

SUMMARY OF COMMENTS AND AGENCY DECISIONS - Explanation of Rulemaking

Division 1 Updates – Civil penalties, comprehensive inspections, protection for employee refusal of work

Title: Division 1 Civil Penalty and Work Refusal Changes From SB 592 and SB 907

Department of Consumer & Business Services
Oregon Occupational Safety & Health Division

Anticipated Administrative Order Number: 3-2023

Anticipated Adopted Date: November 22, 2023

Anticipated Effective Date: January 1, 2024

1. Executive Summary

This document provides the rulemaking history, rationale, and explanation of Oregon OSHA's decision to amend its Division 1 rules (OAR chapter 437) in accordance with legislation passed by Oregon's Legislative Assembly and in response to stakeholder input during the rulemaking process.

Senate Bill 592¹ (SB 592) and Senate Bill 907² (SB 907) were two bills passed by the 82nd Oregon Legislative Assembly that impacted Oregon OSHA's Division 1 rules. This administrative rule set applies to all workplaces and employers subject to Oregon OSHA's jurisdiction. A summary of each enrolled bill is provided below. The complete legislative history of each bill is publicly available for review through the Oregon State Legislative Information System (OLIS): <https://olis.oregonlegislature.gov/>.

A. Summary of Key Components: SB 592

Section 1 of SB 592 – Amendments to ORS 654.067 – Inspection of places of employment; denial of access; warrants; safety and health consultation with employees.

Comprehensive Inspections

Section 1(1)(c) requires Oregon OSHA to conduct a comprehensive inspection of any place of employment as deemed necessary by the department based upon the prior violation history of the place of employment regarding any state occupational safety or health law, regulation, standard, rule or order. The comprehensive inspection would occur within one year of the date on which the closing conference associated with the prior violation was held.

Section 1(2) requires Oregon OSHA to conduct a comprehensive inspection of an employer whenever an inspection of an accident reveals that a violation caused or contributed to a work-related death. The comprehensive inspection would occur within one year of the date on which the closing conference for the inspection associated with the work-related fatality was held.

Section 1(3) requires Oregon OSHA to conduct a comprehensive inspection of an employer whenever three or more willful violations or repeat violations have occurred at the same workplace within a one-year period. The comprehensive inspection would occur within one year of the date on which the closing conference associated with the third willful or repeat violation was held.

Section 2 of SB 592 – Amendments to ORS 654.086 – Civil penalty for violations; classification of violations; payment and disposition of penalty moneys.

Increase in Civil Penalties

Section 2(1)(a)(A) requires Oregon OSHA to impose a civil penalty between \$1,116 and \$15,625 for each serious-rated violation not covered under Section 2(1)(a)(B). This mandatory civil penalty range would be annually adjusted in accordance with Section 2(4) of SB 592, which is described in more detail below. The minimum civil penalty in effect at the opening of the inspection must be maintained even through settlement discussions.

Section 2(1)(b) requires Oregon OSHA to issue civil penalties up to \$15,625 for each first-instance other than serious-rated violations. This mandatory civil penalty range would be annually adjusted in accordance with Section 2(4) of SB 592, which is described in more detail below.

Section 2(1)(a)(B) requires Oregon OSHA to issue a civil penalty between \$20,000 and \$50,000 for each serious-rated violation that caused or contributed to a work-related death. This mandatory civil penalty range would be annually adjusted in accordance with Section 2(4) of SB 592, which is described in more detail below. The minimum civil penalty in effect at the opening of the inspection must be maintained even through settlement discussions.

Section 2(1)(c)(A) requires Oregon OSHA to issue a civil penalty between \$11,162 and \$156,259 for any willful violation or repeat violation that is rated as other-than-serious or serious. This mandatory civil penalty range would be annually adjusted in accordance with Section 2(4) of SB 592, which is described in more detail below. The minimum civil penalty in effect at the opening of the inspection must be maintained even through settlement discussions.

Section 2(1)(c)(B) requires Oregon OSHA to issue a civil penalty between \$50,000 and \$250,000 for any willful violation or repeat violation that is rated as other-than-serious or serious that caused or contributed to a work-related death. This mandatory civil penalty range would be annually adjusted in accordance with Section 2(4) of SB 592, which is described in more detail below. The minimum civil penalty in effect at the opening of the inspection must be maintained even through settlement discussions.

Section 2(3) states that civil penalties assessed for a repeat willful violation, a repeat willful violation that caused or contributed to a work-related fatality, or a repeat serious violation that caused or contributed to a work-related fatality, may not be reduced based on employer size unless the employer agrees to comply with additional abatement measures at the discretion of the administrator. In practice, a “repeat” “willful” violation cannot be issued by Oregon OSHA because each is defined by rule as the same type of violation, with a distinct definition. However, a repeat serious violation that caused or contributed to a work-related fatality may be considered for a penalty reduction during settlement discussions. Civil penalties issued under Section 2(3) is the only circumstance where civil penalties may be reduced below the annually adjusted minimum requirement.

Annual adjustment of penalty amounts

Section 2(4) requires Oregon OSHA to annually adjust its civil penalties to account for any percentage increase or decrease, if any, in the Consumer Price Index for All Urban Consumers (CPI-U), West Region (All Items), hereafter referred to in this document as “West Region CPI-U” as reported by the U.S. Bureau of Labor Statistics.

Annual Legislative Report

Section 2(8) requires the Director of the Department of Consumer and Business Services to submit an annual report to the interim committees of the Oregon Legislative Assembly related to business and labor that summarizes:

- The total number and total amount of penalties assessed by the department;
- The total number of appeals of citations, violations and penalty assessments filed with the department; and
- The total number of inspections completed by the department, along with the scope of the inspections and the circumstances that led to the inspections.

B. Summary of Key Components: SB 907

Section 1 of SB 907 – Amendments to ORS 654.062 – Notice of violation to employer by worker; complaint by worker to director; inspection; protection of complaining employees; rebuttable presumption.

Protected Work Refusal

Section 1(5)(e) clarified a pre-existing discrimination protection for Oregon workers who refuse to perform a dangerous work task when there is a risk of serious injury or death arising from a hazardous condition. SB 907 did not establish a new worker protection right or create new employer obligations under the OSEA (ORS 654).

Section 1(8) directed Oregon OSHA to adopt rules to clarify protected work refusal in accordance with the federal Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.). Work refusal is a protected activity under 29 CFR 1977.12(b), which is enforced by federal OSHA.

Unlike Oregon OSHA, federal OSHA has the authority to investigate both worker discrimination complaints (also called whistleblower claims) and conduct occupational safety and health compliance inspections. In Oregon, these two types of investigations are divided between two separate state agencies. The Oregon Bureau of Labor and Industries (BOLI) is responsible by statute (ORS 654.062(6)) for investigating worker discrimination complaints filed under ORS 654.062(5). Whereas Oregon OSHA conducts enforcement activities related to workplace safety and health.

As a state OSHA program, Oregon OSHA was already required to ensure that BOLI's enforcement practices are "at least effective as" (ALEA) federal OSHA as it relates to discrimination under the OSEA, including protected work refusal. As part of the state plan approval, Oregon OSHA oversees the discrimination investigations conducted under the authority of Occupational Safe Employment Act (OSEA) through an interagency agreement with BOLI.

BOLI is responsible for discrimination complaint intake, processing, investigating, and when appropriate, mediating, settling, or litigating claims filed under ORS 654.062. Oregon OSHA provides payment to BOLI for investigating discrimination complaints filed under ORS 654.062.

2. Application of Statutory Requirements

This rulemaking falls within Oregon OSHA's statutory authority, and Oregon OSHA has fulfilled all of its related obligations under [ORS 654](#) (Oregon Safe Employment Act; OSEA) and [ORS 183](#) (Administrative Procedures Act; APA).

The purpose of the OSEA and of all rules adopted under that law is found in ORS 654.003, which describes the law's general purpose as

"... to assure as far as possible safe and healthful working conditions for every working person in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, that is created by occupational injury and disease."

ORS 654.003(3) "Authorize[s] the Director of the Department of Consumer and Business Services and the designees of the director to set reasonable, mandatory, occupational safety and health standards for all employments and places of employment³."

This rulemaking is in response to Oregon legislation and is the result of discussions with stakeholders to explore the issues involved, discussions with Oregon OSHA and other state agency staff, review of the legislative record, and review of the public comments. The Oregon Administrative Procedures Act (ORS 183.335):

“encourages agencies to seek public input to the maximum extent possible before giving notice of intent to adopt a rule.”

“When an agency proposes to adopt, amend or repeal a rule, it shall give interested persons reasonable opportunity to submit data or views.”

“The agency shall consider fully any written or oral submission.”

Although SB 592 was passed with an emergency clause that made it immediately effective upon adoption, Oregon OSHA chose to engage in the permanent rulemaking process under the APA. Oregon OSHA did not engage in temporary rulemaking. All rule advisory committee and public involvement requirements were met⁴.

All required documents for rule proposal⁵ were published with the Oregon Secretary of State on August 31, 2023. Public comments on the proposed changes were accepted until 5:00 pm on November 3, 2023. Five public hearings were conducted to receive oral comments. One of the public hearings was conducted in Spanish.

The APA requires a fiscal impact statement. No additional compliance requirements were added for the employer during this rule update. Because of this, Oregon OSHA does not see an economic impact⁶ to the cost of compliance from these changes. Throughout the rule development process, the rulemaking advisory committee (RAC) was solicited to identify if a fiscal impact that would be attributed to the proposed rules. A fiscal impact was not identified by the RAC. Small business reductions were included in first-instance and repeat civil penalties in an effort to make an equitable impact with civil penalties.

All material regarding the changes and all exhibits for the public hearings were posted at <https://osha.oregon.gov/rules/making/Pages/proposed.aspx>. This included all filing documentation sent to the Secretary of State, Senate Bill 592, Senate Bill 907 and the text of changes for the Division 1 proposed changes. All exhibits were posted in the public hearings and online for participants to access.

The APA requires Oregon OSHA to fully consider any written and oral comments⁷. Oregon OSHA did not respond to individual public comments, but has included a general review and response to oral and written public comment in Section 5 Summary of Comments and Agency Decisions.

The rule is fully within Oregon OSHA’s statutory authority. Oregon OSHA has satisfied all applicable requirements of the APA. The rule is legal.

3. History of the Current Rulemaking

Beginning in June 2023, Oregon OSHA invited stakeholders to participate as members in a rule advisory committee (RAC) related to SB 592 and SB 907, and associated Division 1 rulemaking. The existing Oregon OSHA partnership member list was used for the initial contact and members of all other active RAC memberships were invited to join the RAC for this rulemaking.

The first RAC meeting for this rulemaking was held on June 20, 2023. This and all subsequent RAC meetings were conducted virtually and recorded as part of the rulemaking record. A single RAC was convened to evaluate rulemaking issues related to both SB 592 and SB 907. This consolidated the number of meetings RAC members needed to attend and ensured that all RAC members could be kept updated with all rulemaking discussions related to Oregon OSHA's Division 1 rulemaking. A total of four RAC meetings were held on the following dates in 2023: June 20, July 20, August 10, and August 23.

