

**OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**

PROGRAM DIRECTIVE

Program Directive: A-158
Issued: March 15, 1991
Revised: September 20, 2018

SUBJECT: Citations: Egregious Violations

PURPOSE: This directive provides policy and guidance for issuing violation-by-violation (egregious) citations. Oregon OSHA has determined that this egregious policy is an integral part of our overall compliance strategy.

BACKGROUND: Over the past several years, in a limited number of cases, federal OSHA has alleged a separate violation and proposed a separate penalty for each instance of noncompliance with federal OSHA recordkeeping regulations, the safety and health standards, and the General Duty Clause [Section 5(a)(1) of the Occupational Safety and Health Act (the Act)]. The resulting large aggregate penalties are part of a compliance strategy that improves the efficiency and effectiveness of the agency and conserves its limited resources.

This program directive covers enforcement procedures applicable in cases where violation-by-violation citation and penalty provisions are employed.

- A. In the context of the Oregon Safe Employment Act, (OSEAct) penalties are intended to provide an incentive to employers to prevent safety and health violations in their workplaces and to voluntarily correct violations that exist.
- B. The OSEAct intends that this incentive be directed not only to an inspected employer but also to any employer who has hazards and violations of standards.
 - 1. The large proposed penalties that accompany violation-by-violation citations are not primarily punitive nor exclusively directed at individual sites or workplaces. They serve a public policy purpose; namely, to increase the impact of Oregon OSHA's limited enforcement resources.
 - 2. The criteria contained in this directive are intended to ensure that when they are proposed, large penalties serve this public purpose.

- C. Large proposed penalties result from application of existing standard OAR 437-001-0175. Instead of grouping or combining violations for penalty purposes, each instance of noncompliance is considered a separate violation with a separate penalty applied. This procedure is known as the egregious or violation-by-violation penalty procedure.
 - 1. Application of these procedures is appropriate in situations where the violations in question constitute willful violations of Oregon OSHA standards or of the general duty clause of the OSEAct and meet certain criteria to be discussed later in this directive.
 - 2. Since large penalties are likely to result in litigation and widespread public attention, review at the central office of Oregon OSHA is currently mandated.
 - 3. In all other respects, such cases are handled in accordance with the Field Inspection Reference Manual (FIRM).
- D. While this practice of citing each violative instance as a separate violation has been utilized by federal OSHA since 1986, Oregon OSHA is authorized to use this approach by the language of the statute, its legislative history, and the agency's historic role as the sole prosecutor of violations occurring under the OSEAct.
- E. In these cases, as in all other cases, violation-by-violation citations and penalties are proposed by the administrator.

ACTION: GUIDANCE

- A. **Early Identification of Cases.** It is important that field office enforcement managers identify cases which may be appropriate for violation-by-violation treatment as early as possible.
 - 1. Meticulous documentation of evidence for each violation and appropriate involvement of technical specialists that may be required for litigation is essential to the successful pursuit of potential egregious cases.
 - 2. Coordination with Salem's central office must be scheduled in time for comprehensive review before the expiration of the statutory 6-month (180 days) citation period.
 - 3. Early involvement with the Department of Justice will ensure adequate legal, evidentiary, and resource coordination.
- B. **Criteria.** In general, this directive identifies those conditions which normally constitute a flagrant violation of the OSEAct or Oregon OSHA standards such that violation-by-violation handling is appropriate. (See Appendix B)
 - 1. The criteria given in the following section will be used by the

field office enforcement managers to determine whether to recommend the use of violation-by-violation citations and penalties.

2. Cases under consideration for such treatment must be classified as willful (category a. below) as well as at least one of the categories given in b through g.

a. The employer is found in violation of an Oregon OSHA requirement:

i. If they have actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency enforcement, direct evidence of specific recognized jobsite hazards or other appropriate factors.

ii. If they have made no reasonable effort to eliminate the known violation, intentionally, through voluntary action or inaction.

b. The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.

c. The violations resulted in persistently high rates of worker injuries or illnesses.

d. The employer has an extensive history of prior violations of the OSEAct.

e. The employer has intentionally disregarded its safety and health responsibilities.

f. The employer's conduct taken as a whole, clearly amounts to bad faith in the performance of their duties under the OSEAct.

g. The employer has committed a large number of violations as to significantly undermine the effectiveness of any safety and health program that might be in place.

C. **Penalty Calculation.** Penalties for egregious safety and health violations are to be determined by the administrator in accordance with OAR 437-001-0175.

