

October 20, 2011

Oregon OSHA - Proposed Changes To Penalties and other rules in Division 1, General Administrative Rules

Public Hearings Scheduled for:

<u>Date</u>	<u>Time</u>	<u>Location</u>
December 2, 2011	10:00 am	Oregon OSHA Field Office 1140 Willagillespie, Suite 42 Eugene OR 97401-2101
December 7, 2011	10:00 am	Fremont Place, Building I 1750 NW Naito Parkway, Suite 112 Portland OR 97209-2533

This rulemaking would make adjustments to the penalty rule to more effectively use Oregon OSHA's existing penalty authority. Both nationally and at state levels, it has been suggested that Oregon OSHA penalties are not as effective as they might be in promoting health and safety in the workplace. The proposal grows not out of a desire to increase penalties (although many worker advocates suggest larger penalties would be appropriate) but is instead an effort to develop a more effective approach to use penalties to encourage employers to comply with safety and health rules.

The assessment of penalties takes into account a number of factors. Oregon OSHA is proposing several changes in how penalties are calculated. The proposed changes include:

1. increasing the difference between small employer and large employer penalties,
2. a decrease in penalty amounts for those employers who demonstrate "good faith" efforts to promote workplace safety and health,
3. a removal of the current decrease in penalty amounts based on an employer's immediate correction of violations,
4. a change in the reduction of penalties given employers history,
5. an increase in the base penalty amount for death violations, and
6. a change in the definition of repeat violations to focus on repeat behavior rather than technical issues related to the code.

The rationale for these proposals is discussed below.

1. The change to increase the difference between small employer and large employer penalties is proposed as a way to better motivate larger employers. The current penalty structure may motivate the small employer but is unlikely to motivate the larger employer to the same degree. Hence, a sliding scale with multiple thresholds based on size of the employer is being proposed. This proposed change would not require any additional assessment on the part of the enforcement officer nor would it depend upon their individual judgment.
2. An assessment of the employer's "good faith" efforts would allow enforcement officers to better reflect the overall commitment of a company to safety and health. It would allow for a reduction to the base penalty amount in recognition of an employer's efforts put forth "*prior to the inspection*". The proposal allows more flexibility to provide penalties appropriate to a particular situation. A "good faith" assessment would introduce an element requiring a judgment be made based upon an established set of criteria. Similar to what enforcement officers currently do when assessing probability factors to determine base penalties.
3. The current practice of providing a reduction in penalties for employers who immediately abate violations provides an incentive for employers to reduce employee exposure at the time of the inspection. The proposed change to the rule takes into account that correction of a violation is already an employer obligation and should take place without the incentive of a penalty reduction. It may even be argued that failure to abate violations prior to an inspection represents a lack of good faith effort on the part of the employer. Current practice may be viewed as rewarding undesirable behavior.
4. A fourth proposed change to the penalty rule relates to the current 35% reduction given employers with a better-than-average history of injuries and illnesses. The new proposal is to reduce that adjustment to 10%. This change would continue to credit employers who maintain a positive history over time, but would eliminate the distortion created by relatively large penalty adjustments on the basis of relatively small statistical variations in injury and illness rates.
5. The base penalty in the penalty matrix for death is increasing from \$1,500 to \$2,100 for violations assessed as low/death. The base penalty for violations assessed as medium/death are increasing from \$2,500 to \$3,000. The increase of the base penalty for high/death violations will be from \$5,000 to \$7,000. The increases in the penalty amounts for a death violation are simply to encourage stronger efforts by employers to promote safety and health in the workplace. The increase provides a stronger incentive for employers to put forth additional compliance efforts.
6. A change in the assessment and penalties for repeat violations is also proposed. We often cite employers for general responsibility rules and a second violation becomes a repeat even when the circumstances are completely different. This change in the rule would eliminate some of those repeats. The proposal is to change the language to more clearly identify that a repeat violation must be a second violation that is substantially similar to the previously cited violation

When does this happen: Adoption tentatively will be by end of 2011, with an effective date in the first quarter of 2012.

To get a copy: Our web site – www.orosha.org Rules/Compliance, Proposed Rules
Or call the Oregon OSHA Resource Center at 503-947-7447

To comment: Department of Consumer and Business Services/Oregon OSHA
350 Winter Street NE
Salem OR 97301-3882
E-mail – tech.web@state.or.us or, Fax – 503-947-7461

Comment period closes: December 14, 2011

OR-OSHA contact: Claudia Marthaller, Central Office @ 503-947-7454;
or email at claudia.s.marthaller@state.or.us

Note: In compliance with the Americans with Disabilities Act (ADA), this publication is available in alternative formats by calling 503-378-3272.

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING*

A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer and Business Services/Oregon OSHA
Agency and Division

OAR 437
Administrative Rules Chapter Number

Sue Joye
Rules Coordinator

350 Winter Street NE Salem OR 97301-3882
Address

503-947-7449
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RULE CAPTION

Proposed changes to Division 1, General Administrative Rules – Penalties and others.

December 2, 2011	10:00 am	Oregon OSHA Field Office 1140 Willagillespie, Suite 42 Eugene OR 97401-2101	Sue Joye
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Hearing Date	Time	Location	Hearings Officer
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Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

AMEND: OAR 437-001-0015, 437-001-0075, 437-001-0145, 437-001-0160, 437-001-0165, 437-001-0175, 437-001-0230, 437-001-0255, 437-001-0400, 437-001-0405, 437-001-0410, 437-001-0411, 437-001-0415, 437-001-0420, 437-001-0430, 437-001-0435, 437-001-0760.