Across each meeting, the RAC met to review SB 592 and SB 907, discuss rulemaking topics, and provide an avenue for stakeholder engagement and feedback on the rulemaking process. At the first RAC meeting, the operational dates for SB 592 and SB 907 were discussed. SB 592 was signed into law with an emergency clause, which necessitated Oregon OSHA begin the rulemaking process as soon as the RAC was formed. The operative date for SB 907 was set for January 1, 2024. Unlike SB 592, which introduced substantial amendments to the OSEA, SB 907 directed Oregon OSHA to clarify an existing requirement. SB 907 directed Oregon OSHA to update its administrative rule for employee discrimination (OAR 437-001-0295(1)(b)) in accordance with federal OSHA's requirements (29 CFR 1977.12(b)).

In addition to sharing draft rulemaking concepts, the RAC meetings were used to solicit input from stakeholders regarding the anticipated fiscal impact of this rulemaking. Since neither SB 592 nor SB 907 introduced new compliance requirements for employers, it was determined that there was no fiscal impact for this rulemaking. The provisions in SB 592 and SB 907 do not change the cost of compliance with Oregon OSHA's rules and regulations. RAC members were encouraged to provide feedback if the fiscal impact determination needed to be adjusted, however, no fiscal impact was identified.

Prior to the first RAC meeting, documents for both senate bills and the Division 1 rules impacted by the legislation were shared with the RAC membership. Documents were color-coded to indicate specific topics and sections of the rule potentially impacted by the legislation. The categories included comprehensive inspections, penalties, annual penalty adjustments, and discrimination protection for refusal of work. The purpose of this was to assist RAC members understanding the scope of the revisions.

During the June, 20, 2023 meeting, the rulemaking process and timeline was reviewed. Oregon OSHA informed the RAC that this would be an accelerated process due to the emergency clause in SB 592. Oregon OSHA also stated that the scope of rule changes will be focused on the topics of the two legislative bills. Other identified topics would need to be addressed in separate rulemaking. Oregon OSHA identified that the legislation did not add additional compliance requirements for businesses. Therefore, no fiscal impact was expected from the changes. RAC members were encouraged to provide feedback if that changed and no fiscal impact was identified during the rulemaking process.

Regarding SB 592, and the requirement to annually adjust civil penalties, the RAC generally supported Oregon OSHA's proposal to use a bulletin process similar to federal OSHA. Each year, federal OSHA adjusts its civil penalties based on changes in the national CPI-U, All Items. Once adopted as a process through administrative rulemaking, the bulletin would allow Oregon OSHA to annually update its civil penalties to reflect changes (if any) in the West Region CPI-U, without having to conduct rulemaking each year. Draft bulletin options developed by Oregon OSHA were reviewed during multiple RAC meetings.

Feedback was generally favorable for moving forward with an annual bulletin for penalty adjustments rather than annual rulemaking, as long as only civil penalty amounts were being adjusted. A significant number of RAC members also requested that Oregon OSHA maintain civil penalty reductions for smaller businesses. RAC membership requested that Oregon OSHA present a variety of civil penalty options for serious violations at the next meeting, including one that mirrored federal OSHA penalty structures, one that provided small business reductions, and one with the first-instance penalty at the minimum the legislation requires.

Regarding SB 907, federal OSHA's rule regarding discrimination protection for refusal of work was shared with the RAC. In general, RAC members provided feedback that they would like to see Oregon OSHA's language mimic the federal OSHA requirements or tests, rather than mimic the actual language of the federal rule. RAC members requested that the needs of the employee and the employer be addressed in the revised language and that Oregon OSHA was requested to provide multiple options to the next meeting.

The second meeting was July 20, 2023. Prior to that meeting, Oregon OSHA provided documents to RAC members with proposed changes to the Division 1 rules, a sample bulletin for annual adjustment of civil penalties, and five options for civil penalties for serious violations. Members had approximately one week to review the material before the meeting. Civil penalty options included one similar to the federal OSHA framework, one with the base penalty at the minimum identified in SB 592, one with 3 times the minimum following the federal framework, one at 2 times the Senate Bill 592 minimum and one at 3 times the Senate Bill 592 minimum.

Regarding SB 592, RAC membership identified three preferences to consider. The options that were similar to the federal framework, with the base as the minimum identified in Senate Bill 592, and 3 times the minimum following the federal framework were preferred. Worker advocates voiced a preference for higher penalties, while business advocates voiced a preference for the lower penalties. Oregon OSHA reviewed with the RAC the current civil penalty adjustment options for good faith activities, employer history and reductions for immediate correction. Oregon OSHA also reviewed with the RAC the adjustment options for civil penalties under appeal.

Oregon OSHA committed to move forward with one of the options for review by the RAC, and to also have available for review draft language on civil penalties for repeat, willful and caused or contributed to a workplace fatality. Multiple RAC members requested Oregon OSHA consider removing penalty amounts from the rules because they will be updated annually. They also requested the addition of a definition for a violation that caused or contributed to a work-related fatality.

Oregon OSHA considered the addition of programmed inspection for cause to address the comprehensive inspections identified in SB 592 section 1(1)(c)-(3). RAC members generally supported this addition but requested some clarification to the language when the inspections would occur under the requirements in SB 592 section 1(1)(c).

Regarding SB 907, Oregon OSHA presented options based on OSHA federal language and current BOLI administrative rule language (OAR 839-004-0016(3)). RAC membership voiced concerns regarding the use of imminent hazard and hazards inherent to the job. Worker advocates requested that environmental and climate factors be included in the rule text of the hazards and requested clarification on when an employee could walk away from the site. Worker advocates also requested a clarification of the communication requirement for employees with their employer or supervisor for situations when employees may not have access to a phone or may not have a signal in their work areas. Oregon OSHA suggested the clarifications requested by the advocates could be addressed with supplemental educational material. Generally, RAC members agreed that could be a way to address the topics. Oregon OSHA committed to providing updated language at the next meeting.

The third meeting was held on August 10, 2023. Prior to that meeting, Oregon OSHA provided documents with draft changes to the Division 1 rules and options for repeat, willful and caused or contributed violations. Oregon OSHA provided four different options for Repeat violations for consideration:

- A multiplier of 5/7/9x to the first-instance penalty with a \$7,000 reduction for business with 1-25 employees
- A multiplier of 5/7/9x to the first-instance penalty with a \$14,000 reduction for business with 1-25 employees
- A multiplier of 4/6/8x to the first-instance penalty with a \$7,000 reduction for business with 1-25 employees
- A multiplier of 4/6/8x to the first-instance penalty with a \$14,000 reduction for business with 1-25 employees

Willful violations and all caused or contributed to a workplace fatality serious violations did not include a size reduction option due to requirements in SB 592 Section 2(3). The civil penalty option that was 3 times the minimum first-instance penalty following the federal framework was used as the example for discussion.

Generally, RAC members were supportive of the repeat violation options and the reduction options for small businesses. RAC members asked questions regarding the development or source of the reduction amounts and requested Oregon OSHA explore other options. Oregon OSHA clarified its position regarding flat reductions for employee size, explaining that this method of reduction is needed to meet the minimum and maximum requirements identified in SB 592 Section 2(1)(c)(A). Oregon OSHA maintains the importance of having a meaningful difference for civil penalties based on violation type and severity level, that will be clear for compliance officers and understandable for employers. RAC members voiced both support and opposition for the \$14,000 reduction available for serious-rated death violations, and it was suggested to expand the reduction for small business to those with 1-50 employees to align with Oregon's Administrative Procedures Act⁸ definition for small business.

Those opposed voiced concerns about a large reduction on a violation that was perceived to be more hazardous. Those that supported the reduction option voiced the need for larger reductions for a broader definition of small businesses. Oregon OSHA agreed to review the structures and bring additional options to the next meeting. An additional RAC suggestion was to include the West Region CPI-U adjustment to the reduction amount applied to repeat violations for small business. This would ensure the reduction remains proportionate to the West Region CPI-U adjusted penalty.

RAC members generally supported the options for willful violations and caused or contributed to a workplace fatality violations. Some RAC members expressed the need for a willful violation that caused or contributed to a work related fatality to have the highest civil penalties in each category. Oregon OSHA reinforced the need for many of the categories to not have the highest penalty required by the legislation in order to maintain administrator discretion options. Generally, RAC members supported the concept of administrator discretion for all levels of violations.

RAC members generally supported the changes to the programmed inspection for cause language to address SB 592 Section 1(1)(c) requirements. RAC members requested additional clarification on how violation history would be applied in determining when a comprehensive inspection would be conducted.

Oregon OSHA updated the RAC membership on civil penalty amounts being included in the rule, noting that base civil penalty amounts identified in SB 592 need to appear in the rule as a base to make the annual adjustments.

RAC members generally supported the language that would clarify the violations considered to have cause or contribute to a work related fatality. RAC members primarily requested sentence structure changes. Oregon OSHA requested suggestions be submitted for updating the language.

Regarding SB 907, draft language updates and RAC member suggestions were shared with the RAC membership prior to the meeting.

Generally, the RAC membership supported a blend of the federal OSHA language and the BOLI language OAR 839-004-0016(3). Concerns regarding specific words were expressed by members.

- OAR 437-001-0295(1)(b)(A) includes “where possible”
 - RAC members requested “possible” be changed to “possible, feasible or practicable.” Oregon OSHA expressed preference for the option that provides the broadest definition and did not limit protection. “Where possible” has current federal case law⁹ that supports the use of the term.
- OAR 437-001-0295(1)(b)(B) “reasonable person”
 - RAC members requested clarification to include a perceived hazard and agency abatement of a hazard. Oregon OSHA followed federal OSHA with the use of reasonable person as a qualifier. A reasonable person would be a similarly trained and experienced person in a similar work environment.
- OAR 437-001-0295(1)(b) “Imminent danger”
 - RAC members requested “imminent” be changed to “clear” or “real.” Oregon OSHA agreed to review the proposed language and bring a draft to the next meeting.

RAC members voiced concerns on when an employee is protected if they leave the worksite or do not arrive to a worksite due to hazards. Oregon OSHA reiterated that the hazard is task-related and may or may not apply to the entire work site. The evaluation is completed during BOLI’s investigation. Other members requested additional information be included for when the protection ends.

At this meeting, Oregon OSHA communicated to the RAC its intent to have a proposed rule before the end of the month. Oregon OSHA provided RAC members with one more revision to review for final comments the following week.

The final RAC meeting was August 23, 2023. Prior to that meeting, documents with draft changed language to the Division 1 rules and a sample civil penalty bulletin were provided to the RAC.

Regarding SB 592, RAC members were generally supportive of the civil penalty reduction of \$7,000 for all serious-rated violations for employers with up to 50 employees based on Oregon Employment Department's definition for small business. According to data from Oregon Employment Department in 2023, 96 percent of Oregon businesses and approximately 39 percent of employees are in this category¹⁰. The civil penalty reduction for employers with 50 or fewer employees for repeat violations will be included in the annual West Region CPI-U adjustments as suggested by members at the previous meeting.

Other than serious-rated violations were updated in the rule language and the bulletin. SB 592 does not exclude repeat other than serious-rated violations and other than serious-rated repeat or willful violations that caused or contributed to a work related fatality from the minimum civil penalties required in the bill. The bill requires repeat violations to be affected by the minimum repeat penalty and does not distinguish between the type of repeat violation. SB 592 does distinguish the difference for first-instance caused or contributed to a work related fatality serious-rated violation, so no changes were necessary to the draft materials. Most RAC members expressed concerns for the other than serious civil penalties but agreed with Oregon OSHA's understanding of the legislation.