1. For a willful violation, the administrator, based on facts of the violation, may assess a penalty of not less than \$8,900 or more than \$126,749.

2. What will constitute separate violations for purposes of

applying the violation-by-violation penalty procedures will depend on several factors.

- a. In cases involving violations of Oregon OSHA standards, the standard language must support citations of separate violations. For example:
 - i. OAR 437-001-0760(1)(a) is a requirement for the employer to train each employee in safety and health. For each employee not trained there is a separate violation of the standard.
 - ii. 1910.217(c)(1)(i) is a requirement for a point of operation guard for a mechanical power press. Consequently, each mechanical power press unguarded point of operation found is a separate violation of the standard.
 - iii. OAR 437-002-0382(1)(b) limits the exposure of each employee to air contaminants regulated in Oregon Table Z-1. Thus each employee exposed above the 8-hour time weighted average for a regulated substance constitutes a separate violation of the standard.
 - iv. OAR 437-002-0382(5) requires the implementation of engineering and work practice controls to reduce employee exposure to air contaminants. Thus, a separate violation exists for each identifiable source of air contamination to which engineering controls have not been applied irrespective of the number of employees overexposed.

NOTE: Since overexposures and engineering controls are two separate violation types, a violation-by-violation citation and penalty may be issued for each. Similar Air Contaminant rules are found in Division 3 and Division 4.

- b. Substantially similar violative conditions cannot be penalized on a violation-by-violation basis under two different standards. For example:
 - i. 1910.1001(c) prohibits exposure of any employee to airborne concentrations of asbestos in excess of 0.1 fibers per cubic centimeter of air (8-hr. TWA). Each employee overexposed constitutes a separate violation.
 - ii. 1910.1001(g)(1) requires employers to provide

respirators to employees overexposed to asbestos and to ensure their use whenever they are required; e.g., in cases where airborne concentrations of asbestos exceed the PEL.

- Employees without respirator protection have already been cited for overexposure under 1910.1001(c).
 - Respirators are required for that very reason. Thus, violation-by-violation penalties for each overexposed employee would be tantamount to a second penalty for substantially the same violative condition and would be inappropriate.
- iii. 1910.1001(g)(2) requires that the employer select the appropriate respirator according to Table 1. For the same reason given in the first bullet under subparagraph C.2.b.ii above, respirators with the incorrect filters cannot be penalized using violation-by-violation penalty procedures when airborne concentrations exceed the PEL.
- iv. When airborne concentrations exceed 50 x PEL and only half-mask respirators are used, the violation is no longer substantially similar and each such instance of providing an inadequate respirator may be penalized as a separate violation when provided to an exposed employee for respiratory protection.
- c. Violations of the general duty clause are to be cited in accordance with the FIRM.
- i. The hazard must be identified with specificity. Multiple citations may not be issued on the basis of missing controls or different sources or causes of the hazard.
 - ii. Each employee exposed to the recognized hazard at the time of the violation constitutes a separate violation.
3. All violations not recommended for consideration as egregious must be classified and issued separately in accordance with the FIRM. They must not be grouped with violations recommended as egregious.

D. **Case Support Requirements.** Because these cases involve administrative and legal issues critical to the effective enforcement of the OSEAct, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations, and the prosecution of litigation in such cases.

1. **Documentation.** Whenever a case is proposed for violation-by-violation treatment, fully document detailed responses to the questions listed in Appendix A of this directive. Supporting documentation must be provided and cross-referenced whenever possible.
 - a. These questions, originally developed for recordkeeping cases, have been adapted as appropriate for safety and health cases.
 - b. Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as far as possible uniformity of case development across field offices.
2. **Evidence.** Documentary support must be planned for and obtained early in the investigation.
 - a. The evidence necessary to support citations being considered for violation-by-violation penalty sanctions must be included in the case file. Such evidence must be present for each separate violation.
 - i. Photographs, videotapes, audiotapes, sampling data, and witness statements must be used whenever possible to provide supporting evidence of violative conditions.
 - ii. Company documents supporting knowledge of the standard and the violative conditions as well as willfulness of the violation must be diligently sought and obtained by subpoena as appropriate. Note: You may subpoena consultant reports but if challenged by the employer you most likely would not prevail.
 - iii. Examples of documents are internal audit reports, insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety to plant management of corporate safety recognizing violations and bringing them to the attention of higher management, and notes relating to Oregon OSHA's

activities and industry practice in other companies or industries.

