

 FACT SHEET

Employer Knowledge of Hazardous or Violative Condition



In 2014, the Oregon Supreme Court held that the term “reasonable diligence” in ORS 654.086(2) is delegative in nature, which means a reviewing court will defer to Oregon OSHA’s determination so long as it remains within the range of discretion allowed under the Oregon Safe Employment Act. The Court noted that Oregon OSHA’s interpretation and application of that term may be accomplished by administrative rule or by adequate explanation on a case-by-case basis in an administrative proceeding.

After that opinion, Oregon OSHA convened a Rulemaking Advisory Group to discuss proposed language for an Oregon Administrative Rule, which was ultimately proposed in early 2020. However, due to the global pandemic, this rulemaking process was delayed, and rulemaking hearings were conducted in 2021. Ultimately, Oregon OSHA did not adopt a rule, but used the approach developed during that process to provide guidance to staff on how to interpret and apply the term on an inspection-by-inspection basis for an administrative proceeding.

That guidance is provided in the Field Inspection Reference Manual (FIRM), Chapter 2 (Hazard Evaluation and Violation Documentation), Section III (Four Major Elements of Violation Documentation), Element 4: Employer Knowledge. This provides direction to Oregon OSHA staff on how to assess reasonable diligence as part of an inspection, as set forth below.



FIRM, Chapter 2, Section III, Element 4:

Regardless of the presence of an agent of the employer, an employer is liable for any violations of the Oregon Safe Employment Act (ORS 654) unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

Reasonable diligence, for the purposes of ORS 654.086(2), is a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations. In determining whether an employer could have known of the presence of the violation through the exercise of reasonable diligence, the following criteria apply:

- If the violation arises from the work activity or the workplace and an agent of the employer had not taken adequate steps to address the presence of the violation, then the employer did not exercise reasonable diligence.
- If the violation does not arise from the work activity or the workplace and an agent of the employer did not have actual knowledge of the presence of the violation, then the employer could not have known of the presence of the violation with the exercise of reasonable diligence.
- If the presence of the violation arises from the work activity or the workplace and the employer had taken some steps to address it, then the employer did not exercise reasonable diligence unless the employer can demonstrate that the violation was the result of “unpreventable employee misconduct” or was otherwise both isolated and unpredictable.

Unpreventable employee misconduct, for the purposes of ORS 654.086(2), is where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer could not have prevented. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

- a) The employer had devices, safeguards, rules, procedures, or other methods in place to eliminate or safely control the hazard or prevent the violation; and
- b) The employer had effectively communicated to employees the methods established under (a) above; and
- c) The employer had provided employees with the necessary training, equipment, and materials to use and comply with the methods established under (a) above; and
- d) The employer had developed and implemented measures that identify any violations of methods established under (a) above; and
- e) The employer had taken effective correction action when a violation was identified under (d) above.

FIRM, Chapter 2, Section III, Element 4 - Continued

Types of Employer Knowledge

Employer knowledge can be either actual knowledge or constructive knowledge. Actual knowledge may be established through a person in charge who observes or has personal knowledge of the hazard or violative condition. Constructive knowledge may be established through a person in charge, who with the exercise of reasonable diligence, could have known -- in the sense of being capable of knowing -- of the hazard or violative condition. The actual or constructive knowledge of a supervisor, or other agent of the employer who is aware of the violative condition, can usually be imputed to the employer for purposes of establishing employer knowledge.

Exception: An agent's actual knowledge of their own violative conduct is not attributed to the employer if the only employee exposed as a result of the violation is the agent. In such cases, the agent will be

considered only an employee and not an agent of the employer for purposes of employer knowledge. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

NOTE: A Compliance Officer can look to other agents of the employer that either knew, or could have known with the exercise of reasonable diligence, that the agent was or could have been exposed to the violative condition.

Example: The highest ranking person in a corporation, the President, is found by Oregon OSHA engaged actively installing roofing materials more than six feet above a lower level without using any type of fall protection system, and there are no other employees exposed to the same hazard. The Compliance Officer would not use the President's own knowledge of the violative condition against the employer (the corporation) as the President would be considered only an employee and not an agent of the employer for purposes of employer knowledge. However, if the employer's worksite Foreman, who is also an agent of the employer, had either actual knowledge or constructive knowledge of the President's exposure to the hazards, then the Compliance Officer could proceed with a citation using the Foreman's knowledge.¹



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¹ See Chapter 2 of [Oregon OSHA's Field Inspection Reference Manual \(FIRM\) dated March 31, 2026](#)