RAC members generally agreed the definition for "caused or contributed" provides adequate clarification for the violation type. Concerns were raised regarding it being determined by the compliance officer and requested that it be changed to the administrator. Oregon OSHA included the determination by the compliance officer to reflect the compliance officer's complete review and documentation of the violation. Oregon OSHA agreed to review this prior to the proposed rule.

Oregon OSHA requested feedback on the placement of the caused or contributed to a workplace death information in the rules. RAC members were generally supportive of the placement of the information in each rule and did not express the need for there to be a new separate rule that only addresses the caused or contributed to a work-related fatality violation type.

Regarding SB 907, language updates were discussed. Oregon OSHA modified the order of the (A)-(C) in the rule. The order was changed to mirror the federal language and better represent the applicability of the reasonable person test. The word "clear" was changed to "real" to match the federal OSHA language in 29 CFR 1977.12(b). RAC members were generally supportive of this change.

Some RAC members continued to voice concerns regarding the use of "where possible." "Practicable" was provided as another option. RAC members requested the language focus on the ability of the employee to contact the employer. "Where possible" is federal OSHA rule language.

Some RAC members voiced concerns regarding "seek assistance from" versus "obtain assistance from" and requested the federal language of "eliminating" the hazard be included.

One RAC member requested that the rule making process for SB 907 be separated from SB 592 to allow additional review time. Oregon OSHA explained the need to keep the two legislative concepts connected due to the fact that both were in the same general rule set and that there was not capacity to take on two independent rulemaking processes at this time, based on other mandated rulemaking activities. The rulemaking of both SB 592 and SB 907 continued together through adoption of the Division 1 rules.

Any additional comments and feedback were requested from RAC members no later than 1 pm on August 24, 2023.

Oregon OSHA contacted the RAC members by e-mail on August 23, 2023 after the meeting with an update to the rule language based on RAC member feedback for (C). Rule text was updated to include federal language regarding the elimination of the hazard. Members were reminded of the 1 pm deadline on August 24, 2023 in that message.

Feedback from the RAC members generally supported the changes to (C) but requested changes to “where possible” and the addition of climate and work environment as a specific hazard. Both items were requested in previous RAC meeting.

Oregon OSHA reviewed and considered all comments received from the RAC and made some minor adjustments to the draft before being proposed to the Secretary of State on August 31, 2023. Prior to proposal, Oregon OSHA did discuss with federal OSHA the draft language for SB 907 and agreed that “possible” is appropriate because it matches federal OSHA rule language and federal case law that is attributed to the word “possible”. Changing the language to “practical” or “feasible” the outcome might not be the same, as it was feasible and maybe even practical to contact the employer in a situation, but it was not possible.

Additionally, adding the concept of a list of conditions that applies including environmental hazards is not necessary and could be harmful by painting the picture to the worker of the gravity the hazard must be to exercise the right. It was recommended to not list examples in the rule language. The language in the proposal comes from BOLI’s current rule OAR 839-004-0016(3)(a) “...work area, equipment, or other factors...” and it was proposed as currently written in their rule.

4. Description of Changes to the Proposed Rules as Adopted

The adopted rules in Division 1 apply to all workers in Oregon covered under by the OSEA. Administrator discretion can be applied to all civil penalties.

OAR 437-001-0295 discrimination complaints are investigated by BOLI under ORS 659A. More information regarding BOLI discrimination investigation and enforcement activities can be found at <https://www.oregon.gov/BOLI/pages/index.aspx>

437-001-0015 Definitions

Comprehensive inspection (16):

The definition was updated to clarify when a programmed inspection is considered to be comprehensive and when it is limited in scope. The following text was added:

“With the exception of an emphasis inspection, a programmed inspection defined in OAR 437-001-0057 is a comprehensive inspection.”

SB 592 Section 1(1)(c)-(3) require a comprehensive inspection of a place of employment where an employer is issued three willful violations or three repeat violations in one year, a violation that caused or contributed to a work-related fatality, or any place of employment as deemed necessary by the Department based upon prior violation history. “Programmed Inspections for cause” was added to OAR 437-001-0057 (Scheduling Inspections) to address this requirement. Emphasis programs are clarified as a program inspection but not necessarily a comprehensive inspection.

The professional judgement of the compliance officer was added to the definition of a comprehensive inspection in order to align with SB 592 Section 1(8)(c) and to add clarity to the professional judgment statement included previously in the rule. The compliance officer is the primary source of information for Oregon OSHA regarding the violation. The observations and documentation of the compliance officer provide the organization with evidence of the violation. The compliance officer’s professional evaluation of the evidence provides the type, classification, probability and severity of the violation from which the civil penalty is calculated.

Violation (63):

Repeat violation (C) was updated for consistency with OAR 437-001-0160 Penalty Criteria – Repeat Violations. The following text was added:

“cited within the previous three years, will be cited as a repeat violation under the criteria in OAR 437-001-0160(3)(a).”

A repeat violation of a substantially similar violation must occur within a three year period from when the employer received the citations will be cited as a repeat violation. This requirement does not change Oregon OSHA’s definition of a repeat violation.

Caused or contributed to a work-related fatality (63)(e) definition was added to the rule. The following text was added:

“(e) Caused or contributed to a work-related fatality violation – The workplace death of an employee that was attributed to a violation or in which the violation was a related factor, as determined by the compliance officer.”

SB 592 Section 2(1)(a)(B) and Section 2(1)(c)(B) added a violation category to be applied to a first instance serious-rated violation, a repeat or willful violation. Violations that caused or contributed to a work-related fatality use a different civil penalty structure than a similarly classified violation that did not cause or contribute to the death of an employee.

For the new violation category, Oregon OSHA loosely used the language from the Federal Drug Administration¹¹ rule on medical devices that caused or contributed to an injury or fatality as a starting point. Additional text was considered and not included because it did not add any additional clarity to the definition or required the addition of additional definitions to define the definition. For example, the request to include that the violation materially contributed to the fatality would have required to define in rule “materially contributed”. The violation needing to be a “substantial factor” in the work related fatality is another phrase that was not included due to the requirement for defining what a substantial factor would include. The definition for caused or contributed was maintained as a combined definition to maintain consistency with the use of the term in SB 592 Section 2(1)(a)(B) and Section 2(1)(c)(B). A violation meeting either word (“caused” or “contributed”) in the definition will be assigned that civil penalty. Compliance officers will apply their professional judgment when reviewing all of the violations and the factors in the complete inspection when determining if a violation has caused or contributed to a work-related fatality. Compliance officers will document the violative condition, work environment, and all other relevant factors that substantiate their conclusion.

437-001-0055 Priority of Inspections

Oregon OSHA added Programmed Inspection for cause to the priority of inspections as the 5th inspection priority. Programmed inspections for cause is not intended to remove inspection priority of imminent danger, fatality, catastrophe, or accident, complaint or referrals. Programmed inspections for Cause is defined in OAR 437-001-0057(8). Placement of the inspection as the 5th priority of inspections will meet the requirements identified in SB 592 Section 1(c)(2)-(3). The comprehensive inspection must be opened within one year of the closing conference associated with the qualifying violation.

437-001-0057 Scheduling Inspections

Oregon OSHA added the criteria for a Programmed Inspection for Cause to 437-001-0057(8) to addresses SB 592 Section 1(1)(c)-(3) requirement for a comprehensive inspection when one of the identified criteria is met. SB 592 Section 1(3) requires a comprehensive inspection when an employer has three willful violations within one year or three repeat violation within one year. The bill also requires a comprehensive inspection following an accident investigation in which a cited violation has caused or contributed to a work-related fatality, and when the department deems it necessary based on the employer’s prior violation history.

The one year review period for violations is a rolling cycle based on violation history and does not follow a calendar or fiscal cycle. The one year to open the comprehensive inspection is 365 calendar days following the closing conference of the inspection that initiates the comprehensive inspection requirement.

Repeat violations must meet the criteria identified in OAR 437-001-0160 Penalty Criteria – Repeat Violations and the criteria in SB 592 Section 1(3) for a Programmed inspection for cause to be initiated. A programmed inspection for cause must be opened within one year of the closing conference of the inspection that included a repeat third violation within one year. This first-instance violation is used to determine the repeat status but is not included in the requirement for a programmed inspection for cause.

For example, an employer has the following:

Example 1		Example 2	
Violation	Inspection for cause count triggered by 3 repeat violations	Violation	Inspection for cause count triggered by 3 repeat violations
First instance violation closing conference: June 1, 2024	0	First instance violation closing conference: June 1, 2024	0
First repeat violation closing conference: August 1, 2024	1	First repeat violation closing conference: August 1, 2024	1
Second repeat violation closing conference: December 1, 2024	2	Second repeat violation closing conference: December 1, 2024	2
Third repeat violation closing conference: July 1, 2025	3 Triggers Comprehensive inspection to be opened before 1 year from July 1, 2025	Third repeat violation closing conference: September 1, 2025	2 No Comprehensive is triggered because it was outside of one year of the closing conference on August 1, 2024
Fourth repeat violation closing conference: December 1, 2025	3 Comprehensive inspection already triggered to be opened before July 1, 2026	Fourth repeat January 1, 2026	2 No Comprehensive is triggered because it was outside of one year of the closing conference on December 1, 2024
Fifth repeat closing conference: June 1, 2026	3 Comprehensive inspection already triggered to be opened before July 1, 2026	Fifth repeat December 1, 2026	2 No Comprehensive is triggered because it was outside of one year of the closing conference on September 1, 2025

Note: the dates in the example are for illustrative purposes and do not reflect the actual number of days in the year represented. For this purpose of this table: August 1, 2024 to August 1, 2025 is one year. Leap year is not considered.

Example 1 – Programmed inspection for cause initiated.

The employer had three violations in the same year from the date of the closing conferences but only two repeat violations because the first violation (June 1, 2024) was not a repeat but rather a “first instance”. The third repeat violation August 1, 2025 will initiate a programmed inspection for cause.

Example 2 – No programmed inspection for cause initiated.

The employer had three violations in the same year from the date of the closing conferences but only two repeat violations because the first violation (June 1, 2024) was not a repeat but rather a “first instance” violation. The third repeat violation on September 1, 2025 will not initiate a programmed inspection for cause because it is outside of the year period from the closing conference on June 1, 2024. A programmed inspection for cause would be initiated if the employer had two more repeat violations closing conference within one year of the September 2025 violation, but as displayed in the example, this did not occur.

Once the comprehensive inspection for cause is conducted from the trigger of 3 repeat violations, that comprehensive inspection resets the repeat violation count for the purpose of this provision relating to comprehensive inspections for cause from the 3 repeats. Any subsequent repeat violations will only be counted after the comprehensive inspection is completed and a citation is issued or no violations were identified.

Willful violations must meet the criteria identified in OAR 437-001-0175 – (Determination of Penalty Willful or Egregious Violation) and the criteria in SB 592 Section 1(1)(c)-(3) for a programmed inspection for cause to be initiated. A programmed inspection for cause must be initiated within one year of the closing conference for the third inspection that cited a willful violation within one year. Any willful violation would apply and does not need to be substantially similar violations.