- b. Employers must be asked explicitly:
 - i. If and when they recognized the hazardous nature of each of the violations.
 - ii. If they knew what Oregon OSHA's standards require, and, if so, what steps the company had taken to abate and why the apparent violations had not been corrected.
 - iii. If they knew of the documents identified under subparagraph D.2.a.iii above and what those documents contained.
 - c. Their responses must be carefully documented (verbatim if possible). An attempt must be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
 - d. Signed employee statements must be obtained routinely to support each of these violations in as much detail as possible.
 - e. Employee exposure and the nature and extent of injuries or illnesses related to the violations must be carefully and adequately described.
 - f. The need for subpoenas and medical access orders must be decided and documents obtained as soon as possible.
 - g. The need for experts must also be decided and necessary arrangements made early. It is anticipated that experts will be needed for cases involving complex violations, such as ergonomics or abatement methods.
 - h. Particular attention must be paid to anticipating and preparing for possible employer defenses.
3. Early involvement of the field office enforcement manager is essential to examine and evaluate documentation and other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Department of Justice to write a legal opinion on the merits of the case.
- a. The statewide safety and health enforcement

managers, through the field office enforcement managers, must seek legal guidance (informally) from the Department of Justice periodically throughout the case development process.

- b. The field office enforcement managers must ensure that such involvement is accomplished at least 4 full months prior to the 6-month issuance date.

E. **Citations.** The OSEAct authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the FIRM, the following procedures must be adhered to in issuing citations with violation-by-violation penalties:

1. Each separate violation must have its own standard alleged violation element (SAVE). (The SAVE must be repeated for each violation instance.)
2. Each separate violation must have its own alleged violation description containing the facts that describe the particular conditions associated with that violation instance.
3. Each separate violation must have its own penalty.

F. **Central Office Review.** The procedures and time-tables given below are to be followed in all cases involving violation-by-violation citations.

1. **Documentary Package.** It is the responsibility of the field office safety and health enforcement managers to ensure adequate documentation of cases involving violation-by-violation citations is provided.
 - a. Two copies of the documentation package for all violation-by-violation citations must be forwarded to the Salem's central office.
 - b. The package submitted for review must include, at a minimum:
 - i. A brief memorandum summarizing the information contained under D of this section.
 - ii. Copies of all violation worksheets related to the violations to be proposed for egregious penalty handling.
 - iii. Copies of all critical evidence establishing the willfulness of the violation.
 - iv. Copies of all critical evidence establishing the justification for the violation-by-violation citation and penalty.

- v. Copies of samples of each type of violation in the proposed violation-by-violation citations.
- c. If the field office enforcement manager, after review of the case file material, believes that the case is appropriate for violation-by-violation citation procedures, a copy of the complete documentation package must be forwarded to the statewide safety or health manager who will review and forward to the Department of Justice as soon as practicable after completion of the review (but no later than 8 weeks before the citation issuance date) for legal analysis and composition of a legal opinion.
 - d. The statewide safety or health manager must include a copy of the written legal opinion with the documentation package and submit the complete package to the administrator as soon as possible after receipt of the legal opinion.
 - e. If the legal opinion has not been received within 5 weeks of the 6-month date, the documentation package must nevertheless be submitted to the administrator and the legal opinion forwarded as soon as it is received.
 - f. The field office enforcement manager will be responsible for composing a concise summary of the most valid reasons supporting the egregiousness of the violation and the appropriateness of the application of the additional penalty. The summary must include the following:
 - i. Outline of the facts of the inspection, including inspection type, company name and size, operation involved and the employee representative, if any.
 - ii. Oregon OSHA inspection history (statewide and at this site).
 - iii. Brief summary of violations found, the number and nature of proposed citations and the amount of the proposed penalty.
 - iv. Brief justification of willfulness and egregiousness.
 - v. Novel issues involved in the case or issues with national implication for program or

litigation policy.

2. **Recordkeeping Violations.** If the case involves recordkeeping violations which are being considered for additional penalties, additional evidence is necessary.
 - a. Copies of evidence supporting each recordkeeping violation proposed as egregious, from the company's occupational injury and illness logs and supplementary records, workers' compensation records, medical records, first aid logs and other sources, must be included in the package.
 - b. This evidence must support the existence of violation for both nonrecorded and misrecorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work, days of restricted work activity beyond the day of injury or onset of illness, as well as evidence that the case was work related.

