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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 437  
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES  
OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION

**FILED**  
07/31/2020 1:05 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Oregon OSHA's proposed increase of certain minimum and maximum penalties for alleged violations  
(Corrected)

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/30/2020 5:00 PM

*The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.*

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Filed By:  
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HEARING(S)

*Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.*

DATE: 09/24/2020  
TIME: 11:00 AM  
OFFICER: Michael Wood  
ADDRESS: Oregon OSHA Portland  
Field Office  
(by webinar and appointment)  
16760 SW Upper Boones Ferry Rd  
Portland, OR 97224  
SPECIAL INSTRUCTIONS:  
These hearings replace those  
scheduled for 8/20/20 and 9/22/20,  
which have been canceled.

DATE: 09/24/2020  
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Go to the link below under "Need for  
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This hearing will be conducted entirely  
in Spanish

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NEED FOR THE RULE(S):

**EXHIBIT C**

Due to COVID-19 restrictions these hearings will be conducted by webinar and limited in person appointments, go to <https://osha.oregon.gov/rules/making/Pages/proposed.aspx> for information on how to register, which is incorporated here and by reference.

In November of 2015 Congress passed legislation requiring federal OSHA to increase maximum and minimum penalties for alleged violations by up to 78%. Federal OSHA had not raised these penalties since 1990, reducing the effectiveness of penalties as a deterrent for non compliance. Under federal law OSHA state plans must include effective sanctions for violations. Oregon must adopt similar standards as federal OSHA to maintain state plan authority.

After seeking a change in the statute to provide the necessary authority to mirror federal penalty adjustments, Oregon OSHA first adjusted these maximum and minimum penalties by rule in 2017, with an effective date of January 1, 2018. Under that rule change (or, during that rulemaking), the maximum penalty for a violation that is not classified as willful or repeat was raised from \$7,000 to \$12,471, and the maximum penalty for willful or repeated violations was raised from \$70,000 to \$124,709. The minimum penalty for a willful violation was increased from \$5,000 to \$8,900, while the other minimum penalties were left unchanged. When making adjustments to the base penalties consistent with the new maximum penalties, Oregon OSHA also created a new size adjustment for Oregon's smallest employers (10 or fewer), changing the size reduction in the base penalty for such employers from 60% to 75%.

Effective in January of 2019, the federal maximum penalty for a violation that is not classified as willful or repeat was increased to \$13,260 and the maximum penalty for willful or repeated violations was increased to \$132,598. Modest increases to both figures will be made again in January of 2020, and it is the intention of the present rulemaking to mirror the most current federal figures (based on preliminary information CPI information, Oregon OSHA expects the federal maximums to increase to \$13,538 and \$135,382, respectively). In addition, the current rulemaking includes several other clarifications and technical adjustments to the Oregon OSHA penalty rules.

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DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

OAR 437, Division 1, General Administrative Rules

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FISCAL AND ECONOMIC IMPACT:

See "Cost of Compliance" below.

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COST OF COMPLIANCE:

*(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).*

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

In relation to all employers affected by the proposed rule, it must first be noted that the proposed changes in the rule do not affect the cost of complying with existing Oregon OSHA rules nor do these proposed changes create any new requirements for employers. The only financial impact is on those employers who receive a violation that carries a penalty. For that reason (as has been the case with past changes to the penalty rules), Oregon OSHA believes that there

will be no "cost of compliance" for businesses of any size or any other employer covered by the rule. Any change in the penalty structure, by its very nature, affects the cost of non-compliance with Oregon OSHA rules, not the cost of complying with them. This rule does not change the compliance obligations of the employer; it just changes the penalties of non-compliance.

All state agencies are affected by the rule only in the sense that they are employers under the Oregon Safe Employment Act (OSEAct) and may be subject to penalties in the event violations are identified and cited. State agencies other than DCBS/Oregon OSHA will have no costs under this rule other than those that they would incur as an employer – and, as noted above, the rule will make no change to the cost of compliance for employers. Similarly, local governments are affected by this rule only in the sense that they are employers under the OSEAct and may be subject to penalties in the event violations are identified and cited. Finally the public as a whole will be affected only to the degree that members of the public are employers (who may be cited and assessed penalties) or employees (who may benefit from increased compliance with workplace health and safety rules as a result of increased employer compliance with existing rules). None of these entities will experience any fiscal impact due to changes in the cost of complying with this proposed rule.