Example 1		Example 2	
Violation	Inspection for cause count triggered by 3 willful violations	Violation	Inspection for cause count triggered by 3 willful violations
First instance willful violation closing conference: June 1, 2024	1	First willful violation closing conference: June 1, 2024	1
Second willful violation closing conference: August 1, 2024	2	Second willful violation closing conference: August 1, 2024	2
Third willful violation closing conference: December 1, 2024	3 Triggers Comprehensive inspection to be opened before 1 year from December 1, 2024	Third willful violation closing conference: July 1, 2025	2 No Comprehensive is triggered because it was outside of one year of the closing conference on June 1, 2024
Fourth willful violation closing conference: July 1, 2025	3 Comprehensive inspection already triggered to be opened before December 1, 2025	Fourth willful violation closing conference: September 1, 2025	2 No Comprehensive is triggered because it was outside of one year of the closing conference on August 1, 2024
Fifth willful violation closing conference: August 1, 2025	3 Comprehensive inspection already triggered to be to be opened before December 1, 2025 opened by July 1, 2026	Fifth willful January 1, 2026	2 No Comprehensive is triggered because it was outside of one year of the closing conference on July 1, 2024

Note: the dates in the example are for illustrative purposes and do not reflect the actual number of days in the year represented. For this purpose of this table: August 1, 2024 to August 1, 2025 is one year. Leap year is not considered.

Example 1 - Programmed inspection for cause initiated.

The employer had three willful violations in the same year from the date of the closing conferences. The third willful violation closing conference on December 1, 2024 will initiate a programmed inspection for cause.

Example 2 - No programmed inspection for cause initiated.

The employer did not have 3 willful violations in the same year of the closing conferences at any point. A programmed inspection for cause would be initiated if the employer had two more willful violations within one year of the September 2025 violation closing conference, but as displayed in the example this did not occur.

Once the comprehensive inspection for cause is conducted from the trigger of 3 willful violations, that comprehensive inspection resets the willful violation count. Any subsequent willful violations will only be counted after the comprehensive inspection is completed and a citation is issued or no violations were identified.

Violations identified during an accident investigation that caused or contributed to a work-related fatality meet the criteria in SB 592 Section 1(2) for a Programmed inspection for cause to be initiated.

A programmed inspection for cause must be opened within one year of the closing conference for the work-related fatality inspection.

Employers with a history of non-compliance initiate a programmed inspection for cause when it is deemed necessary for the protection of employees as identified in SB 592 Section 1(1)(c). History of non-compliance is identified with violations from complaints, referrals or accident investigations. This is intended to be applied when an employer's violation history reflects a habitual occurrence that requires a more comprehensive approach than the traditional targeting methods that were in effect prior to this rule adoption (such as scheduling lists, complaints, referrals, emphasis programs, etc.). Among other factors, the Administrator will consider the employer's violation history, complaint or referral history that resulted in violations from the allegations, or indications that the employer is not implementing abatement methods across locations or worksites. For example, a fixed employer who receives multiple violations across multiple facilities and abatement appears to be limited to the locations inspected, or complaint or referral activity indicate that abatement methods are not implemented statewide or maintained.

Programmed inspections for cause do not use the neutral standard concept for other scheduled inspections explained in OAR 437-001-0057(1) and are initiated by violations of the employer. For the purposes of programmed inspections for cause, Oregon OSHA will not send notifications to employers based on their NAICS code as identified in OAR 437-001-0057(12) that they are subject to this type of inspection.

Programmed inspections for cause do not appear on an annually generated list like other scheduled inspection lists as explained in OAR 437-001-0057(3) and will not be subject to the exclusions from an inspection identified in OAR 437-001-0057(4).

The notes included in section (3) were changed from a note to (a) and (b) for clearer rule presentation and to clarify in rule how active consultation activities operate in relation to enforcement activities. With the exception of the addition of the Programmed Inspection for Cause portion, no additional text changes were made.

437-001-0099 Closing Conference

Oregon OSHA added Programmed Inspection for Cause to OAR 437-001-0099(o) as a discussion point with the employer of the possibility of subsequent inspections. If known, the compliance officer will attempt to notify the employer if the inspection triggers one of the criteria for a programmed inspection for cause. SB 592 Section 1 (1)(c)-(3) requires a comprehensive inspection after specific criteria are met. Oregon OSHA added programmed inspections for cause to address the SB 592 Section 1 (1)(c)-(3) requirements and are defined in Scheduling Inspections OAR 437-001-0057(8). It is recognized that the compliance officer will not likely know at the time of closing that the employer's history reaches the level that the Administrator deems necessary for the protection of employees. As such, they will not be able to notify the employer that a programmed inspection for cause could be initiated.

Typographical error were corrected in in section (1) and section (1)(i),(p) and (q) of the rule.

437-001-0142 Annual Adjustment of Civil Penalties

Oregon OSHA added a new rule number OAR 437-001-0142 Annual Adjustment of Civil Penalties. SB 592 Section 2(4) requires annual adjustment of identified civil penalties by the West Region CPI-U.

Oregon OSHA will publish an annual bulletin to adjust civil penalties annually based on the October West Region CPI-U. Utilization of October data is consistent with federal OSHA CPI-U adjustments for civil penalties. The bulletin will update the new civil penalty amounts that will become effective in January each year. Application of the adjusted civil penalties will be for all inspections opened on January 1st through December 31st of the designated year. Additional application will be as follows:

Follow-up inspections: Civil penalties from the year the inspection is opened will be applied for all violations and daily civil penalties assessed. If a new violation is cited during a follow-up inspection and the civil penalties for that date reference a different bulletin, the civil penalties applied to the violation will be consistent with the year the inspection was opened.

Daily civil penalties for failure to correct (failure to abate) violations will use the civil penalties cited in the first-instance citation and will change to the updated civil penalty structure if the correction has not been made prior to the updated bulletin becoming effective.

Repeat violations are assessed based on the history of the business and not based on the adoption dates of civil penalty adjustments or bulletins. If an employer is cited for a repeat other than serious-rated violation prior to adoption of the rule and is cited again after the updated civil penalty structure is in place, the penalty is assessed based on the bulletin in effect when the inspection is opened.

Oregon OSHA is required to calculate the annual adjustment based on the Consumer Price Index for all Urban Consumers, Western Region. Annual inflation adjustments are based on the percent change between the Consumer Price Index for all Urban Consumers, Western Region in October of the preceding year and October of the current year. The percent change is the cost-of-living adjustment multiplier for the following year. In order to compute the annual adjustment, the Agency will multiply the most recent penalty amount for each applicable penalty by the multiplier and rounded to the nearest dollar utilizing standard rounding practices.

Oregon OSHA will follow federal OSHA application of the CPI-U and utilize five digits after the decimal. Future application will be made based on the unrounded civil penalty amount. Annual adjustments to the bulletin will not require Oregon OSHA to engage in rulemaking. Civil penalties not identified in the bulletin will not be subject to annual adjustments.

When this rule is adopted, Oregon OSHA is required to apply the West Region CPI-U adjustment for 2023. Oregon OSHA will adopt this rule, and then immediately publish a bulletin using the West Region CPI-U calculations for 2023 for civil penalties that will go into effect on January 1, 2024.

437-001-0145 Penalty for Other than Serious, Serious, or caused or contributed to a work related fatality

Oregon OSHA updated the rule to include the new violation type of a violation that caused or contributed to a work-related fatality as required by SB 592 Section 2(1)(a)(B) and Section 2 (1)(c)(B).

Civil Penalty amounts referenced in OAR 437-001-0142 Annual Adjustment of Civil Penalties are defined in this rule. The civil penalties identified in this rule will be updated with the October 2023 West Region CPI-U adjustments for 2024 civil penalties. Civil penalty amounts will be adjusted annually in accordance with OAR 437-001-0142.

The civil penalty adjustments previously listed in the rule were removed from OAR 437-001-0145 and added to OAR 437-001-0150 for consistency of content in the rule title.

437-001-0150 Penalty Adjustments

Oregon OSHA added new rule number OAR 437-001-0150 Penalty Adjustments. Size adjustments, good faith, history and immediate correction previously located in OAR 437-001-0145 are now included in this rule. Reductions were moved to a new rule to more clearly address the civil penalties identified in SB 592 Section 2(4).

Size adjustments for first instance serious-rated violations were not modified and are included in Table 2 -Civil Penalties for Serious and Other Than Serious-rated Violations of the rule. Size adjustments referenced in Table 2 do not apply to civil penalties for repeat, willful or violations that caused or contributed to a work-related fatality. Repeat serious-rated violations have a \$7,000 reduction for employers with 50 or fewer employees based on statewide peak employment. This reduction is calculated by the first instance penalty without any reductions being multiplied by the number identified in OAR 437-001-0165 Table 1 - Penalties for Repeat Violations and then reducing that civil penalty by \$7,000. The civil penalty adjustment of \$7,000 is adjusted annually in accordance with OAR 437-001-0142. The current year reduction will be listed in the bulletin.

History, good faith, and immediate correction rules moved from OAR 437-001-0145 and added to set of rules but do not have any substantial changes to the reductions.

With the exception for additional abatement as described in the executive summary on page 3, reductions cannot lower the citation amount below the minimum civil penalty for the citation category.

437-001-0155 Determination of Penalty — Failure to Correct

Oregon OSHA updated the rule to meet the requirements in SB 592 Section 2(1)(d). Civil penalties will be adjusted in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties. Failure to correct civil penalty can have a size reductions applied if the first-instance citation is eligible for a size reduction (first-instance or repeat for a business with 50 or fewer employees).

Civil penalties will be calculated based on the severity and probability of the exposure assessed in the new inspection where a failure to correct (abate) is identified and will use the bulletin in effect for each day of exposure. Daily civil penalties will change to the updated civil penalty structure if the correction has not been made prior to the updated bulletin becoming effective. For example, a correction was due on December 20 and Oregon OSHA opens an inspection on January 5. In that inspection, a correction was not made and employees were still exposed to the hazard. The compliance officer will assess a failure to abate citation for the unabated days in December utilizing the bulletin still in effect in December, and utilizing the new bulletin for the days in January.

437-001-0160 Penalty Criteria — Repeat Violation

Oregon OSHA updated the rule to meet the requirements in SB 592 Section 2 for minimum and maximum civil penalties. Civil penalties will be adjusted in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties required in SB 592 Section 2(4).

Repeat violations must involve a substantially similar violation that such citation has been delivered to the employer within the last three years. SB 592 Section 1(3) requires a comprehensive inspection when three repeat violations are issued within one year of the closing conference of the third violation. These inspections are a programmed inspection for cause. Additional information regarding programmed inspection for cause can be found in 437-001-0057 Scheduling Inspections.

437-001-0165 Determination of Penalty — Repeat Violation

Oregon OSHA updated the rule to meet the requirements in SB 592 Section 2 for minimum and maximum civil penalties. Civil penalties will be adjusted in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties required in SB 592 Section 2.

SB 592 Section (2) includes requirements for all repeat violations. SB 592 Section 2(1)(c)(B) requires a different civil penalty range for repeat violations that caused or contributed to a work-related fatality. These violations will use the civil penalties for repeat violations that caused or contributed to a work-related fatality and not the repeat violations civil penalty structure.

Repeat violations requirements are established in 437-001-0160 Penalty Criteria — Repeat Violation. The criteria for a repeat violation was not modified by changes to this Division 1 rulemaking.