3. **Timetable.** It is critical to the development of a uniform state policy that all cases appropriate for the violation-by-violation citation be handled by the statewide safety or health enforcement managers. They must adhere as closely as possible to the timetables described below.
 - a. Failure to supply the required documentation by the times designated in the following subsections may preclude issuance of violation-by-violation citations in otherwise appropriate cases.
 - b. The statewide safety or health enforcement manager must take care not to expand the inspection beyond what they can reasonably expect to accomplish within these timeframes.
 - c. Within one month after the start of an inspection which appears to be appropriate for consideration for violation-by-violation citation:
 - i. The field office enforcement manager must notify the statewide safety or health enforcement manager of a potential egregious case. Notification must include:
 - Establishment name.
 - Field office of jurisdiction.
 - Six month date.

- Opening conference date.
 - General type of apparent violations (e.g., safety, health, recordkeeping)
- ii. The field office enforcement managers must notify the Department of Justice of the impending case and seek advice as to necessary documentation and involvement of outside experts.
- d. The statewide safety or health enforcement managers must establish an appropriate timetable for periodic submission of the case by the field office enforcement manager for Salem’s central office and Department of Justice review.
 - i. After 60 days onsite, the field office enforcement manager must ensure that the preliminary case is submitted to Salem’s central office for information.
 - ii. The statewide safety or health enforcement manager must submit the preliminary case to the Department of Justice for an interim legal review, evaluation and guidance.
 - iii. As the case is being developed and as additional information becomes available, the statewide safety or health enforcement manager must ensure that this information is submitted to the Department of Justice for additional evaluation.
 - e. No later than 8 weeks before the 6-month date, the entire case file must be submitted to the Department of Justice for final legal analysis and for a written legal opinion as outlined in D of this section
 - f. No later than fifteen days before the 6-month issuance date, at a time to be scheduled by the statewide safety or health enforcement manager, the field office enforcement manager must send the compliance officer conducting the inspection to Salem’s central office, if requested, to discuss the proposed citation in detail.
4. **Salem Central Office Review.** Upon receipt of the documentary file at Salem’s central office, the file must be logged in and sent to the appropriate statewide safety or health enforcement manager for review.

- a. After reviewing the package and making any corrections, a copy of the report must be sent to the Department of Justice through the statewide safety or health enforcement manager.
- b. The Department of Justice will review the package and prepare a written legal opinion.
- c. Once the package has returned from the Department of Justice, the statewide safety or health enforcement manager must present the package to the administrator for final screening.
- d. The administrator is the authority to impose the citation and establish the penalty.

Note: Press releases must be submitted to the deputy administrator for review.

EFFECTIVE

DATE: This directive is effective immediately and will remain in effect until cancelled or superseded.

History: Issued 8-15-1991 Revised 8-5-1991, 10-21-1993, 2-6-1994, 6-28-1995, 6-27-2012, and 9-20-2018

APPENDIX A
Egregious Cases: Information

A. Scope of Inspection

1. Date initiated.
2. Latest date for issuance of citations (6-month date).
3. Type of inspection (e.g., safety, health, programmed, complaint, referral).
4. Nature of employer's business, corporate-wide and at this facility.
5. Number of employees (overall; in plant).
6. Names of unions representing employees.

B. Inspection History

1. Numbers and dates of previous inspections.
2. Previous violation history at this establishment and in the corporation, nationwide.

C. Inspection Methodology

1. Procedures followed in conducting the investigation:
 - a. Were warrants, medical access orders or administrative subpoenas necessary? Why? Where were they obtained and used?
 - b. What written records or other documents were examined or obtained?
 - c. What are the names of the compliance officers conducting the inspection?
 - d. Were experts or other consultants used in the inspection? If so what are their names and qualifications?
 - e. Have depositions been taken? Are any planned? Who will be deposed?
2. For recordkeeping violations:
 - a. Who has the responsibility for maintaining and certifying the OSHA-300, Log and Summary of Work-Related Injuries and Illnesses, and related materials?
 - b. Were medical or injury and illness records reviewed by Oregon OSHA physicians?

D. Findings

1. Summary of violations:
 - a. Number and classification.
 - b. Types of violations:
 - i. Standards violated.
 - ii. General Duty Clause (OSEAct) violations together with applicable industry standards, NIOSH recommendations, ANSI standards, and other supporting guidelines.

