive and negative) could be passed to employees enrolled in the coverage.

Health insurers that offer group health benefit plans may incur some costs associated with reviewing and/or revise their business processes and application forms to ensure compliance with the new rule. The rules are unlikely to have a significant economic impact on insurance producers.

(2)(a) These rules would apply to all employers that purchase group benefit plans under the Oregon Insurance Code, however the vast majority of these businesses would not be affected by the change in counting methodology.

The primary cost of compliance with the proposed rules will fall on licensed health insurers, who may be required to review or revise their business processes and/or application forms to ensure compliance with the revised rules. Based on financial filings made to DFR, no insurers meet the definition of a small business under ORS 183.310, because no insurer is independently owned and operated.

(2)(b) The primary costs of complying with the rules will fall on licensed health insurers. Because health insurers are already required to gather data and maintain records about an employer's size, the changes made to the counting methodology are not expected to increase the overall cost of reporting, recordkeeping and administrative activities associated with the rules. Health insurers may incur some additional costs associated with reviewing and revising their

business processes and/or application forms in order to ensure compliance with the revised rules.

Based on financial filings made to DFR, no insurers meet the definition of a small business under ORS 183.310, because no insurer is independently owned and operated.

(2)(c) DCBS does not have information available to estimate the cost of professional services, equipment, supplies, labor, or increased administration that may be necessary to comply with the rule. The primary costs of complying with the rules will fall on licensed health insurers who may need to review or revise their business processes and application forms to ensure compliance with the new rule.

Based on financial filings made to DFR, no insurers meet the definition of a small business under ORS 183.310, because no insurer is independently owned and operated.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Rules Advisory Committee included representatives of insurance producers who assist small business with purchasing group health benefit plans, many of whom are small businesses themselves. Representatives of small businesses were also invited to provide comment on the rule.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

AMEND: 836-053-0015

RULE SUMMARY: Revises methodology for determining whether an employer is a small or large employer for purposes of purchasing a group health benefit plan under the Oregon Insurance Code. Adopts exhibit B titled "Second Revised Counting Methodology for Determining Small or Large Group" and makes the counting guidance provided under Exhibit B mandatory for plan years beginning on or after July 1, 2023.

CHANGES TO RULE:

836-053-0015

Definition of Small Employer ¶

(1) This rule establishes the methodology for defining a small employer to be used in any instance in which the definition set forth in ORS 743B.005 would apply and in rules of the Department of Consumer and Business Services implementing the Insurance Code.¶

(2) For purposes of determining the number of employees in a group health benefit plan, insurers and producers should follow:¶

(a) For plan years beginning before July 1, 2023, the guidance entitled, "Revised Counting Methodology for Determining Small or Large Group," as set forth in Exhibit A of this rule; and¶

(b) For plan years beginning on or after July 1, 2023, the guidance entitled "Second Revised Counting Methodology for Determining Small or Large Group," as set forth in Exhibit B of this rule.

Statutory/Other Authority: ORS 731.244, ORS 743B.005~~3~~, ~~Chapter 142, 2017 Laws~~743B.020

Statutes/Other Implemented: ORS 743B.005~~3~~, ~~Chapter 142, 2017 Laws~~743B.020, 743B.100

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.



Oregon

Kate Brown, Governor



Division of
Financial
Regulation

Department of Consumer
and Business Services

EXHIBIT B TO OAR 836-053-0015

July 1, 2023

TO: Health Insurers Who Issue Health Benefit Plans to Small Employers

RE: Second revised employer group health insurance counting methodology to determine small or large group.

The Oregon Division of Financial Regulation of the Department of Consumer and Business Services (department) is issuing this guidance to assist insurers and producers with determining employer group size. Specifically, this guidance will:

1. Clarify how to determine whether an employer is qualified to purchase a group health benefit plan.
2. Clarify the counting methodology an insurer must use to determine the size of an employer group in order to identify the group as a large or small employer group.
3. Clarify what an eligible employee means as used in the Insurance Code as applicable to group health benefit plans.

The guidance is provided to assist insurers in determining the correct placement of employer groups and applies to all plans issued or renewed on or after January 1, 2018.

In accordance with ORS 743B.005, “small employer” means an employer who employed an average of at least one but not more than 50 full-time equivalent employees on business days during the preceding calendar year and who employs at least one full-time equivalent employee on the first day of the plan year, determined in accordance with this methodology.

ORS 743B.020 directs the department to adopt by rule a method for determining whether an employer is a small employer as defined in ORS 743B.005. The method adopted by the department must be consistent with the corresponding federal requirements for the Small Business Health Options Program (SHOP) as defined in ORS 741.300. The definition of small employer for purposes of the SHOP program is the same as the definition specified in ORS 743B.005.