Civil penalties for repeat other than serious-rated and serious-rated (including death-rated) violations that are a fourth repeat or greater will be assessed a penalty at the discretion of the Administrator. The fourth or greater violation will be referred to the Administrator to assign a civil penalty amount higher than the third repeat.

Civil Penalty multipliers for serious-rated violations are shown in Table 1. The penalty calculated by the first-instance penalty based on the probability and severity of the violation is multiplied by the number identified in OAR 437-001-0165 Table 1 - Penalties for Repeat Violations. Employers with 50 or fewer statewide employees are eligible for a civil penalty reduction identified in OAR 437-001-0150(2)(b). The civil penalty reduction is adjusted annually in accordance with OAR 437-001-0142. The current year reduction can be found in the bulletin.

Other than serious-rated repeat violations are included in repeat violations in with a minimum violation applied based on the penalty structure identified in OAR 437-001-0145.

All penalties that are a fourth repeat or greater and did not cause or contribute to a work-related fatality will be assessed a penalty at the discretion of the Administrator. The fourth or greater violation will be referred to the Administrator to assign a civil penalty amount higher than the third repeat.

All penalties in this section will be within the minimum and maximum for a repeat or repeat that caused or contributed to the death of an employee identified in OAR 437-001-0145. With the exception for additional abatement as described in the executive summary on page 3, reductions cannot lower the citation amount below the minimum civil penalty for the citation category. All repeat civil penalties are adjusted annually in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties.

For purposes of calculating a repeat violation that falls under the ruleset “437-001-0203 Determination of Penalty — Relating to Violations Which Have No Probability and Severity,” the minimum repeat penalty according to the Civil Penalties Annual Adjustment Bulletin will be applied. This would be similar to how 1st repeat other-than-serious penalty would be applied. SB 592 requires a minimum repeat penalty, and does not distinguish violations that are other-than-serious or the rules contained in 437-001-0203.

437-001-0170 Determination of Penalty — Failure to Report an Occupational Fatality, Catastrophe, or Accident

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties.

437-001-0171 Determination of Penalty — Failure to Register a Farm Labor Camp/Facility

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties.

437-001-0175 Determination of Penalty — Willful or Egregious Violation

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 - Annual Adjustment of Civil Penalties. Willful or egregious civil penalties apply to other than serious-rated violations and serious-rated violations.

Willful violations that caused or contributed to a work-related fatality as required by SB 592 Section 2(3) are addressed in 437-001-0175(2). Willful or egregious civil penalties that caused or contributed to a work-related fatality apply to other than serious-rated violations and serious-rated violations.

When three willful violations are issued to an employer within one year, a programmed inspection for cause is initiated as required in SB 592 Section 1(3). See 437-001-0057 - Scheduling Inspections for additional information. Willful violations do not need to be from a substantially similar rule to initiate a programmed inspection for cause.

437-001-0180 Determination of Penalty — Relating to Red Warning Notice

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 - Annual Adjustment of Civil Penalties.

437-001-0201 Determination of Penalty — Relating to Field Sanitation.

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 - Annual Adjustment of Civil Penalties.

437-001-0203 Determination of Penalty — Relating to Violations Which Have No Probability and Severity

Oregon OSHA updated the maximum civil penalty required by SB 592 Section 2. Civil penalties are adjusted annually in accordance with OAR 437-001-0142 Annual Adjustment of Civil Penalties.

437-001-0295 Discrimination Complaint.

SB 907 Section 1(5)(e) requires Oregon OSHA to clarify its discrimination rule in accordance with federal OSHA's criteria for protected work refusal. Oregon OSHA's modifications are consistent with federal OSHA's rule language and policy. As the Agency with jurisdiction, BOLI is required to enforce this whistleblower provision in accordance with its current rules and procedures, and otherwise ensure its enforcement practices are "at least effective as" (ALEA) federal OSHA under 29 CFR 1977.12(b).

437-001-0295(1)(b) updated the following language:

"With no reasonable alternative and in good faith, the employee refused to perform a work task that would expose the employee to a hazardous condition that presents a real risk of death or serious physical harm and a reasonable person would agree under the circumstances all of the following conditions are met:"

Federal OSHA's rule 1977.12(b) includes the requirements that no reasonable alternatives are available and that the employee refused a work task in good faith. Refusing to complete the task in good faith that would expose the employee to a dangerous condition would be protected against discrimination.

This change captures the federal OSHA clarification for no reasonable alternative being available to the employee to mitigate the alleged hazard associated with the assigned task. The hazard may still be present in the work environment but has been mitigated to not be hazardous to the employee.

The reasonable person evaluation is assessed by the BOLI investigator and includes an assessment of all relevant factors that affect the alleged hazardous condition that was connected to an employee's work refusal. Federal OSHA has a whistleblower investigation manual¹² (WIM) that contains federal OSHA's investigation practices and policies related to whistleblower complaints filed under the federal OSH Act. Oregon OSHA is in the process of updating its Oregon-specific WIM (PD A-288) in accordance with federal OSHA's WIM and BOLI's rules and investigation procedures. BOLI investigators may rely on federal OSHA's WIM and the PD A-288, in addition to its own rules and policies, during an investigation of work refusal as filed under the OSEA.

Imminent danger definition can be found in OAR 437-001-0015(38) and serious physical harm definition can be found in OAR 437-001-0015(58).

Federal OSHA rule 1977.12(b) identifies three requirements that must be met for the employee to be protected from discrimination after refusing to complete an assigned task. These include a reasonable person standard, an urgent need where correction methods may not be available, and an employee expectation to communicate the hazard with the employer. All three of the criteria must be met for the refusal of work to be protected.

Oregon OSHA updated section 1(b)(A) with the following language:

“Where possible, the employee requested from the employer, and was unable to obtain, a correction of the hazardous condition; and”

Like the federal OSHA rule language, this provision is subject to agreement by a reasonable person. There must be sufficient evidence or information that would lead a reasonable person to believe that this element under (b)(A) is true.

Oregon OSHA updated section 1(b)(B) with the following language:

“A hazardous condition that if exposed, would have subjected the employee to imminent danger or serious physical harm; and”

Like the federal OSHA rule language, this provision is subject to agreement by a reasonable person. There must be sufficient evidence or information that would lead a reasonable person to believe that this element under (b)(B) is true. A hazard does not need to be created by tasks at the workplace for it to be considered. Oregon OSHA defines occupational hazards broadly to mean “a condition, practice, or act that could result in an injury or illness of an employee” in OAR 437-001-0015(36). Therefore, workplace hazards covered under the OSEA are not limited by their source or origin.

Oregon OSHA updated section 1(b)(C) with the following language:

“Due to the urgency of the hazardous condition, there was insufficient time or opportunity to correct the hazard through regulatory authorities, such as Oregon OSHA.”

Like the federal OSHA rule language, this provision is subject to agreement by a reasonable person. There must be sufficient evidence or information that would lead a reasonable person to believe that this element under (b)(C) is true.

Discrimination complaints are filed with and investigated by BOLI. Section (2) of Oregon OSHA’s rule was updated to include a reference to Oregon House Bill 2420¹³ (2021 legislative session), which impacted the filing period for Oregon OSHA discrimination complaints.

Section 3 clarifies a complaint may be dual filed with the US Department of Labor. This is not a requirement but an additional option for an employee to file a complaint.

5. Summary of Comments and Agency Decisions

Oregon OSHA received 194 written comments regarding the proposed Division 1 changes. Oral comments were received during the five public hearings. Many of the comments received addressed both SB 592 and SB 907 and many comments addressed more than one of the bills.

Oregon OSHA reviews and considers all comments during the rule making process, written and verbal. The review process is not a tally of a support or opposition to a subject or proposed change. Oregon OSHA reviews the comments for topics that may add clarity to the rule and additional options not considered during the proposed rule development process. In regards to the discrete comments shown below in italics, often times multiple comments were received conveying the same general message but only one commenter was attributed to the comment to ensure that slight variations of a comment are an accurate reflection of the commenter's words. In other words, one form letter may have been received from multiple individuals or groups that were identical or nearly identical but only one name was attributed to it to ensure accuracy of the message. Since the comments are a sampling of what was received it was not necessary to attribute the concept to each commenter.

Oregon OSHA does not address individual comments that were received during the public comment period but has grouped similar public comments together to address them in this document. Some categories may contain a representative comment from one or more of the public comments. This is intended to provide a representative sample of similar comments and does not necessarily include all comments submitted regarding the proposed rule.

SB 592 Comments:

(1) Public Comment Summary: The proposed penalties are a large increase in penalty amounts and the citation amount is larger than the required minimum in Senate Bill 592

- Oregon OSHA received several comments with concerns regarding the increase in civil penalties. Some of the comments included:

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"OHBA would prefer rules that establish the initial penalty amount as close to the statutory minimum penalty amount as possible without the need for subsequent downward adjustment. The statutory increase is substantial and will change employer behavior on its own."¹⁴

"There is no reasoning behind any penalty or fine to be that ridiculously high"¹⁵

"Penalty amounts for the least serious violations should fall at the lowest amount required by statute. The statutory minimum penalty for a serious violation is \$1,116. As the proposed rule presently stands, the base penalty for a low probability serious violation the lowest possible serious violation—would be \$3,348, which is three times the statutory minimum. While AGC understands that the proposed rule allows for certain modifiers to reduce this base penalty, the reality is that for larger employers, a reduction to the statutory minimum is impossible under the proposed scheme, and is highly unlikely for all but small contractors (those with 25 employees or less). Larger employees should not always be faced with more-than-minimum penalties."¹⁶

The civil penalty ranges used in the rule update were established in SB 592, and modifies the Oregon Safe Employment Act ORS 654.067 and 654.086. Oregon OSHA rules must be in alignment with this statute.

SB 592 established a range for civil penalties for other than serious, serious, repeat, willful and any of those types that caused or contributed to a work-related fatality. Oregon OSHA wanted to maintain distinctly different civil penalty amounts based on the severity and probability of the violation, which follows the agency's current civil penalty model and is aligned generally with how federal OSHA assesses penalties. In order to follow that structure, Oregon OSHA applied civil penalties for violations with greater severity and probability a value at the higher end of the range from SB 592 while those with lower probability and severity were assigned a value at the lower end of the range. Oregon OSHA considered several options during this review.

The civil penalty ranges in SB 592 are very similar to federal OSHA which was often shared as the legislative intent during committee hearings. Federal OSHA civil penalties for serious rated violations are between \$6,696 and \$15,625. Reductions can be applied to the civil penalty that may reduce it to \$1,116. The numbers used in Oregon OSHA's proposal and subsequent planned adoption for first-instance penalties are mostly the same as federal OSHA except for two categories that reflect the same penalty amount. It is important to Oregon OSHA that each penalty be independent from one another on the probability and severity matrix. To account for this difference between federal OSHA and Oregon OSHA, a lower penalty than federal OSHA's was created to be proportionally below the lowest number on the federal OSHA matrix. This was also a recognition of the large number of small employers in Oregon, and the importance of having a penalty that was lower than federal OSHA's lowest penalty on the matrix of \$6,696. Other than serious rated violations are \$0 to \$15,625 and willful or repeat violations are \$11,162 to \$156,259. Federal OSHA does not have a separate civil penalty structure for a violation that caused or contributed to a work-related fatality.