NOTE: In recordkeeping cases, violations must be categorized by year and according to; (1) failure to record or misrecording of days away from work and/or days of restricted work activity; (2) loss of consciousness; (3) job transfer; (4) restriction of work or motion (i.e., restricted work activity on the day of injury/illness only); (5) medical treatment; and (6) other. They must also be prepared by injury or illness type.

2. Proposed citations:
 - a. How is the violation-by-violation penalty to be applied?
 - b. How many violations?
 - c. Are there additional violations, not egregious?
3. For recordkeeping violations:
 - a. How many cases were not recorded for the previous 2 years? How many were recorded? Of those not recorded, how many were lost workday cases?
 - b. What is the DART rate according to company records? According to Oregon OSHA findings?
 - c. What is the DART rate among production employees (or among classes of employees affected by the proposed citation) according to company records? According to Oregon OSHA findings?
 - d. Were any previous inspections terminated because of a low DART rate?

NOTE: You may also wish to refer to the recordkeeping PD A-249.

E. Documentation Relating to Additional Penalty Factors

1. Determination of willfulness:

- a. What were the FIRM's guidelines or policies relating to safety and health in general and, in particular, to the subject violation (e.g., recordkeeping, hazard communication, machine guarding, use of respirators, maintenance of pressure vessels)? What was the nature of the inspected facility's safety and health program?
- b. Do corporate or plant policies or guidelines differ from Oregon OSHA requirements, or other relevant standards, or guidelines? What is management's explanation for differences between its policies and Oregon OSHA's requirements?
- c. Did responsible persons actually know of the requirements of the relevant Oregon OSHA standards, guidelines or instructions? Who were they and how did such persons come to know Oregon OSHA's requirements?
- d. Did responsible persons actually know of the existing hazardous conditions? Did they recognize the hazardous nature of these conditions? If so, who were these persons and for how long had they recognized the hazard?
- e. How did the employer explain the existence of the violations? Did the employer claim that any steps to abate had already been taken? Was any documentation available to support such claims?
- f. Had the company done anything toward identifying, evaluating or correcting the hazardous conditions prior to Oregon OSHA's visit? Was an abatement program in place or had one been proposed? What progress had been made toward implementing it? Does it seem adequate? What was the company's explanation as to why more progress had not been made?
- g. Are any memoranda, letters, minutes, accident reports or other documents addressing the hazards, violations or corrective measures available? Describe them. Did management admit knowledge of these documents? Had management responded in any way to them? How?

2. Penalty factors:

- a. How many violations of each standard are involved and how extensive (pervasive) is the problem?
 - i. What is the nature of the violation? (How many machines? How many different engineering controls? How many employees exposed?)
 - ii. What does the administrator propose as the "multiplier" for penalty

- calculation purposes? Why that multiplier?
- b. For recordkeeping cases:
 - i. Did the unreported or misrecorded cases tend to hide violative safety and health conditions in the establishment?
 - ii. Were unrecorded incidents investigated by the company?
 - iii. Were the unrecorded injuries or illnesses serious?
 - iv. Were the unrecorded injuries or illnesses the subject of workers' compensation claims?
 - c. What kind of safety and health program exists in the plant? What is management's attitude toward safety and health? What do management officials actually say?
 - d. What training was given to employees and supervisors regarding compliance with the standard or regulation, or abatement of the recognized hazard? If none is given, what did management admit or what explanation did they offer?
 - e. Did the company enforce its own policies and guidelines?
 - f. What were the most serious reasonably predictable injuries or illnesses that could result from exposure to the hazard? Would these potential injuries or illnesses be classified as serious? Did management admit recognition of the potential for these injuries and illnesses?
 - g. What was the company's record (especially relating to workers' compensation claims) for injuries and/or illnesses associated with alleged violations? What kind and how many such injuries or illnesses?
 - h. Are the abatement methods used by the company sufficient? Are the hazards well known in the industry? What is industry practice with respect to the hazards? Are appropriate methods to correct the hazards well recognized in the industry? What is industry practice with respect to the hazards? Why had the employer not implemented them? Were any interim protection measures in place? If not, why not?

NOTE: All of the above questions are to be directly asked of management personnel and their responses carefully recorded. A second CSHO or other reliable witness must be present if at all possible. Documentary evidence must be sought throughout the investigation, using administrative subpoenas promptly and freely, as appropriate.

Appendix B

In general, this identifies those conditions that normally constitute a flagrant violation of the OSEAct or Oregon OSHA standards and regulations such that violation-by-violation handling is appropriate.

SCO/HCO conducts inspection and finds multiple violations of the same standard