The methodology the department adopts to determine whether an employer is a “small employer” or a “large employer” is the Full Time Equivalent employee counting methodology employed by the IRS which is the same method used to determine qualification for SHOP.



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This guidance is in alignment with requirements found in Section 1304 of the Patient Protection and Affordable Care Act (PPACA) and adopts the IRS method described for determining number of employees. This guidance mirrors advice provided in the IRS Fact Sheet, “Determining if an Employer is an Applicable Large Employer” which provides guidance for interpreting the regulations adopted by the Department of Treasury on employer shared responsibility for employers. 26 CFR 4980H-1, H-2 and H-3. <http://www.irs.gov/Affordable-Care-Act/Employers/Determining-if-an-Employer-is-an-Applicable-Large-Employer>.

The following definitions will be used:

Full-time employee means an employee who for any calendar month has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month.

Large employer means, with respect to a calendar year, an employer that employed an average of at least 51 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year.

Seasonal worker is generally defined for this purpose as an employee who performs labor or services on a seasonal basis. For example, retail workers employed exclusively during holiday seasons are seasonal workers.

Common law employee: an employee is considered a common law employee if the employer has the authority to direct and control the manner in which the services are performed by the individual.

The following criteria determine whether an employer is eligible to purchase a group health benefit plan:

1. If the employer is a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or the spouse of a person who is a sole proprietor, a partner in a partnership or a 2-percent S corporation shareholder, at the beginning of the plan year, the employer employs at least one common law employee that is enrolled in the plan, and offers the group health benefit plan to all full time employees.
2. At the beginning of the plan year, the group has at least one common law employee that is enrolled in the plan.

The following methodology should be used to determine whether an employer is a large (at least 51 employees) or small (50 or fewer employees) employer:

The determination of the number of employees shall be based on the number of employees during the prior calendar year. If an employer **has at least 51** full-time employees, including full-time-equivalent employees, on average during the prior calendar year, the employer is a large employer for the current calendar year.

Whether an employer is a large employer is determined each calendar year, and generally depends on the average size of an employer's workforce during the prior calendar year. If an employer **has fewer than 51** full-time employees, including full-time

equivalent employees, on average during the prior calendar year, the employer is a small employer for the current calendar year.

To determine its workforce size for a year an employer adds its total number of full-time employees for each month of the prior calendar year to the total number of full-time equivalent employees for each calendar month of the prior calendar year and divides that total number by 12.

Full-time equivalent employees

An employer determines its number of full-time-equivalent employees for a month in these two steps:

1. Combine the number of hours of service of all non-full-time employees for the month but do not include more than 120 hours of service per employee; and
2. Divide the total by 120.

An employer's number of full-time equivalent employees (or part-time employees) is only relevant to determining whether an employer is a large employer.

The following employees should not be included in the count:

- Leased employees¹
- Contracted employees
- Retired or former employees on continuation of coverage
- A sole proprietor
- A partner in a partnership
- A 2-percent S corporation shareholder
- The spouse of a person who is a sole proprietor, a partner in a partnership or a 2-percent S corporation shareholder
- A worker described in 26 U.S.C. Section 3508

Growing employers

For plans sold outside the Oregon Health Insurance Marketplace (OHIM), an insurer must conduct an annual employee count in order to determine the current group size and to comply with ORS 743B.010.

¹ An employer may continue to offer group health insurance to its leased workers in accordance with ORS 743.521, but the leased employees are not included in the employee count when determining group size.

Basic employer size determination examples²

Example 1 — Employer is a small employer

- Company X has 40 full-time employees for each calendar month during the calendar year.
- Company X also has 15 part-time employees for each calendar month during the calendar year each of whom have 60 hours of service per month.
- When combined, the hours of service of the part-time employees for a month totals 900 [15 x 60 = 900].
- Dividing the combined hours of service of the part-time employees by 120 equals 7.5 [900 / 120 = 7.5]. This number, 7.5, represents the number of Company X's full-time-equivalent employees for each month during the calendar year.
- Employer X adds up the total number of full-time employees for each calendar month of the calendar year, which is 480 [40 x 12 = 480].
- Employer X adds up the total number of full-time equivalent employees for each calendar month of the calendar year, which is 90 [7.5 x 12 = 90].
- Employer X adds those two numbers together and divides the total by 12, which equals 47.5. [(480 + 90 = 570)/12 = 47.5].
- Because the result is not a whole number, it is rounded to the next lowest whole number, so 47 is the result.
- So, although Company X has 55 employees in total [40 full-time and 15 part-time] for each month of the calendar year, it has 47 full-time employees (including full-time equivalent employees) for purposes of determining group size.
- Because 47 is less than 51, Company X is not a large employer for 2017.