Oregon OSHA reviewed whether the federal OSHA citation structure would be effective. A civil penalty structure format that mirrored federal OSHA would have made substantial changes to how Oregon OSHA administers its enforcement program, as federal OSHA's terminology means something different (ex. gravity versus probability and severity). In addition to the changes in the penalty amounts, the reduction amounts and options available would have changed Oregon OSHA's enforcement process beyond the scope of the rulemaking. Oregon OSHA did not recommend full adoption of the federal citation system due to those changes. Federal Statute does not have minimum penalties for final order violation that SB 592 creates, which illustrates another difference between the two systems.

Oregon OSHA considered a first-instance penalty structure with the legislative minimum as the first-instance penalty for serious-rated violations in the low severity and low probability category. Using this model, Oregon OSHA was unable to identify a civil penalty schedule with distinctions for each severity, probability and employer size for civil penalties that were within the established ranges in Senate Bill 592. The proponents of the bill also reminded the committee that the intent was to be more closely aligned with federal OSHA, and not having these meaningful distinctions would not have been in line with the legislative intent. Federal OSHA would likely have objected to the lack of distinction and could have raised an “at least effective as” (ALEA) issue.

The chief proponent of the SB 592 stated in comment:

“With Oregon 50th out of 50 states in penalties levied, it was long past time to align Oregon penalties with federal OSHA’s to be sure to hit that “at least as effective” benchmark. However, we also recognize that the systems, procedures and rules of Oregon OSHA are not perfectly mirrored to Federal OSHA’s systems, procedures and rules. So, while we would have liked the penalty matrixes outlined in 437-001-0145, 437-001-0165, 437-001-0175 to be the exact same as Federal OSHA’s, we appreciate that those proposed are as close as possible given the inherent differences in the formulas between the two systems. And most importantly, these rules are still very much in compliance with the statute when it comes to maximum and minimum penalties as outlined in SB 592.”¹⁷

Oregon OSHA was also looking for a civil penalty structure that would maintain a distinction based on severity, probability and the frequency of the repeated condition for repeat violations. There was an objective to maintain an easy to understand structure that was similar to the current structure. Application of the multiplier after civil penalty reductions did not maintain the distinction based on severity, probability and the frequency of the repeated condition. Because of this, the application of the multiplier is to the first-instance penalty before any adjustments. This maintained the violation distinction and was within the ranges established in the senate bill. The similar system was intended to be familiar to the employers and provide a consistent and easy to use system.

For repeat violations, two multiplier sequences were considered during the rulemaking process. Based on feedback noted above during the RAC, the proposal and subsequent planned adoption of the rule includes multiplying the first-instance penalty: Four times for the first repeat violation, six for the second, and eight for the third repeated violation. The fourth or greater violation would be referred to the Administrator to assign a civil penalty amount higher than the third repeat. Utilizing the 4/6/8x multiplier allowed Oregon OSHA to maintain the distinction based on severity, probability, the frequency of the repeated conditions, and a distinction in civil penalties for the caused or contributed to a work-related fatality or willful violations. The other multiplier sequence considered (5/7/9x) did not allow the distinctions between violation classification (severity and probability) without topping out at the high end of the death violation probability.

Application of employer size reductions were complicated to apply, understand and maintain within the requirements of the senate bill. To address employer size, Oregon OSHA considered a couple of options during the RAC discussions but for proposal and subsequent planned adoption of the rule, a flat \$7,000 reduction for all serious-rated violations for small employers was selected. The size of the employer eligible for the reduction was also considered during committee discussions, and determined for proposal and subsequent planned adoption of the rule to use the Oregon Employment Department definition for a small business of 1-50 employees. By using this definition, Oregon OSHA can utilize the data from Oregon Employment Department to articulate the employer business sizes in Oregon for inclusion into the Statement of Need and Fiscal Impact Review filing form.

Section 2 of SB 592 establishes a range for repeat violations. The legislation requires the minimum penalty assessed for a repeat violation be not less than \$11,162. There was no clarifying language included as in other sections that this minimum applied to only serious violations. The same clarifying language was also not included in the repeat and willful caused or contributed to a work-related fatality penalty range. The clarifying language was included in the caused or contributed to a work-related fatality for a serious-rated violation. Because the legislation did not limit the penalty ranges to only serious-rated violations, Oregon OSHA could not exclude other than serious-rated violations from the mandatory range.

Oregon OSHA reviewed several options to meet the requirement in SB 592 for annual adjustment of civil penalties. The civil penalties included in the rule are generally based on the federal OSHA civil penalty amounts for 2022 and serve as a base that future required adjustments will be applied. The bulletin will include Bureau of Labor and Statistics (BLS) source information for transparency to employers. A bulletin is currently used by the Oregon Workers' Compensation Division and Oregon Workers' Compensation Board to address annual adjustments. Oregon OSHA mirrored that process for this requirement. To better align with federal OSHA, Oregon OSHA will use the October data, which is published in November using the same methodology to annually adjust the civil penalties. The intent is to update the civil penalties when the West Region CPI-U data is available for October and publish that information online and in the Oregon Bulletin in advance of the effective date to provide employers as much prior notice as possible. The use of the bulletin will reduce the cost and time requirements by both Oregon OSHA and advisory committee members from what would be required for annual rulemaking.

*"...there is clear language under 437-001-0142 around the annual adjustment of civil penalties with CPI for the Western Region in alignment with Section 2 of SB 592. Instead of convening a RAC yearly to make this simple statutory change, the rules wisely propose to publish these CPI changes in the January Annual Bulletin. This will be a useful tool in notifying employers, while also staying in compliance with the law to index to inflation from now on."*¹⁸

*"I also support the annual adjustments of civil penalties to businesses. Researchers estimate that a 10 percent increase in average penalties reduces worker injuries by almost one percent. This change could have saved the lives or mitigated harm for over 400 workers and their families last year. Currently, Oregon is ranked last out of 50 states in penalties levied. We are long overdue for this change."*¹⁹

Several comments referenced a study that estimated a 10 percent increase in penalties would reduce the injuries by 1 percent. During legislative testimony this study was referenced multiple times with slightly different variations of the phrasing, but the name of the study or a link was not available during the hearing with the testimony for review. After receiving written comment during the public comment period, the genesis of this study became evident. The complete study is available in the rulemaking record.

The following abstract was taken from the study (published in 1990) to provide context of the work referenced. The underlined portion was added to emphasize and draw attention to the language similar to what is provided in multiple comments received:

“We develop a model of risk assessment that incorporates assumptions from the behavioral theory of the firm into conventional expected utility models of compliance, and test the model using data on injuries and OSHA inspections for 6842 manufacturing plants between 1979 and 1985. Four hypotheses are supported—the specific deterrence effect of an inspection, the importance of lagged effects of general deterrence, the asymmetrical effects of probability and amount of penalty on injuries, and the tendency of injury rates to self-correct over a few years. The model estimates that a 10% increase in enforcement activities will reduce injuries by about 1% for large, frequently inspected firms. Prior analyses reporting lower impacts (Smith, 1979; Viscusi, 1986a) are replicated to distinguish between sampling and modeling differences. The results suggest that further compliance theory needs more detailed models of risk-assessment processes to be tested on samples of firms most affected by enforcement.”²⁰

(2) Public Comment Summary: Impact to small business and businesses

Oregon OSHA received several comments with concerns regarding the impact of the increased civil penalties for small businesses and the impact to the business and economic environment in Oregon from the increases. Some of the comments included:

“the substantial increase of punitive measures and fine amounts will disproportionately impact small businesses and contractors and may lead to higher operational costs across the construction industry. In an industry already experiencing significant hardship due to inflation and supply chain issues, Emergency SB592 threatens to stifle economic growth and job creation in the State.”²¹

“I am urging you to dismiss and vacate the new fine increases. Increasing the penalties will in no way make workers safer, however it will ultimately close businesses.”²²

“We participated in the many conversations during rulemaking about the small employer penalty reduction, and we continue to believe that giving smaller employers lower penalties due to their size may counteract the strong deterrence of a high penalty.”²³

“...the substantial increase of punitive measures and fine amounts will disproportionately impact small businesses and contractors and may lead to higher operational costs across the construction industry. In an industry already experiencing significant hardship due to inflation and supply chain issues, Emergency SB592 threatens to stifle economic growth and job creation in the State.”²⁴

The advisory committee emphasized the importance of maintaining current options for reductions for first-instance penalties to account for small business. The committee emphasized the importance of civil penalties remaining equitable based on employee size. Oregon OSHA maintained civil penalty reduction opportunities to meet this interest.

Oregon OSHA assigned a value to the first instance penalty for a serious-rated violation greater than the minimum requirement identified in Senate Bill 592 to maintain options for civil penalty reductions. Civil penalties may be reduced by up to 75% based on the employer size, up to 20% for good faith efforts by an employer to comply with the regulations, up to 10% based on the employer history and 10% when the employer immediately corrects the hazard. Poor good faith efforts by the employer and a poor employer history of violations can also result in an increase to the civil penalty of 20% and 10% respectively. These possible civil penalty modifications for first instance penalties were not updated in this rule update and remain applicable for first instance penalties that are described in Table 2 – Civil Penalties for Serious and Other Than Serious-rated Violations. SB 592 established minimum and maximum civil penalties that the adjusted civil penalty must be between.

Civil penalty modifications for size, history, immediate correction and good faith remain the same as in the previous rule for first instance violations in Table 2 – Civil Penalties for Serious and Other Than Serious-rated Violations. ORS 437-001-0150 was added to clarify the change in eligibility for reductions to civil penalties.

(2) Public Comment Summary: The updated civil penalties will have an unintended impact for public entities with a statutory budget

Oregon OSHA received several comments with concerns regarding the impact of the increased civil penalties being applied to public entities with statutory budgets. Some of the comments included:

“Impact on Budgets and Services: Increasing penalties, as outlined in SB 592 and SB 907, would place a significant strain on our limited budget. We remain sensitive to the potential financial hardships that these penalties could impose on public employers. We urge Oregon OSHA to consider the financial implications of these penalties and explore alternative, more consultative approaches to enforcement that emphasize education over punitive measures for minor offenses.”²⁵

“Federal OSHA Jurisdiction: We would also like to highlight the fact that Federal OSHA does not have jurisdiction over state and local public employers. It relies on individual state administrators to enforce health and safety regulations, acknowledging the differences between public and private employment. It is essential to consider alternative methods of compliance that are better suited to the unique challenges faced by public employers, as detailed in 29 CFR 1956.1(b) and the Federal OSHA State Plan Policies and Procedures Manual.”²⁶

“Klamath Irrigation District has a statutorily defined budget and revenue source placed directly upon the backs of farmers and ranchers without any guaranteed water supply due in part to Oregon State’s failure to defend state water law and water rights. Any increase in penalties to the District will harm the District’s ability to provide needed services to the public.”²⁷

“... I would also like to comment on the rulemaking for SB 592. Local governments like ours and our neighbors have a statutorily defined budget and revenue source that cannot be increased without a vote of the people. Any increase in penalties could result in a negative outcome on the abilities for us to deliver the critically needed services we are here to provide.”²⁸

While Oregon OSHA understands the concerns raised, as a state plan, Oregon OSHA must meet the requirements identified in the OSEA which does not identify a difference for enforcement between public and private employers or a difference for application of penalties.