## 2. Cost of compliance effect on small business (ORS 183.336):

As noted, there would be no change in the cost of compliance, for either small businesses or large businesses.

Small employers already experience somewhat lower penalties on average than do large employers, and those differences were magnified in the previous rulemaking for employers with 10 or fewer employees. Those existing differences would not be significantly affected by the proposed changes.

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

As previously noted, this rule has no anticipated fiscal impact on compliant employers. Those businesses affected in the form of penalties for non-compliance would include employers of all sizes. In Oregon more than 90% of all employers are small businesses, employing more than half of the state's workforce.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

There are no new recordkeeping or other administrative activities required for employers to comply with the proposed rules.

c. Equipment, supplies, labor and increased administration required for compliance:

There are no equipment, supplies, labor or increased administration required for employers to comply with the proposed rules.

The preceding paragraphs represent the legally required fiscal impact statements regarding the proposed rule. The remainder of this discussion relates not to the cost of compliance, but to the likely effect on assessed penalties. Although Oregon OSHA recognizes that such an analysis is not legally required, the analysis has been provided because of the level of stakeholder interest in such information.

Even without repeat violations or the evidence of willful conduct, Oregon OSHA currently has the authority to issue penalties of up to \$12,471 per violation, but in practice the majority of penalties are much lower. Most penalties result from the identification of a "serious" violation, where a serious injury or death could result. However, nearly two-thirds of violations cited by Oregon OSHA continue to be considered "other-than-serious" with no penalty attached. Overall, more than half of Oregon OSHA inspections result in no penalties at all, either because there were no violations issued or because the violations issued carried no penalties. There is no reason to believe this will change as a result of the revised penalty rules.

As part of its 2017 rulemaking, Oregon OSHA estimated that the average penalty for a first-time serious violation would increase from an average of \$435 during Federal Fiscal Years 2015 and 2016 to an average of \$553 following adoption of the revisions to the rule. That expected increase of more than 27 percent was primarily the result of the 78 percent increase in the maximum penalties, offset somewhat by the increased reduction in the base penalty for the smallest employers. The actual increase in penalties – almost certainly affected by factors other than the rulemaking – was just over 50 percent, with the average for the most recent two years being \$656 (having peaked at \$682 in FFY 2018 before dropping back to \$629 – illustrating the instability of the year-to-year average figure). Because the 2017 analysis involved comparing the penalties issued to the penalties that would have been issued under the revised rule for the same set of violations, Oregon OSHA remains reasonably confident that the actual impact of the 2017 rulemaking was much closer to the 27 percent estimate (in an interesting statistical coincidence, the later numbers involved fewer violations, so that the total penalty amount assessed for first-time serious violations for the most recent two-year period in fact represented just slightly more than the 27 percent estimate would have predicted).

In relation to the current rulemaking, which would increase the maximums by just over 8.5 percent and make other adjustments, Oregon OSHA estimates that the primary effect of the rulemaking would be to increase the average penalty for a first-time serious violation by 7.5 percent to \$673 (compared to the FFY 2019 figure). This analysis is appropriately less complex than the 2017 analysis, because it does not need to account for the offsetting effect of a new size reduction, but instead is driven almost entirely by the modifications to the base penalty table.

#### Summary of Changes by rule number and Potential Fiscal Impact on Non-Compliant Employers

##### 437-001-0060 Advance Notice

The only substantive change in the proposed draft of OAR 437-006-0060 is to make the language regarding issuance of a penalty permissive rather than mandatory. For this reason, to the extent it has any effect, it would be to potentially

reduce the cost. However, no such penalty has been assessed during at least the past 15 years.

#### 437-001-0096 Red Warning Notice

The only substantive change in the proposed draft of OAR 437-001-0096 is to remove the penalty language. However, those provisions are repeated elsewhere in the proposed rule, so there is no actual substantive change.

#### 437-001-0135 Evaluation of Probability to Establish Penalties

The change in the criteria for the evaluation of probability is a substantive one, although for the most part it better aligns the rule language with current training and practice. To the degree it has an effect, it would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments.

