



INTEROFFICE MEMORANDUM

Oregon Occupational Safety & Health Division

December 1, 2011

TO: Interested Parties
FROM: Oregon OSHA
SUBJECT: Amended Rule Filing

Oregon OSHA used an advisory group in this Division 1 rulemaking process, therefore, by Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) we are given authority to file an amended Statement of Need and Fiscal Impact.

In response to inquiries, Oregon OSHA amended the fiscal impact statement with technical corrections and clarifications. This amended Statement of Need and Fiscal Impact was filed with the Secretary of State on December 1, 2011 and replaces the first document filed on October 14, 2011 with the Notice of Proposed Rulemaking Hearing.

This rulemaking makes amendments in Division 1, General Administrative Rules, that include definitions, penalties rules, and applying plain language changes to appeal and informal conference requests.

The comment period on the proposed Division 1 amendments remains open through December 14, 2011. The Notice of Proposed Rulemaking Hearing, the Statement of Need and Fiscal Impact, and the text of rule changes, can be accessed on our web site www.orosha.org by selecting Rules/Compliance from the menu on the left, then choose Proposed Rules from the menu on the right.

Questions concerning this amendment to the Statement of Need and Fiscal Impact may be directed to:

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Department of Consumer and Business Services
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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):

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:

- increasing the difference between small employer and large employer penalties,
- decreasing the penalty amounts for those employers who demonstrate "good faith" efforts to promote workplace safety and health,
- increasing the penalty amounts for those employers who demonstrate "poor faith" efforts to promote workplace safety and health,
- removing the current decrease in penalty amounts based on an employer's immediate correction of violations,
- replacing the 35% reduction of penalties given to employers based on their history of injury and illnesses (DART) with a 10% reduction of penalties for employers with a positive history, no reduction for an average history, and a 10% increase in penalties for employers with a negative history. History will include injury and illness trends and enforcement activity within the past five years.
- increasing the base penalty amount for death violations,
- changing how repeat violations are defined effecting how penalties are determined with the focus on repeat behavior rather than technical issues related to the code,
- establishing a base penalty multiplier for willful or egregious violations.

Division 1 rule amendments that do not affect penalties include:

- 437-001-0015, changes to the definition of agent of the employer.
- 437-001-0255 applying plain language changes to appeal and informal conference requests.

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.

First, it should be noted that changes in the penalty rule, 437-001-0045, do not affect the cost of complying with existing Oregon OSHA rules nor does it create any new requirements for employers. 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. It should be noted that willful or egregious violations, 437-001-0175, have a statutory maximum of \$70,000. The proposed change includes a multiplier of 25x the base penalty amount. This should pose no significant change as the \$70,000 cap on willful or egregious violations remains in place. A reduction based on the employer’s size will apply.

The baseline data for the analysis was actual inspection records from July and August of 2010. The sample took into account 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. These adjustments include; good faith efforts (downward penalty adjustments of 20% for employers who demonstrate good faith efforts or increased penalty adjustments of 20% for those who demonstrate poor faith efforts), size reduction scaling based on the number of employees ranging from 60% for small employers to no reduction for employers with 251 or more employees, and employer injury and illness history and the previous five years enforcement activity (10% reductions for a positive history, a 10% increase for a negative history and no increase or reduction for an average history). In some cases, it was not clear whether “good faith” would have been appropriate. To accurately reflect the rules’ expected results, half of those cases were randomly assigned “good faith.” All other determinations were based on information available in the case file.

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 rules (with nearly half of those receiving the minimum \$100 penalty under both the existing and the proposed rules).

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 rules.

For employers with fewer than 50 employees, the rules 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 rules 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.

Citing an employer's second or subsequent violation(s) involving substantially similar hazardous conditions as the earlier violation as a repeat was also part of our discussions with the advisory group. This amendment would allow some latitude where a vertical rule has broad application such as the Division 1, 437-001-0760 rule.

A citation may be issued for failure to properly instruct and supervise employees in the safe operation of any machinery, tools, equipment, process, or practice. Current rule application allows that the employer could have a repeat violation without the same or substantially similar conditions existing simply because the same rule is violated. With the proposed rule change, if substantially similar hazardous conditions exists, whether in a general industry or construction application, a repeat violation may be cited. This means that employers may be cited a repeat violation under the new rule that would not have been a repeat violation under the existing rule. On the other hand, under the new rule if the existing violative conditions are substantially different, a repeat violation will not be cited. The new rule allows for a five year look back when determining a repeat violation.

As an example, Division 2, Subdivision O, 1910.212(a)(1) requires guarding point of operation, in-going nip points, rotating parts, and flying chips and sparks. Currently, a second violation of any one of these conditions would be cited repeat. Under our proposal, violating any one of these conditions would not be cited as a repeat violation simply because it is the same rule. It would be a repeat violation only if the cited conditions were substantially similar to previously cited conditions.

Our conclusions are that some repeats will result in an increase of penalty amounts and may be affected by the number of times repeated and the penalty multiplier. In other inspection circumstances, there will be no repeat violation because the same or substantially hazardous condition did not exist. In both scenarios, the new proposal allows for a penalty reduction based on size which is not currently allowed for repeat violations.

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 discussing proposed changes to Division 1.

Administrative Rule Advisory Committee consulted? Yes.

If not, why?

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

<u>/s/ Michael D. Wood</u>	<u>Michael D. Wood</u>	<u>12/1/2011</u>
Authorized Signer	Printed name	Date