The OSEA includes:

654.005 Definitions.

(5) “Employer” includes:

(a) Any person who has one or more employees.

(b) Any sole proprietor or member of a partnership who elects workers’ compensation coverage as a subject worker pursuant to ORS 656.128.

(c) Any successor or assignee of an employer. As used in this paragraph, “successor” means a business or enterprise that is substantially the same entity as the predecessor employer according to criteria adopted by the department by rule.

654.025 Jurisdiction and supervision of Workers’ Compensation Board, director and other state agencies over employment and places of employment; rules. (1) The Director of the Department of Consumer and Business Services is vested with full power and jurisdiction over, and shall have such supervision of, every employment and place of employment in this state as may be necessary to enforce and administer all laws, regulations, rules, standards and lawful orders requiring such employment and place of employment to be safe and healthful, and requiring the protection of the life, safety and health of every employee in such employment or place of employment.

The recommendations provided in comment are not in line with the OSEA and cannot be applied as suggested. Additionally, the reference to federal OSHA’s jurisdiction is not relevant in Oregon as the OSEA does not have any exclusions for these entities.

(4) Public Comment Summary: Oregon OSHA should focus more on education and not penalties. Training and educational options should be used instead of penalties.

Oregon OSHA received several comments with concerns regarding having more of an emphasis on training and educational opportunities and not penalties. Some of the comments included:

“Due to this effect of penalties on the ability of the local government to provide needed services, Oregon OSHA should consider amending their administrative rules to change the inspection procedures to a more consultative approach for statutorily authorized public employers. Education first, then penalties for severe offenders. The Federal OSHA State Plan Policies and Procedures Manual discusses alternative methods of compliance for public employers.”²⁹

“Employers are often dedicated to workplace safety, but employees act in ways that are outside the employers’ control or ability to correct. In such instances, punishment is rendered without consideration of the employers’ workplace operating standards, procedures, or employee training/education.”³⁰

“... in addition to stifling business growth, the fear of severe penalties may deter contractors from investing in innovative safety solutions or adopting new technologies that could enhance workplace safety. This reluctance to invest in advancements may hinder the overall progress of the construction industry, jeopardizing both safety and economic growth.”³¹

“Impact on Budgets and Services: Increasing penalties, as outlined in SB 592 and SB 907, would place a significant strain on our limited budget. We remain sensitive to the potential financial hardships that these penalties could impose on public employers. We urge Oregon OSHA to consider the financial implications of these penalties and explore alternative, more consultative approaches to enforcement that emphasize education over punitive measures for minor offenses.”³²

Oregon OSHA continues to offer consultative services to Oregon employers. This service is free of charge and confidential. Employers can initiate a consultation by contacting their local Oregon OSHA office. Consultations can be subject specific or comprehensive for a work location. Oregon OSHA Consultation and Enforcement Programs are different, and cannot be intermingled.

As a state plan, Oregon OSHA cannot take the approach of training in lieu of enforcement. Oregon OSHA is required to be “at least effective as” (ALEA) federal OSHA, including its enforcement practices, and enforcement officers cannot provide “consultations” without penalties if the *prima facie* elements of a violation are identified.

Oregon OSHA also offers a variety of public education options for Oregon employers. Classes are offered in person and on-line. Many of the trainings are also available in Spanish. Many rules have additional resources such as guidebooks, fact sheets, posters, and sample written documentation plans available on their topic page in the A-Z index on Oregon OSHA’s website. There is also a resource library available with videos and industry standards that are available for review.

Oregon OSHA technical staff are also available free of charge for employers and employees that have questions regarding rules and regulations that apply to their work.

(5) Public Comment Summary: The use of prior violation history for comprehensive inspection for a programmed inspection for cause is a concern.

Oregon OSHA received several comments with concerns regarding the use of prior violation history initiating a programmed inspection for cause. Some of the comments included:

“The rule adds in clear definitions for repeat violations, “caused or contributed to a workplace death,” and adds “programmed inspections for cause” to the list of reasons for an inspection, in addition to an inspection for a history of non-compliance. All of these elements ensure that Section 1 of SB 592 – which requires a comprehensive inspection when there has been a work-related fatality in connection to a violation or when there are 3 or more willful violations within a year or when “deemed necessary by the department based upon the prior violation history of the place of employment regarding any state occupational safety or health law, regulation, standard, rule or order” to conduct a comprehensive inspection – be appropriately and effectively implemented in practice.”³³

“First, one of the fundamental legal concerns with Emergency Senate Bill 592 is the potential infringement on due process and fairness. Under Section (1)(c), there is no clear guideline as to what “prior violation history” would entitle OSHA to perform a comprehensive inspection. No other state or federal OSHA is permitted to perform a comprehensive inspection based on something as simple and arbitrary as a “prior violation history.” This lack of due process exposes businesses to arbitrary enforcement actions and undermines their rights through murky, if not entirely arbitrary, legal justification standards.”³⁴

Inspections are initiated in one of seven ways identified in OAR 437-001-0055 - Priority of Inspections. Programmed inspections (scheduled inspections) is the sixth priority for inspections. These inspections are selected from a list of employers based on the most hazardous industries but they differ from the programmed inspections for cause.

Some employers, based on their NAICS code, may not be included in the criteria for fixed scheduling lists identified by rule [OAR 437-001-0057](#). The inclusion of Programmed inspections for cause provides Oregon OSHA the ability to include that employer in a comprehensive scheduling list as required by SB 592.

An employer must have a documented Oregon OSHA violation history to initiate a programmed inspection for cause. Oregon OSHA recognizes the interest in better understanding the factors that would be considered when the Administrator deems a comprehensive inspection is necessary for protection of employees. In response to that concern, under section “437-001-0057 - Scheduling Inspections” of this document, there is a discussion on how this section of the rule is intended to be implemented. Additionally, a program directive will be developed for programmed inspections for cause to help the regulated community and compliance officers understand this concept required by SB 592.

Senate Bill 907 Comments

(1) Public Comment Summary: The list of hazards should be expanded to include biological, natural, manmade, and environmental threats.

Oregon OSHA received several comments requesting the inclusion of additional examples of hazards in OAR 437-001-0295 – Discrimination Complaint, section (1)(b)(B). Some of the comments included:

“However, It is important to note that adding this language does not expand the scope of the rule or change the substance of it. By asking for more comprehensive language, we are asking for OSHA’s rules to be clear that it covers environmental, biological, and human-made hazards so that a layperson reading the rules can understand their existing right more clearly - with examples that contextualize “hazards” at the workplace.”³⁵

“Workers and laypersons must be able to read this rule and understand that the right to refuse hazardous work covers anything that causes them imminent physical harm. They should not have to be an attorney, and this right shouldn’t just be left to agency interpretation and guidance - but rather Oregon’s language should be modernized to account for 21st-century health threats.”³⁶

“I think OSHA should add more elements of workplace hazards beyond “equipment.” The way the draft rule is currently written, a worker’s right to refuse dangerous work could be interpreted to consider only unsafe equipment. Instead, I agree with other union members and workers who have suggested that OSHA include in Sec. 1(b)(B) “any other factors including but not limited to natural, environmental, human-made or biological factors.” This will protect workers in education and other fields where we may face unsafe working conditions due to many factors beyond equipment.”³⁷

“The District provides emergency services, including flood control and emergency repairs to levies. Oregon OSHA must clearly define what conditions a public employee can refuse to work; emergency conditions should be an exception. Any reduction in the workforce can cause severe health and safety risks, up to and including death, for everyone, including the public and those employees remaining to complete these mandatory tasks.”³⁸

“Work Refusal Rules and Emergency Responses: The proposed changes to work refusal rules have raised significant concerns. These changes have the potential to

disrupt emergency responses, particularly those related to fire, police, and EMS. Public employers, like our fire district, provide vital life-sustaining and emergency services. Any reduction in our workforce due to rules that allow employees to refuse work more easily poses serious health and safety risks to our community and the employees who remain dedicated to their essential tasks. Oregon OSHA must carefully define the conditions under which a public employee can refuse work to ensure the safety of all stakeholders.”³⁹

“We ask you to expand your list of examples of hazardous work conditions beyond just unsafe work equipment to fully capture the scope of threats out there- including biological, natural, manmade, and environmental threats. Our state has seen unprecedented smoke from wildfires, extreme heat, pandemics, toxic algae blooms, and other health hazards. These hazards impact workers, and should be addressed.”⁴⁰

Oregon OSHA’s intent has always been to provide clarity through supplemental documents with examples of possible hazards, not an exhaustive list. It is Oregon OSHA’s position that broadening the list of possible hazards does not provide additional clarity and may provide more confusion by creating a threshold of importance for the worker to compare with their scenario. If a worker reads the list and sees only large scoping issues, it may influence their assessment of whether their hazard is like the example. The inclusion of a list was originally from BOLI’s OAR and initially seemed helpful information but as the public comment period brought more additions to the list it became distracting from the intent. The rule is not intended to exclude any hazard from consideration as long as the hazardous condition meets the three elements that a reasonable person would agree:

- (A) Where possible, the employee requested from the employer, and was unable to obtain, a correction of the hazardous condition; and
- (B) A hazardous condition that if exposed, would have subjected the employee to imminent danger or serious physical harm; and
- (C) Due to the urgency of the hazardous condition, there was insufficient time or opportunity to correct the hazard through regulatory authorities, such as Oregon OSHA.

Oregon OSHA is committed to developing supplemental materials that help employees understand their rights under this rule, including a reiteration that environmental hazards (as long as they meet the conditions set forth in the rule) are applicable to the rule, just as much as entering an oxygen deficient confined spaced would be (as long as it meets the conditions set forth in the rule). Once again, there is no hazardous condition that is excluded from this rule as long as it meets the conditions set forth in the rule.

Another challenge to listing types of hazards is that they may not be hazardous to everyone due to abatement methods or simply the circumstances confronting the employee. For example, an employee working outside in an area that has an air quality index rating of 251 may face different hazards than an equipment operator in the same area in an enclosed cab with air filtration systems in working condition. Adding in the specifics makes the application too broad without taking into account the exposure of the individual worker as described above. For this reason, Oregon OSHA has removed hazard examples in the rule and went back to the language in federal OSHA's rule to simply use "hazardous condition". This eliminates the confusion and aligns with federal OSHA as the bill requires Oregon OSHA to do.

The use of "hazardous condition" is intended to be comprehensive of all unmitigated hazards that would expose an employee to imminent danger or serious physical harm. Hazards such as "biological, natural, man-made, and environmental threats," could be covered under the term "hazardous condition." The source of the hazardous condition, such as "wildfires, extreme heat, pandemics, toxic algae blooms, and other health hazards," could also apply if the circumstances of the work refusal rule are met.

Oregon OSHA's position is that it is more appropriate to address specific hazards in educational material that can be more easily customized to industry specific hazards.

(2) Public Comment summary: The use of "where possible" to clarify an employee's responsibility in contacting a supervisor or their employer.