#### 437-001-0145 Penalty for Other than Serious or Serious Violation

The changes to the base penalties as described by the table would result in the following adjustments:

- No change for other-than-serious or low probability non-death serious violations;
- An increase of 7.14 percent for medium probability non-death serious violations;
- An increase of 7.5 percent for high probability non-death serious violations;
- An increase of 7.14 percent for low probability death violations;
- An increase of 8.33 percent for medium probability death violations;
- An increase of 8 percent for high probability death violations.

Because the various adjustments (including repeat and willful calculations) are themselves calculated using these base penalties, the likely effect of these changes on penalty amounts (as noted above) is expected to be an increase of approximately 7.5 percent in the average penalties assessed.

The only other substantive change in OAR 437-001-0145 corrects an oversight in recent rulemaking activity. Oregon OSHA had inadvertently eliminated the administrator's discretion in relation to repeat violations, creating some (although very infrequent) circumstances where the recognition of a repeat violation would require a penalty lower than would otherwise have been assessed (using the administrator's discretion). Because such violations are rare, this change is unlikely to have a meaningful effect on the penalty averages overall.

#### 437-001-0155 Determination of Penalty – Failure to Correct

There are two proposed changes in this section with potential substantive impacts:

The first would clarify that failure-to-abate penalties are to be calculated based on the number of workdays that the violation goes uncorrected, rather than simply those such days with independently documented exposure. In the relatively infrequent case of a failure-to-abate violation, this would at least sometimes result in an increase in the penalty assessed.

The second is the proposed decrease in the minimum daily penalty, which aligns it with the minimum penalty for a first-time serious violation. As a result of this change, those failure-to-abate violations that are cited with a calculated penalty of between \$100 and \$250 before the daily penalty is assessed will not experience an artificial increase resulting simply from the fact that the size-adjusted base penalty is relatively low (such a relatively low penalty is either the result of the employer's small size, the relative lack of gravity of the violation, or a combination of the two). While this change is also not likely to affect many employers, Oregon OSHA believes that the two changes in this rule section would be likely to offset one another in their impact on average penalties.

#### 437-001-0160 Penalty Criteria – Repeat Violation

The only substantive change in this section relates to those situations where an employer's activities across its fixed sites are managed in a fashion more consistent with non-fixed sites. The change would allow the administrator the same discretion to address such issues that he or she currently has when confronted with non-fixed sites that are managed in a fashion more consistent with fixed sites. The effect of this change, which would be applied rarely if ever, would be a slight upward pressure on average penalties for repeat violations.

#### 437-001-0165 Determination of Penalty – Repeat Violation

There are two substantive changes in this section other than the modified maximum penalties for such violations. One involves restoring the administrator's discretion in repeat violations, which was discussed in an earlier section. The other adds a 3rd and 4th repeat penalty amount to the discussion of Other-than-Serious repeat penalties (it was not

updated in a previous rulemaking, when the administrator's discretion for both 3rd and 4th Serious and Other-than-Serious repeats was replaced as the "default" approach by the additional language on the existing table). This change is not expected to affect average penalty amounts.

The overall effect of the change in the maximum penalties would be the same estimated 7.5 percent increase as the change in the base penalties.

#### 437-001-0170 Determination of Penalty – Failure to Report an Occupational Fatality, Catastrophe, or Accident

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those infrequent situations where they might occur. Because of their infrequency, Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

#### 437-001-0171 Determination of Penalty – Failure to Register a Farm Labor Camp/Facility

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those infrequent situations where they might occur. Because of their infrequency (and the infrequency of the underlying violation itself), Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

#### 437-001-0175 Determination of Penalty – Willful or Egregious Violation

The only substantive change to this section is the change in the maximum and minimum penalties. The overall effect of the change would be the same estimated 7.5 percent increase as the change in the base penalties.