REPEAL: OAR 437-001-0260.

ORS 654.025(2) and 656.726(4)

Stat. Auth.

Other Authority

ORS 654.001 through 654.295

Stats. Implemented

RULE SUMMARY

This rulemaking would make adjustments to the penalty rule to more effectively use Oregon OSHA's existing penalty authority. Both nationally and at state levels, it has been suggested that Oregon OSHA penalties are not as effective as they might be in promoting health and safety in the workplace. The proposal grows not out of a desire to increase penalties (although many worker advocates suggest larger penalties would be appropriate) but is instead an effort to develop a more effective approach to use penalties to encourage employers to comply with safety and health rules.

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

/s/Michael D. Wood
Signature

December 14, 2011

Last Day for Public Comment
Last day to submit written comments to the Rules Coordinator

Michael D. Wood 10/14/2011
Printed name Date

*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00pm on the preceding workday. ARC 920-2005

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services/Oregon OSHA
Agency and Division

OAR 437
Administrative Rules Chapter Number

In the Matter of: Amending OAR 437-001-0015, 437-001-0075, 437-001-0145, 437-001-0160, 437-001-0165, 437-001-0175, 437-001-0230, 437-001-0255, 437-001-0400, 437-001-0405, 437-001-0410, 437-001-0411, 437-001-0415, 437-001-0420, 437-001-0430, 437-001-0435, 437-001-0760.
Repealing OAR 437-001-0260.

Rule Caption: (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)
Proposed changes to Division 1, General Administrative Rules.

Statutory Authority: ORS 654.025(2) and 656.726(4)

Stats. Implemented: ORS 654.001 through 654.295

Need for the Rule(s):

First, it should be noted that changes in the penalty rule do not affect the cost of complying with existing Oregon OSHA rules and the rule creates no new requirements. The only impact is on those employers who receive a violation that carries a penalty. Even without repeat violations or evidence of willful conduct, Oregon OSHA has the authority to issue penalties of up to \$7,000 per violation, but in practice the majority of penalties are much lower. Most penalties result from the identification of a "serious" violation, where a serious injury or death could result. However, nearly two-thirds of violations cited by Oregon OSHA are considered "other than serious," with no penalty attached. Overall, more than half of Oregon OSHA inspections result in no penalties at all, either because there were no violations issued or because the violations issued carried no penalties.

The baseline data for the analysis was actual inspection records from July and August of 2010. The sample included all inspections that included violations with penalties during a roughly six-week period – this resulted in a total sample of 444 violations. The base data was corrected to eliminate a small number of calculation errors and to adjust for incorrect application of the existing rule. This provided the penalty information used to assess the effect of the rule. The same calculations were then adjusted to reflect the requirements of the rule as proposed. In some cases, it was not clear whether "good faith" would have been appropriate. To accurately reflect the rule's expected results, half of those cases were randomly assigned "good faith." All other determinations were based on information available in the case file.

Documents Relied Upon, and where they are available:

OAR 437, Division 1, General Administrative Rules

Fiscal and Economic Impact, including Statement of Cost of Compliance:

All state agencies are affected by the rule in the sense that they are employers under the Oregon Safe Employment Act (OSEAct). However, state agencies other than DCBS/Oregon OSHA will have no costs under this rule other than those they would occur as an employer. Similarly, local governments are affected by this rule only in the sense that they are employers under the OSEAct. Finally, the public as a whole will be affected only to the degree that members of the public are employers and employees.

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Overall Impact

The sample resulted in an average penalty per violation under the current rule of \$388. The analysis of the proposed rule’s impacts resulted in an average penalty per violation of \$412, an increase of less than 6¼ percent.

However, the impact was not consistent for all violations cited. A total of 170 violations in the sample would see reductions in the expected penalty, while 196 violations would result in an increase. The remaining 78 violations would be the same under the proposed rule as the existing rule (with nearly half of those receiving the minimum \$100 penalty under both the existing and the proposed rule).

Relative Impact on Small Employers

Small employers already experience somewhat lower penalties on average than do large employers. That difference would increase under the proposed rule.

For employers with fewer than 50 employees, the rule would result in no change in the average penalty per violation.¹ The distribution of these average changes varies considerably depending upon the circumstances and severity of the particular violation. For those employers with fewer than 50 employees, the analysis showed 143 violations experiencing a penalty decrease, 137 experiencing an increase, and 66 remaining the same.

For employers with 50 or more employees, the analysis indicates that the rule would result in an increase of nearly 20 percent in the average penalty per violation (from \$562 to \$673). And, within that group, the analysis shows the largest employers (with more than 250 employees) receiving an increase of more than 28 percent (from \$568 to \$730). For these employers, 27 of the violations showed a decrease, 59 showed an increase, and 12 would be expected to remain the same.

¹The analysis actually showed a slight reduction, from \$339.28 to \$338.68, but that 0.17 percent reduction is certainly within the margin of error of such an analysis.

How were small businesses involved in the development of this rule?

Numerous associations, representing small and medium size businesses, were involved in the Penalty Advisory Committee.

Administrative Rule Advisory Committee consulted? Yes.

If not, why?

The Penalty Advisory Committee met a number of times from June through September 2011.

/s/Michael D. Wood
Authorized Signer

Michael D. Wood
Printed name

10/14/2011
Date