

Explanation of Rulemaking, Final Action
Increase of Certain Minimum and Maximum Penalties for Alleged Violations
Oregon OSHA
December 22, 2017

Table of Contents

History of Current Rulemaking	2
Description of Rule as Adopted.....	2
The Basis for the Rule’s Adoption.....	3
Conclusion	3

History of Current Rulemaking

Oregon OSHA's rules related to the assessment of penalties for employer violations of the Oregon Safe Employment Act (OSEA) can be found in Oregon Administrative Rules (OAR) 431-001-0135 through OAR 437-001-0175. Although the rule includes additional detail about the exact way in which Oregon OSHA's penalty authority can be used, the pre-existing rule reflected a statutory maximum penalty for first-instance other-than-serious and serious violations of \$7,000 and for repeat, failure to correct and willful violations of \$70,000. It also reflected a minimum penalty for willful violations of \$5,000. These maximum and minimum penalties were identical to federal OSHA's penalty authority. The current maximums have been in place (in both state and federal law) since the late 1980s

In late 2015, Congress revised federal OSHA's penalty authority by removing federal OSHA's exemption from a previously adopted inflation adjustment that applied to most federal penalties. As a result, federal OSHA's maximum and minimum penalties increased almost immediately by more than 75 percent (to "catch up" with previous inflation adjustments) and were made subject to annual adjustments based on changes in the federal consumer price index. As a result, and reflecting long-standing understandings of the requirement for state programs to have penalty authority identical to federal OSHA (even if actual practice in assessing penalties varied considerably), federal OSHA advised the state programs of the need to adjust their maximum penalties.

The Department of Consumer & Business Services, of which Oregon OSHA is a part, sought legislative changes allowing Oregon OSHA to make the necessary adjustments both now and in the future, and SB 92 was adopted by the Legislative Assembly in 2017 and subsequently approved by the Governor. Although it allows Oregon OSHA to increase the maximum penalties in order to align them with federal OSHA's maximum penalty authority, SB 92 was not expected to fundamentally change Oregon OSHA's overall approach in assessing penalties for violations of workplace health and safety rules. Although Oregon OSHA has long had penalty authority identical to federal OSHA, Oregon's actual approach has generally relied upon more frequent inspections and more modest penalties for most violations. The rule as proposed -- and adopted -- continues Oregon OSHA's historical approach.

Description of the Rule as Adopted

The rule as adopted is identical to the rule as proposed and submitted for public comment.

The rule increases the maximum penalty for a serious violation from \$7,000 to \$12,500. It increases the maximum penalty for a willful or repeated violation from \$70,000 to \$126,749. It also makes adjustments to the "base penalty" table to take account of these changes, by increasing the base penalty for the most serious violations (particularly those rated "death") but not the least serious violations (those rated "other than serious"). In addition, the rule adds a new size adjustment to the existing adjustment to minimize the impact of the new penalties on the smallest employers. Employers with 10 or fewer employees will see an additional 15 percent reduction of the base penalty for size, changing the reduction from 60 percent to 75 percent. Other size reductions are not affected.

The Basis for the Rule's Adoption

Oregon OSHA takes note of the commenter who noted in both oral and written comments that the rule was unnecessary because Oregon OSHA's approach has proven effective and provides a sufficient deterrent.¹ However, Oregon OSHA disagrees with the suggestion that this rule proposal represents a change in its historic approach. Rather, it views this rulemaking as meeting the federal requirement to have at least equivalent penalty authority and as consistent with Oregon OSHA's stated intention prior to the legislature's passage of SB 92 – to make use of the additional penalty authority for the largest employers and the most serious violations.

The commenter suggested it is not necessary for Oregon OSHA to raise penalties “just like the federal OSHA,”² and Oregon OSHA agrees. This rulemaking will align Oregon OSHA's penalty *authority* with federal OSHA (which is an expectation on the part of federal OSHA as part of Oregon OSHA's status as an approved state plan). But it will not align Oregon OSHA's penalty practices or average penalties with federal OSHA – Oregon OSHA will continue to rely upon relatively modest penalties, coupled with a much greater enforcement presence than federal OSHA is able to establish or maintain.

It is also worth noting that the rule is not expected to increase penalties by the 78 percent increase proposed for the maximum penalties. Oregon OSHA estimates that the impact of the rulemaking will be roughly 20 to 25 percent on average (which is not that much greater than the typical year-to-year variation in the average penalty for a first-time serious violation under the current rule).

The commenter also questioned whether Oregon OSHA would need to revise its penalties annually, in the same manner as federal OSHA. Although Oregon OSHA expects to have to make regular adjustments, we believe that they will not need to be as frequent as annually. Federal OSHA has not provided final guidance on this issue. But even if annual adjustments to the maximums are required, Oregon OSHA anticipates that any such rulemaking will simply adjust the maximum penalties and leave the base penalty tables unchanged – probably making adjustments to the tables every five years or so.

Conclusion

As noted previously, Oregon OSHA begins this rulemaking with a recognition that the maximum penalties must be adjusted to reflect federal OSHA's expectation that state programs have penalty authority at least equivalent to that available to federal OSHA. To the degree that the testimony suggested the maximums should be left unchanged, that would be inconsistent both with the expectations of federal OSHA and with the expectations of the Oregon Legislative Assembly in approving SB 92.

In addition, Oregon OSHA has for many years believed that certain violations – those representing the greatest risk of harm and involving the largest employers – should make full use of whatever penalty authority is available to the agency. In adjusting the base penalty tables to make use of the new maximum penalty authority, Oregon OSHA is not pursuing a new approach to using its penalty authority; rather, Oregon OSHA is confirming its commitment to the same proven approach that was acknowledged in the testimony received on the rule.

¹See the testimony of Rod Huffman, Safety Programs Coordinator, Associated Oregon Loggers, November 30, 2017, Public Hearing Transcript, pp. 7-11. Also see letter from Mr. Huffman dated November 29, 2017.

²*Ibid*, p. 9.