Oregon OSHA received several comments requesting the use of reasonably practicable instead of where possible in OAR 437-001-0295 – Discrimination Complaint, section (1)(b)(A). Some of the comments included:

*"The use of "reasonably practicable" attempts to contact the employer would be clearer than "possible" for many classified school employees who work hours outside a 9 a.m. to 5 p.m. schedule. We may not be able to reach our employer at key moments. I cannot control whether I can connect with my supervisor, and this should not be a barrier to my safe working conditions if I have a reasonable, good faith belief that the task I've been asked to perform would expose me to the risk of death or serious physical harm."*⁴¹

*"Further, we believe that Oregon should use "reasonably practicable" instead of "possible" as the standard for when a worker needs to contact the employer about the hazard. Our aim is to be clear that whether a worker contacts the employer or not, they don't need to do the hazardous task as long as they have a reasonable, good faith belief that it would expose them to the risk of death or serious physical harm."*⁴²

The use of "where possible" was discussed at multiple RAC meetings. Some members of the RAC preferred the use of "reasonably practicable." The legislative directive was to clarify the language in OAR 437-001-0295 – Discrimination Complaint to make it consistent with federal OSHA. Federal OSHA 1977.12(b)(2) uses where possible. The use of this language does not modify the scope of the federal OSHA rule that Oregon OSHA was tasked with following.

“Where possible” has been clarified by federal courts⁴³. The use of previously clarified language provides guidance for the employee and the employer with the scope of the requirement. Additionally, Oregon OSHA worked with federal OSHA on the language of this section and it was their recommendation to use the words “where possible”. Federal OSHA as well as other federal whistleblower statutes use the same words, including the Federal Railroad Administration. As mentioned before, there is case law for this rule and using other words could make Oregon OSHA not “at least effective as” (ALEA) federal OSHA if courts interpreted new words differently.

(3) Public Comment Summary: The application of the reasonable person standard when it is applied to work that is inherently dangerous or a public service (for example: EMS, law enforcement, wastewater operators)

Oregon OSHA received several comments requesting clarification of the reasonable person standard that applies when evaluating a hazard. In OAR 437-001-0295 – Discrimination Complaint, section (1)(b)(A)-(C) are evaluated by a reasonable person and would agree that the hazard was present. Some of the comments included:

“Work Refusal Rules and Emergency Responses: The proposed changes to work refusal rules have raised significant concerns. These changes have the potential to disrupt emergency responses, particularly those related to fire, police, and EMS. Public employers, like our fire district, provide vital life-sustaining and emergency services. Any reduction in our workforce due to rules that allow employees to refuse work more easily poses serious health and safety risks to our community and the employees who remain dedicated to their essential tasks. Oregon OSHA must carefully define the conditions under which a public employee can refuse work to ensure the safety of all stakeholders.”⁴⁴

“Police officers, deputy sheriffs, corrections officers, firefighters and other first responders are regularly required to take personal risks for the protection of others. The vast majority of which do so with a sense of duty Oregonians should be proud of. There are however rare instances in which a person who may not suited to these professions could refuse complete a task based on a strict reading of this rule. We suggest words to the effect of:

*437-001-2095(b) The employee is **employed in a profession regulated by federal OSHA and** refused in good faith to be subjected to imminent danger provided the employer refused to correct the hazard or it was not possible to notify the employer of the danger and the employee has notified Oregon OSHA or other appropriate agency, of the hazard, unless excused on the basis of insufficient time or opportunity as stated in OAR 839-003-0025, Bureau of Labor and Industries rules.*

In the event the agency believe they are statutorily required to include public safety professionals in the rule, we request at a bare minimum additional language be included in the draft to reflect the standard by which work refusal would be assessed by the agency. Again we suggest words to the effect of:

437-001-0295(b)(1) If the employee is a police officers, deputy sheriff, corrections officer, firefighter, wildland firefighter or similarly situated employees the refusal to

perform work must be a reasonable decision to a similarly trained, experienced, and equipped employee in the same profession.”⁴⁵

“Our first responders undergo arduous and specialized training to effectively navigate and manage hazardous situations. Utilizing our knowledge, skills, and abilities along with specialized personal protective equipment allows us to respond and mitigate conditions we are tasked with in an efficient and safe manner. This distinguishes first responders from members of the public who are held to a “reasonable person standard” because they are untrained and in the course of their work are not exposed to nor do their duties include inherently dangerous environments and situations.”⁴⁶

“...as Oregon OSHA’s proposed rule is phrased, it may be that the employee gets to determine whether the hazardous condition was sufficiently urgent to warrant a refusal to work or whether there was insufficient time to, e.g., file an OSHA complaint to have the hazard corrected instead of refusing to work. And if that is the case, and this requirement is not tied to a “reasonable person” standard like the Federal counterpart rule is or a “reasonable cause” standard as BOLI’s rule sets out, would the employee be able to satisfy criteria (C) if, for example, OSHA does come out but finds that whatever violation exists does not require immediate correction, and the employee disagrees, so they refuse to continue working? If a reasonable person standard were used, it would be essentially impossible for the employee to satisfy criteria (C) under such circumstances; but if it’s the employee’s subjective perspective that is determinative, then there is no such clarity.”⁴⁷

The original concept of the right to refuse unsafe work has been in effect in Oregon since 1973, and there has never been any exclusions or professions that are not afforded this right. The intent with the application of the reasonable person standard is not to have an individual outside of the industry evaluate the hazardous condition. For example, an elementary school teacher would not evaluate hazards for a firefighter. A firefighter with similar training, years of experience, type of experience, and available protections would agree or disagree with the hazardous condition.

The reasonable person standard is included in the federal OSHA 1977.12(b)(2) standard. The use of this language does not modify the scope of the federal OSHA rule that Oregon OSHA was tasked with following.

Although work refusal is a component of the OSEA, BOLI by statute is the state agency with jurisdiction over discrimination complaints filed under the OSEA. Therefore, it is Oregon OSHA’s position that it cannot provide enforcement interpretation specific to “reasonableness” as it applies to work refusal as this right is enforced by BOLI. As explained in Section 4 of this document, the reasonable person evaluation is assessed by the BOLI investigator and includes an assessment of all relevant factors that affect the alleged hazardous condition that was connected to an employee’s work refusal.

Federal OSHA has a whistleblower investigation manual (WIM) that contains federal OSHA's investigation practices and policies related to whistleblower complaints filed under the federal OSH Act. Oregon OSHA is in the process of updating its Oregon-specific WIM (PD A-288) in accordance with federal OSHA's WIM and BOLI's rules and investigation procedures. BOLI investigators may rely on federal OSHA's WIM and the PD A-288, in addition to its own rules and policies, during an investigation of work refusal as filed under the OSEA.

One of public comment pointed out that the reasonable person standard in the proposal is not tied to all three elements (A)-(C) that must be met and it should be in alignment with federal OSHA's language. Oregon OSHA agrees with this assessment that it should be part of all three elements. Oregon OSHA moved the reasonable person standard from (B) of the criteria into (b) which applies to all three elements. Oregon OSHA confirmed with federal OSHA that this change is appropriate.

(3) Public Comment Summary: Support alignment with federal OSHA rule language. Meets requirement of SB 907. Current text meets the final legislation requirement/do not add additional language for specific hazards.

Oregon OSHA received several comments supporting alignment with federal OSHA rules.

"OHBA generally supports the proposed rule implementing SB 907's provisions clarifying a worker's right to refuse dangerous work. The proposed rule tracks closely with the federal rule governing a worker's right to refuse work, which is consistent with the provision of SB 907 directing rulemaking "in accordance with the federal Occupational Safety and Health Act of 1970."

"Additionally, the proposed rule offers relatively clear guidance to both employers and workers of their obligations and rights under this rule. The language of the proposed rule roughly mirrors what is already federal law and copies the four clear elements found in federal law that workers must demonstrate before refusing a task at work. OHBA additionally supports that the proposed rule does not impose additional requirements on employers that are outside of the federal rule. Due to its close conformity with the federal rule, both employers and workers should be generally comfortable complying with it."⁴⁸

(5) Public Comment Summary: Filing a complaint with BOLI.

Oregon OSHA received comments from BOLI regarding the proposed changes.

"...the use of "must" (or "shall") in the proposal could create some confusion. It is true that, if one files with the Bureau, state law requires one to do so within one year after having reasonable cause to believe a violation has occurred. But the proposal could be misconstrued to suggest that one must file with the Bureau when one could instead choose to file with the U.S. Department of Labor or in Circuit Court. Our language suggestion is included below."⁴⁹

Oregon OSHA agrees with this recommendation, as there are several ways of filing a complaint and using the word “must” provides the reader that it is the only way to access this right. The requested change was made for the adopted rule. Additionally, Oregon OSHA confirmed with federal OSHA that this change was not a concern and they agreed with the decision to update the language to “may”. Additionally, BOLI recommended that Oregon OSHA not include BOLI’s physical mailing address in the administrative rule. Oregon OSHA chose to maintain its current practice in alignment with federal OSHA’s expectations to include the physical mailing address in its administrative rules. If necessary in the future, Oregon OSHA is committed to updating BOLI’s address through rulemaking.

6. Conclusion

Oregon OSHA appreciates the robust stakeholder engagement throughout the RAC process, other stakeholder discussions, and the comments received during the public comment period.

As a result of this extensive discussion, Oregon OSHA is confident that the adopted rule aligns with legislative intent and recognizes the desires and concerns of those that participated in the process. While not everything in the final rule will satisfy everyone, the decisions made during this rulemaking process were made by balancing the requirements of the legislation and the needs of the community in collaboration with federal OSHA to ensure that adopted rule would be “at least effective as” (ALEA) them.

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- ¹ <https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB592>
- ² <https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB907>
- ³ *ORS 654.025 Jurisdiction and supervision of Workers' Compensation Board, director and other state agencies over employment and places of employment*
- ⁴ *ORS 183.333: Policy statement; public involvement in development of policy and drafting of rules; advisory committees.*
- ⁵ *ORS 183.335 Notice; content; public comment; temporary rule adoption, amendment or suspension; substantial compliance required.*
- ⁶ 183.336 Cost of compliance effect on small businesses
- ⁷ 183.335(3)(a) Notice; content; public comment; temporary rule adoption, amendment or suspension; substantial compliance required.
- ⁸ *ORS 183.310(10)(a): "Small business" means a corporation, partnership, sole proprietorship or other legal entity formed for the purpose of making a profit, which is independently owned and operated from all other businesses and which has 50 or fewer employees.*
- ⁹ [https://www.oalj.dol.gov/DECISIONS/ALJ/FRS/2014/LAIDLER_WAYNE_v_GRAND_TRUNK_WESTERN_2014_FRS00099_\(DEC_09_2020\)_133629_CADEC_PD.PDF?_ga=2.13072439.1010169295.1691772120-222983494.1691772120](https://www.oalj.dol.gov/DECISIONS/ALJ/FRS/2014/LAIDLER_WAYNE_v_GRAND_TRUNK_WESTERN_2014_FRS00099_(DEC_09_2020)_133629_CADEC_PD.PDF?_ga=2.13072439.1010169295.1691772120-222983494.1691772120)
- ¹⁰ [A Snapshot of Oregon Firms by Size Class, 2023 - A Snapshot of Oregon Firms by Size Class, 2023 - QualityInfo](#)
- ¹¹ 803.3(c)
- ¹² https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf
- ¹³ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2420/Enrolled>
- ¹⁴ D-11, OHBA
- ¹⁵ D-32, John Schoffner
- ¹⁶ D-192, AGC
- ¹⁷ D-107, Oregon AFL-CIO
- ¹⁸ D-180, Oregon AFSCME
- ¹⁹ D-182, Sarah Ashby
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