#### 437-001-0180 Determination of Penalty – Relating to Red Warning Notice

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those situations where they might occur (red warning violations are themselves very infrequent, although Oregon OSHA recognizes that in those rare situations where such a violation occurs it would not be surprising to determine that it represents willful conduct). Because of their infrequency, Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

#### 437-001-0225 Penalty for Falsification

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those situations where they might occur (such violations are themselves very infrequent, although Oregon OSHA recognizes that in those rare situations where such a violation occurs it would not be surprising to determine that it represents willful conduct). Because of their infrequency, Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

#### 437-001-0740 Falsification or Failure to Keep and Post Records or Make Reports

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those infrequent situations where they might occur. Because of their infrequency, Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

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#### DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses and others were involved in the development of this rule insofar as their representatives were represented on the Oregon OSHA Partnership Committee, the Oregon OSHA Construction Advisory Committee, and other Oregon OSHA stakeholder groups. Those interested have also had the opportunity to comment on several preproposal drafts, and they are also invited to make comments in response to the rule proposal.

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#### WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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#### HOUSING IMPACT STATEMENT:

Description of proposed change: (Please attach any draft or permanent rule or ordinance)  
See attached Notice of Proposed Rulemaking Hearing.

Description of the need for, and objectives of the rule:  
See attached Notice of Proposed Rulemaking Hearing.

List of rules adopted or amended:

AMEND: OAR 437-001-0060, 437-001-0096, 437-001-0135, 437-001-0145, 437-001-0155, 437-001-0160, 437-001-0165, 437-001-0170, 437-001-0171, 437-001-0175, 437-001-0180, 437-001-0225, 437-001-0740

Materials and labor costs increase or savings:  
None.

Estimated administrative construction or other costs increase or savings:  
None.

Land costs increase or savings:  
Oregon OSHA does not foresee any effect on land costs.

Other costs increase or savings:  
Oregon OSHA does not foresee any additional costs.

\*Typical-Single story 3 bedrooms, 1 1/2 bathrooms, attached garage (calculated separately) on land with good soil conditions with no unusual geological hazards.

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PREPARER'S NAME: Renee Stapleton  
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RULES PROPOSED:  
437-001-0060, 437-001-0096, 437-001-0135, 437-001-0145, 437-001-0155, 437-001-0160, 437-001-0165, 437-001-0170, 437-001-0171, 437-001-0175, 437-001-0180, 437-001-0225, 437-001-0740

AMEND: 437-001-0060

RULE SUMMARY: Makes language regarding issuance of a penalty permissive rather than mandatory.  
Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0060

## Advance Notice ¶

(1) No person shall give advance notice of an inspection without authority of the Director, the Administrator, or designee subject to penalties as prescribed in ORS 654.991(2). ¶

(2) If the Director, the Administrator, or designee approves a request for advance notice of an inspection: ¶

(a) The notice shall not be given more than 24 hours in advance; and ¶

(b) When advance notice is given to the employer, ~~the employer shall, without delay, and if required by the~~ Director, the Administrator, or designee, either at the time advance notice is given or any time thereafter, the employer must notify the employee representative without delay of the proposed inspection, or in the absence of an employee representative, immediately post a notice, provided to the employer by Oregon OSHA, in a sufficient number of locations in the place of employment to reasonably inform employees of the planned inspection. ~~Any employer who fails to~~ Failure to provide such notify the employees, through posting, of the proposed inspection ~~shall be assessed~~ when directed by the Director, the Administrator, or designee may result in a penalty as ~~prescribed in ORS 654.086(1)(f), outlined in OAR 437-001-0176.~~ ¶

(3) It will not be considered advance notice to advise a federal or state agency that is not the subject of the inspection of a proposed inspection in order to avoid duplicate inspections or to facilitate enforcement. ¶

(4) Any person who gives advance notice of any safety or health inspection without authority from the ~~the~~ Director or his, the Administrator, or designee shall be punished, upon conviction, by being assessed a penalty not to exceed \$1,000 or be imprisoned for not more than ~~six~~ 6 months, or both, as prescribed in ORS 654.991(2).

