

## SUMMARY OF COMMENTS AND AGENCY DECISIONS

Title: OAR 437-001 General Administrative Rules

Administrative Order Number: AO 2-2009

Adopted Date: January 27, 2009

Effective Date: February 3, 2009

Background: Oregon OSHA is making these changes to Division 1 to bring some rules into harmony with statutes, case law and the practices of federal OSHA. We also are cleaning up some old-fashioned language in favor of clearer rule writing.

Summary of Changes, Comments and Decisions:

437-001-0015 Definitions.

Oregon OSHA adds corporations to the definition of employer to clarify the fact that corporations are employers and to exclude single-person corporations. We also interpret a single-person to include a married couple. We received no comments on this change and it will be made as proposed.

437-001- 0160(1) & (2) Penalty Criteria – Repeat Violation.

The proposed language for repeat violations was to indicate that such citations will be for repeats of substantially similar hazardous conditions instead of identical rule numbers. It also would have moved the 36 month limit for repeat citation conditions from the definition to the rule. This made it necessary for us to also propose changing the definition of repeat violation. We believed that this change would make Oregon OSHA consistent with statutes, case law and federal OSHA practices. Critical comments<sup>(D-1, D-2, D-4, D-5)</sup> from constituents convinced us that more work is necessary to assure that changes are clear and understood.

An e-mail commenter<sup>(D-1)</sup> stated that we do not need to use the term “substantially similar” to mirror Federal OSHA since we are already “as effective as” federal OSHA. It is true that the change is not required by federal OSHA, and we did not intend to suggest that it was. The proposal simply noted that the criterion suggested by the proposal was already in use in other jurisdictions (and had been developed by case law as a way to define the term “repeat”). The current language requires us to cite a repeat violation whenever the same rule is used (even if the issues being addressed are not particularly similar) and it allows us to cite a repeat violation only when the exact rule is violated the second time as was violated the first time. Oregon OSHA’s proposal was based on a belief

that both issues would be better addressed by the approach described in the rule.

That same commenter suggested leaving the 36 month time limit for repeat violations in the definitions section because definitions are rules. Oregon OSHA believes that moving it to the same paragraph as the basic rule is more convenient and logical than making the employer read multiple parts of the standard to understand their obligations. Moving the paragraph would not have made any substantive difference. However, because of the level of concern created by fears that it would in fact make a difference in the application of the rule, Oregon OSHA has decided that those concerns (even if unwarranted) outweigh the benefits of improved clarity of making the change.

Therefore, the definition of repeat violation and the rule on that subject will not change during this action. One commenter supported changing the rule (and suggested other changes), while another commenter suggested additional changes but expressed no concern with the substance of the rule as proposed. Those additional comments<sup>(D-3)</sup> were about other changes and they will be considered during future work on the subject.

#### 437-001-0205(2) Citation and Notice of Penalty.

The rule on method of delivery of citations to employers is changing to allow Oregon OSHA to use any method acceptable to employers. Oregon OSHA did not receive comments on this change. This change will be made as proposed.

#### 437-001-0760(1) and (3)(c) Rules For All Workplaces.

Language detailing responsibilities of supervisors is moving from the paragraph about investigations to the paragraph about employer responsibility. This is for clarity.

An e-mail commenter<sup>(D-1)</sup> stated their opposition to changing “shall see” to “must assure” because they do not add to clarity. Oregon OSHA is eliminating the archaic “shall” from rules as quickly as practical. Legislatively mandated clear language standards discourage use of the Victorian “shall.” Further, we believe the two phrases to be functional equivalents. However, the final rule will use “must see” instead of “must assure”. Oregon OSHA believes the change from “shall” to “must” in no way changes the effect of the rule or the requirements created for employers.

The commenter also objects to the deletion of “are authorized to” from the rule. Unfortunately, some employers have expressed a belief that the phrase exempts them from responsibility for the activities of their employees unless they are expressly and explicitly authorized. That was never the intent of the provision, and Oregon OSHA believes such an understanding to be inconsistent with an

employer's obligation to protect workers whenever they are performing tasks that the employer knows or could reasonably be expected to know they will perform. This change does not diminish an employer's ability to present defenses related to employer knowledge or "rogue acts." This change will be made as proposed and Oregon OSHA believes it places no new requirements on employers, but more accurately reflects the existing statutory expectation that employers take responsibility for activity in the workplace.

437-001-1015(3) Definitions

437-001-1020(2) General Requirements

Two rules on guaranty contracts will change to comply with Senate Bill 559 which changed the term from "guaranty contracts" to "insurance policies."

Oregon OSHA did not receive comments on this change and it will be made as proposed.

All other changes are to clarify the language in keeping with our efforts to move all our writing to a more clear and understandable style.

## COMMENTERS

D-1.	Bend Parks - Dave Crowther	E-mail	Oct 21, 2008
D-2.	AOL - Rod Huffman	Letter	Oct 24, 2008
D-3.	Legal Aid Svcs - Shelly Latin	Letter	Oct 30, 2008
D-4.	ODOT – Julie Davie	Letter	Oct 31, 2008
D-5.	Clean Water – Ken Schlegel	Letter	Oct 31, 2008