Example 2 — Employer is a large employer

- Company Y has 41 full-time employees for each calendar month during the calendar year.
- Company Y also has 20 part-time employees for each calendar month during the calendar year, each of whom has 60 hours of service per month.
- When combined, the hours of service of the part-time employees for a month totals 1,200 [20 x 60 = 1,200].
- Dividing the combined hours of service of the part-time employees by 120 equals 10 [1,200 / 120 = 10]. This number, 10, represents the number of Company Y's full-time-equivalent employees for each month during the calendar year.
- Employer Y adds up the total number of full-time employees for each calendar month of the calendar year, which is 492 [41 x 12 = 492].
- Employer Y adds up the total number of full-time equivalent employees for each calendar month of the calendar year, which is 120 [10 x 12 = 120].
- Employer Y adds those two numbers together and divides the total by 12, which equals 51 [(492 + 120 = 612)/12 = 51].
- So, although Company Y only has 41 full-time employees, it is a large employer for the following calendar year due to the hours of service of its full-time equivalent employees.

² Additional examples can be found in section 54-4980H-2 of the ESRP regulations.



Employer aggregation rules

Companies with a common owner or that are otherwise related under certain rules of section 414 of the Internal Revenue Code are generally combined and treated as a single employer for determining large employer status. If the combined number of full-time employees and full-time-equivalent employees for the group is large enough to meet the definition of a large employer, then each employer in the group (called a large employer member) is part of a large employer, even if separately the employer would not meet the definition of large employer.

Example 3 — Employers are aggregated to determine group size

- Corporation X owns 100 percent of all classes of stock of Corporation Y and Corporation Z.
- Corporation X has no employees at any time during the calendar year.
- For every calendar month in the year, Corporation Y has 21 full-time employees and Corporation Z has 30 full-time employees. Neither Corporation Y nor Corporation Z has any full-time-equivalent employees.
- Corporations X, Y, and Z are considered a controlled group of corporations.
- Because Corporations X, Y and Z have a combined total of 51 full-time employees for each month during the calendar year, Corporations X, Y, and Z together are a larger employer for the following calendar year.
- Corporation Y and Z are each a large employer member for the following calendar year.
- Corporation X is a large employer member for the calendar year because it does not have any employees during the previous calendar year.

Example 4 – Employer does not qualify to purchase insurance as a small group

- Company D has three owners, all practicing physicians that take paychecks and work 40 hours a week. All three owners elect coverage under their small group plan.
- Company D has a part time administrator that works 30 hours per week. The administrator waives coverage because she is covered under her spouses plan.
- Company D does not qualify to purchase small group insurance because no common law employee is electing coverage under the plan.

In order to qualify to purchase small group coverage Company D's administrator would need to qualify as a common law employee AND elect coverage under Company D's small employer Group.

- Because there is NO common law employee electing coverage, the three owners are not eligible to purchase a small group plan and will need to purchase individual health plans.

Seasonal workers

When determining whether an employer is a large employer, the employer must measure its workforce by counting all of its common law employees. However, there is an exception for seasonal workers.

An employer is not considered to have more than 50 full-time employees (including full-time-equivalent employees) if both of the following apply:

1. The employer's workforce exceeds 50 full-time employees (including full-time-equivalent employees) for 120 days or fewer during the calendar year, and
2. The employees in excess of 50 employed during such 120-day period are seasonal workers.

Application to new employers

A new employer (that is, an employer that was not in existence on any business day in the prior calendar year) is a large employer for the current calendar year if it reasonably expects to employ, and actually does employ, an average of at least 51 full-time employees (including full-time-equivalent employees) on business days during the current calendar year.

More Information

More information about determining group size status can be found in the following IRS guidance:

- *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act:*
<http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.
- *Publication 5208 – Affordable Care Act: Are you an applicable large employer?:*
<http://www.irs.gov/pub/irs-pdf/p5208.pdf>.
- *Employee (Common-Law Employee):*
<https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee>.

The Department of the Treasury and the IRS also issued the following legal guidance related to the employer shared responsibility provisions:

- Regulations on the employer shared responsibility for employers. In particular, section 54.4980H-2 of the regulations addresses rules for determining large employer group status:
<http://www.ecfr.gov/cgi-bin/text-idx?rqn=div8&node=26:17.0.1.1.5.0.1.41>
- *Notice 2013-45 Transition Relief for 2014:*
<http://www.irs.gov/pub/irs-drop/n-13-45.pdf>.

For more information on seasonal employees, including the full definition of seasonal worker:

- Regulations found in section 54.4980H-1(a)(39):
<http://www.ecfr.gov/cgi-bin/text-idx?rqn=div8&node=26:17.0.1.1.5.0.1.41>