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0096

RULE SUMMARY: Removed penalty language from rule.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0096

Red Warning Notice ¶¶

(1) The Red Warning Notice shall be authorized by either the Director, ~~the Administrator,~~ one of the statewide Managers of Enforcement, or one of the Field Office Supervise Enforcement Managers. For purposes of this rule, a Camp Closure Notice is a Red Warning Notice. ¶¶

(2) When action is necessary to preclude or eliminate exposure of employees to a condition which, if such exposure occurred or continued, would constitute a violation of any statute or of any lawful regulation, rule, standard, or order, affecting employee safety or health at a place of employment, a Compliance Officer ~~shall obtain~~ will seek permission to post a Red Warning Notice. The notice ~~shall~~ will be posted in plain view of any person likely to use the place of employment, machine, device, apparatus, or equipment that constitutes the hazard. ¶¶

(3) Any place of employment, machine, device, apparatus, or equipment on which a Red Warning Notice has been posted ~~shall~~ must not be operated or used by any person until: ¶¶

(a) The condition has been made safe and healthful; and ¶¶

(b) The Red Warning Notice has been removed by ~~the Division~~ Oregon OSHA; however, ¶¶

(c) Nothing in this section prohibits an employer from using any place of employment, or operating any machine, device, apparatus, or equipment, exclusively for the purpose of remedying the violation, pursuant to the instructions on the Red Warning Notice. ¶¶

(4) No person shall deface or destroy a Red Warning Notice, or remove it without authorization from ~~the Division~~ Oregon OSHA. ¶¶

(5) The Red Warning Notice will be removed after: ¶¶

(a) Notification from the employer that the condition has been corrected; and ¶¶

(b) A follow-up inspection or other information confirms that the condition has been corrected. ¶¶

~~(6) Any person who violates or directs another to violate OAR 437-001-0096(3) or (4) shall be assessed a civil penalty of not less than \$100 and not more than \$5000 for each such violation. ¶¶~~

~~(7) Any employer who violates or directs an employee to violate OAR 437-001-0096(3), and the violation is determined to be a willful violation, may be assessed a civil penalty of not less than \$8,900 and not more than \$126,749.~~

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0135

RULE SUMMARY: Substantively changes language regarding determination of high, medium, and low probability.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0135

Evaluation of Probability to Establish Penalties ¶¶

(1) The probability of an accident that could result in an injury or illness from a violation ~~sh~~will be determined by the Compliance Officer and ~~sh~~will be expressed as a probability rating.¶¶

(2) The factors to be considered in determining a probability rating may include, as applicable:¶¶

(a) The number of employees exposed;¶¶

(b) The frequency and duration of exposure;¶¶

(c) The proximity of employees to the point of danger;¶¶

(d) Factors, ~~which that~~ require work under stress;¶¶

(e) Lack of proper training and supervision or improper workplace design; or¶¶

(f) Other factors that may significantly affect the ~~degree of~~ probability of an accident occurring.¶¶

(3) The probability rating is:¶¶

(a) Low - If the factors considered indicate ~~it would be unlikely that an accident could occur~~ that the likelihood an accident could occur is lower than the compliance officer would consider to be normal;¶¶

(b) Medium - If the factors considered indicate ~~it would b~~ that the likely that hood an accident could occur is what the compliance officer would consider to be normal; or¶¶

(c) High - If the factors considered indicate ~~it would be very likely that an accident could occur~~ that the likelihood an accident could occur is higher than the compliance officer would consider to be normal.¶¶

(4) The probability rating may be adjusted on the basis of any other relevant facts ~~which that~~ would affect the likelihood of injury or illness.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

RULE SUMMARY: Changes in base penalties and table amounts.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0145

Penalty for Other than Serious or Serious Violation ¶¶

(1) A penalty must be assessed for any serious violation and may be assessed for any other than serious violation as established by the intersection of the probability rating and severity rating on the Penalty Schedule (Table 1). In a case where probability and severity are not appropriate considerations, a penalty may be assessed by considering the facts of the violation. ~~Table 1 (attached).~~ See attached table. ¶¶

(2) Penalty adjustments will be made based on an employer's size for all violations ~~except failure to correct.~~ Additional adjustments for an employer's compliance history, injury and illness history, demonstrated good faith efforts, and corrective action taken at the time of the inspection will be determined by the Compliance Officer and assessed as follows: ¶¶

(a) Size adjustments - based on state wide peak employment: ~~Table 2 (attached).~~ See attached table. ¶¶

(b) History adjustments will be based on injuries and illnesses (and trends) during the previous three years, including available information from both Workers' Compensation data and Bureau of Labor Statistics. This assessment will also include a review of the employer's violation history within the past 3 years. Adjustments will be made as follows: ¶¶

(A) 10% reduction of the base penalty if the compliance officer determines that the information demonstrates a positive history overall. ¶¶

