

May 21, 2012

**Oregon OSHA – Adopted Changes to
Penalties and other rules in
Division 1, General Administrative Rules**

The rule as adopted includes most of the provisions of the proposed rule, although some of them were not adopted and several were modified somewhat in response to issues raised during the public comment period. The key issues addressed in the rulemaking include the following:

1. Adjustment for Employer Size

The final rule includes the adjustment to the base penalty for employer size as proposed:

Employees	Percentage Reduction
1-25	60%
26-90	40%
91-130	30%
131-175	20%
176-250	10%
251 or more	none

2. Adjustment Based on Employer Good Faith

The final rule includes adjustments for employer good faith as proposed (leaving the options of a decrease of 20 percent of the base penalty, an increase of 20 percent, or no adjustment), but the description of the criteria for the good faith assessment has been modified for clarity in response to public comments.

3. Adjustment Based on Immediate Correction of Violations

The final rule restores the adjustment for immediate correction of violations found in the current rule but omitted from the rule as proposed. However, the final rule reduces the adjustment to 10 percent of the base penalty and includes guidance limiting such adjustments to situations where substantial, rather than temporary or superficial, steps are taken.

4. Adjustment Based on Employer History

The final rule includes a reduced adjustment for employer history as proposed (leaving the options of a decrease of 10 percent of the base penalty, an increase of 10 percent, or no adjustment), but the description of the criteria has been modified for clarity (clearly including both injury/illness history and overall history of compliance with Oregon OSHA rules). In addition, the time frame for such data has been specified as three years (with the exception of information needed to consider three-year data in the light of longer-term trends).

5. Base Penalty Calculation

The final rule includes the increase in base penalties for death-rated violations as proposed, increasing the base penalties for low, medium and high-probability death-rated violations to \$2,100, \$3,500 and \$7,000, respectively.

6. Application of Adjustments to Repeat and Willful Violations

The final rule includes the proposed provision allowing size adjustments, but no other adjustments, to repeat and willful violations (in contrast to the previous rule, which allowed no adjustments of any kind for repeat and willful violations).

7. Application of Adjustments During Fatality and Accident Investigations

The final rule includes the proposed provision allowing size adjustments, but no other adjustments, to violations that contributed to a fatality or an injury (in contrast to the previous rule, which allowed no adjustments of any kind for such violations).

8. Application of Adjustments for Failure to Abate Violations

The previous rule indicated that no adjustments were made for failure to abate violations. However, this language was confusing, because it was based on the lack of any *additional* adjustments. Agency practice has long been to calculate penalties for most failure to abate violations using the penalty previously cited as the daily penalty. That original penalty, of course, may have included applicable adjustments. The rule as adopted simply omits any reference to adjustments for failure to abate, eliminating the source of the confusion. This does not represent a substantive change and will have no impact on existing Oregon OSHA practice in calculating the penalty for such violations.

9. Penalties for Multiple Repeat and Willful Violations

The final rule includes the proposed language indicating that a fourth repeat would normally be multiplied by 15 and a fifth repeat by 20, while a willful violation would normally be multiplied by 25, all instead of relying exclusively on administrator's discretion in setting such penalties as did the previous rule.

10. Administrator's Discretion

The final rule includes the proposed language allowing the administrator to use his or her discretion to set a penalty for any violation, rather than excluding first, second and third repeat violations from that authority, as did the previous rule.

11. Time Frame for Repeat Violations

The final rule retains the existing three-year time frame for repeat violations, rather than adopting the five-year time frame found in the proposal and current federal OSHA guidance.

12. Repeat Violations at Fixed-Site and Mobile Workplaces

The final rule includes a slight modification to the proposed language, allowing the administrator (or a designee) to determine that a repeat violation at certain mobile workplaces should be handled as a fixed-site violation because the span of control and nature of activity for a portion of the state is more readily comparable to fixed location activity.

13. Definition of Repeat Violations

The final rule includes a modified version of the proposal to change the definition of repeat violations so that it is not determined solely by whether the same rule is being cited. Instead, the rule considers a violation a repeat if it involves a substantially similar violation (the rule as proposed referred to a substantially similar hazardous condition).

14. Penalty for Combined Violations

The final rule adopts the proposed language changing penalty calculations for combined violations (violations involving multiple instances of the same violation), making it consistent with other penalty calculations, rather than relying upon the previous approach of calculating a separate penalty for each instance and then totaling the penalties.

15. Guidance Related to Appeals and Informal Conferences

The final rule adopts a revised version of the proposal to clarify language about the relationship between appeal notices and requests for informal conferences. In contrast to the rule as proposed, the final rule achieves greater clarity by discussing notices of appeal and requests for informal conferences as two completely distinct issues (although the same employer request frequently addresses them both).

The rule as adopted also includes a number of other technical and non-substantive changes (such as replacing references to “the division” with the clearer reference to “Oregon OSHA”).

This is Oregon OSHA Administrative Order 2-2012, adopted May 11, 2012, and **effective July 1, 2012.**

Please visit Oregon OSHA’s web site: www.orosha.org for proposed, adopted, and final rules, as well as current publications, training opportunities, and much more.

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

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies* are true, full and correct copies of the PERMANENT Rule(s) adopted on May 11, 2012 by the
Date prior to or same as filing date

Department of Consumer & Business Services/Oregon Occupational Safety & Health Division 437
Agency and Division Administrative Rules Chapter Number

Sue Joye 350 Winter Street NE, Salem OR 97301-3882 503-947-7449
Rules Coordinator Address Telephone

to become effective July 1, 2012 as Oregon OSHA Administrative Order 2-2012.
Date upon filing or later

Rulemaking Notice was published in the November 2011 *Oregon Bulletin*.**
Month and Year

RULE CAPTION

Adopt changes to Division 1, General Administrative Rules – Penalties and others.
Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

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

REPEAL: OAR 437-001-0260

ORS 654.025(2), 656.726(4)
Stat. Auth.

ORS 654.001 through 654.295
Stats. Implemented

RULE SUMMARY

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/s/Michael D. Wood
Authorized Signer

Michael D. Wood Printed name
5/11/2012 Date

*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

**The *Oregon Bulletin* is published on the 1st of each month and updates rules found in the OAR Compilation. For publication in Bulletin, rule and notice filings must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, when filings are accepted until 5:00 pm on the preceding workday.
ARC 930-2005