(B) No ~~reduction~~ change in the base penalty if the compliance officer determines that history is what would be expected of a typical employer. ¶¶

(C) 10% increase of the base penalty if the compliance officer determines that the information demonstrates a negative history overall. ¶¶

(c) Good faith adjustments will be determined by, but not limited to, review of certain criteria as follows: ¶¶

(A) Evidence of an overall safety and health program. ¶¶

(B) Effective communication of safety and health policies. ¶¶

(C) Promotion of safety and health prior to the inspection. ¶¶

(D) Employees are clearly involved in the safety and health program. ¶¶

(E) Management's commitment at all levels is apparent. ¶¶

(F) Worksite hazard analysis is conducted. ¶¶

(G) Employees and managers alike are held accountable for safety and health. ¶¶

(H) Adjustments will be made as follows: ¶¶

~~(Hi)~~ 20% reduction ~~in~~ of the base penalties if the compliance officer determines that the information demonstrates a better than average effort to comply with the law and rules. ¶¶

~~(Hj)~~ No adjustment in the base penalty if the compliance officer determines that the information demonstrates an employer's good faith effort is ~~at the norm.~~ ¶¶

~~(Average.) ¶¶~~

(Iii) 20% increase ~~in~~ of the base penalties if the compliance officer determines that the information demonstrates a poorer than ~~normal~~ average effort to comply with the law and rules. ¶¶

(d) A 10% reduction of the base penalty will be provided for immediate corrections of violations or other unsafe conditions identified during the inspection provided that such corrective action is substantial and not temporary or superficial. ¶¶

(3) Penalty adjustments, except for size, will not be applied to repeat violations, violations for a failure to correct, willful violations, or any violation that the compliance officer determines contributed to an injury, illness, or death of an employee. Adjustments will not reduce the penalty to less than the mandatory minimum penalty that has

been established by rule or statute or increase the penalty beyond the maximum penalty established by statute.¶

(4) The adjusted final penalty for a serious violation will not be less than \$100.¶

(5) Penalties for combined violations will be calculated by taking the number of violations into account when assessing probability. Severity will be determined by identifying the most severe reasonably predictable injury or illness that could occur.¶

(6) The penalty for grouped violations of different rules is calculated by determining the probability and severity for the entire group.¶

(7) The Administrator may ~~assess a penalty of up to \$12,675 for any, at his or her discretion, assess a penalty of~~ between \$100 and \$13,538 for any serious violation, between \$200 and \$135,382 for any repeated violation, and between \$9,472 and \$135,382 for any willful violation after considering the facts.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.

# Oregon OSHA's Proposed Adjustment of Certain Minimum and Maximum Penalties for Alleged Violations.

July, 2020

437-001-0145

## Penalty for Other than Serious or Serious Violation

(1) A penalty must be assessed for any serious violation and may be assessed for any other than serious violation as established by the intersection of the probability rating and severity rating on the Penalty Schedule (Table 1). In a case where probability and severity are not appropriate considerations, a penalty may be assessed by considering the facts of the violation.

**Table 1 - Penalty table**

Probability	Severity	Probability	Severity	
<b>Other Than Serious</b>		<b>Serious</b>		
			Serious Physical Harm	Death
Low	0	Low	\$300	\$ <del>[3,500]</del> <b>3,750</b>
High	\$300	Medium	\$ <del>[700]</del> <b>750</b>	\$ <del>[6,000]</del> <b>6,500</b>
		High	\$ <del>[2,000]</del> <b>2,150</b>	\$ <del>[12,500]</del> <b>13,500</b>

(2) Penalty adjustments will be made based on an employer's size for all violations. Additional adjustments for an employer's compliance history, injury and illness history, demonstrated good faith efforts, and corrective action taken at the time of the inspection will be determined by the Compliance Officer and assessed as follows:

(a) Size adjustments – based on state wide peak employment:

**Table 2 - Penalty size adjustments**

Number of employees	Percent reduction
1-10	75
11-25	60
26-90	40
91-130	30
131-175	20
176-250	10
251 or more	No adjustment

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AMEND: 437-001-0155

RULE SUMMARY: Changes language regarding calculation of failure-to-abate penalties and proposed decrease in minimum daily penalty.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0155

Determination of Penalty - Failure to Correct ¶¶

(1) A citation ~~shall~~must be issued for an employer's ~~nonabatement of a violation.~~¶

~~(2) Penalties of not more than \$12,675 per day failure to correct a previously cited violation.~~¶

(2) Penalties assessed for a failure to correct a violation:¶

~~(a) A previous cited violation will not exceed \$13,538 per day.~~¶

(a) Such penalties may be assessed for each work-day, or part of a day, that the violation results in continued exposure is not corrected after the ordered correction date;¶

(b) Such penalties must be determined by considering the probability and severity of the original violation, the efforts of the employer to correct the violation, and factors which that delayed the employer in correcting on of the violation; and¶

(c) If failure to correct the violation results from the employer's lack of diligence, the daily penalty shall will be not less than \$50 for other than serious violations, and not less than \$25 \$100 for serious violations, for each day or part of a day, during which the violation remains uncorrected.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0160

RULE SUMMARY: Changes language to allow employer's activities across fixed sites to be managed in a fashion more consistent with non-fixed sites.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0160

Penalty Criteria - Repeat Violation ¶¶

Oregon OSHA will identify repeat violations as follows:¶¶

(1) An employer's second or subsequent violation involving a substantially similar violation, cited within the previous three years, will be cited as a repeat violation as described below.¶¶

(2) When citing an identical standard for a violation of a previously cited statute, regulation, rule, standard, or order it will be presumed to be a repeat violation. That presumption can be disproven only if the circumstances clearly demonstrate that the violation is not substantially similar to a previously cited violation.¶¶

Example: Previously a citation was issued for a violation of 1910.212(a)(1) for not guarding in-going nip points. A recent inspection of the same establishment revealed a citation of 1910.212(a)(1) for not guarding against flying chips and sparks. Although the same standard was cited, the hazardous conditions are clearly not substantially similar and a repeat violation would not be appropriate.¶¶

(3) When citing a different standard, in some circumstances, substantially similar conditions can be demonstrated. In such cases, if the violations found are substantially similar a repeat violation would be appropriate even though the standards are different.¶¶

Example #1: Previously a citation was issued for a failure to install appropriate scaffold guardrails under the Division 3 Construction standards. A recent inspection of the same employer found a violation for a failure to install appropriate scaffold guardrails, but this time the operation involved activities covered by the Division 2 General Industry standard. Although two different standards are cited, the violations are substantially similar and would therefore be treated as a repeat.¶¶

Example #2: Previously a citation was issued for failure to have a respirator program in a Division 2 General Industry situation where exposure to asbestos would require one. A recent inspection of the same employer found a violation for not requiring employees to wear respirators while performing lead related tasks in the Lead, Division 3 Construction standard that requires respiratory protection. Although two different standards are cited, the violations are substantially similar and would therefore be treated as a repeat.¶¶

(4) Where a previously cited violation is under appeal and not yet final:¶¶

(a) The second violation will be cited as a repeat violation; and¶¶

(b) Such citation will state that the earlier violation is under appeal and the repeat classification of the current violation will be rescinded if the earlier violation does not become final.¶¶

(5) At fixed places of employment, "high probability serious" and "death" rated violations will be issued as repeat violations at all of an employer's places of employment in the state. Repeat violations for all other violation types will be limited to the cited place of employment. Where the Administrator, or designee, determines in his or her discretion that the span of control and nature of activity for a fixed place of employment is more readily comparable to nonfixed location activity, repeat violations will be handled in a manner consistent with nonfixed places of employment.¶¶

(6) At nonfixed places of employment, repeat violations will be based on earlier violations occurring anywhere within the state. Where the Administrator, or designee, determines in his or her discretion that the span of control and nature of activity for a portion of the state is more readily comparable to fixed location activity, repeat violations will be handled in a manner consistent with fixed places of employment.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295



AMEND: 437-001-0165

RULE SUMMARY: Changes maximum and minimum penalty amounts.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0165

Determination of Penalty - Repeat Violation ¶

(1) The penalty for a repeat violation will be calculated by multiplying the penalty for the current violation by the following factors:¶

~~Table 1 – Penalties for Repeat Violations¶~~

~~1st Repeat X2¶~~

~~2nd Repeat X5¶~~

~~3rd Repeat X10¶~~

~~4th Repeat X15¶~~

~~5th Repeat X20¶~~

~~Additional Repeats Discretion of Administrator {See attached table.}¶~~

(2) The total final penalty for a repeat violation will not be less than \$200, nor more than a ~~maximum of \$126,749~~ \$135,382.¶

(3) For a repeated other than serious violation that otherwise would have no initial penalty, a penalty of \$200 will be assessed for the first repeated violation, \$500 if the violation has been cited twice before, ~~and~~ \$1,000 for a third repeat, \$1,500 for a fourth repeat, and \$2,000 for a fifth repeat.¶

(4) The administrator may, at his or her discretion, assess a penalty of between \$200 and \$135,382 for any repeated violation after considering the facts.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.

# Oregon OSHA's Proposed Adjustment of Certain Minimum and Maximum Penalties for Alleged Violations.

July, 2020

437-001-0165

## Determination of Penalty – Repeat Violation

(1) The penalty for a repeat violation will be calculated by multiplying the penalty for the current violation by the following factors:

Table 1 - Penalties for Repeat Violations

1 <sup>st</sup> repeat	X 2
2 <sup>nd</sup> repeat	X 5
3 <sup>rd</sup> repeat	X 10
4 <sup>th</sup> repeat	X 15
5 <sup>th</sup> repeat	X 20
Additional repeats	Discretion of Administrator

\* \* \* \* \*

AMEND: 437-001-0170

RULE SUMMARY: Clarifies language that willful violations remain an option for these failures to report.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0170

Determination of Penalty - Failure to Report an Occupational Fatality, Catastrophe, or Accident ¶¶

If an employer fails to report an occupational fatality, catastrophe, or accident as provided in OAR 437-001-0704, a penalty of not less than \$250, nor more than ~~\$12,675~~\$3,538, shall be assessed. In the event that such a violation is determined to be willful, a penalty between \$9,472 and \$135,382 will be assessed at the Administrator's discretion after a consideration of the facts

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0171

RULE SUMMARY: Clarifies language that willful violations remain an option for these penalties.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0171

Determination of Penalty - Failure to Register a Farm Labor Camp/Facility ¶

If an operator, employer, or contractor fails to register a Farm Labor Camp or facility with Oregon OSHA as required in Division 4/J, 437-004-1120(5)(b), a penalty of not less than \$250 nor more than ~~\$12,675~~3,538, shall be assessed. In the event that such a violation is determined to be willful, a penalty between \$9,472 and \$135,382 will be assessed at the Administrator's discretion after a consideration of the facts.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 315.164, 658.750, 658.755, 658.780, 658.785, 658.805, 658.810, 658.825

AMEND: 437-001-0175

RULE SUMMARY: Change in maximum and minimum penalty amounts.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0175

Determination of Penalty - Willful or Egregious Violation ¶

For a willful violation, the Administrator, ~~after considering the facts~~ base penalty, after appropriate adjustments based on the violation, may assess a penalty of not less than \$8,900, nor more than \$126,749. The base penalty will normally be multiplied by 25. ~~The Administrator may, at his or her discretion, assess a penalty between \$9,472 and \$135,382 based on the facts.~~ For egregious violations, the Administrator may assess a separate willful penalty, after any appropriate adjustments based on the employer's size, for each instance of a violation.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0180

RULE SUMMARY: Clarifies language that willful violations remain an option for these penalties.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0180

Determination of Penalty - Relating to Red Warning Notice ¶

~~{Reserved}~~Any person who violates or directs another to violate OAR 437-001-0096(3) or (4) shall be assessed a civil penalty of not less than \$100 and not more than \$13,538 for each such violation. In the event that such a violation is determined to be willful, a penalty between \$9,472 and \$135,382 will be assessed at the Administrator's discretion after a consideration of the facts.

Statutory/Other Authority: ORS 654.025(2), 656.726(3)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0225

RULE SUMMARY: Clarifies language that willful violations remain an option for these penalties.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0225

Penalty for Falsification ¶¶

(1) An employer who knowingly makes any false statement, representation, or certification regarding the correction of a violation shall be assessed a civil penalty of not less than \$100 and not more than \$2,500. In the event that such a violation is determined to be willful, a penalty between \$9,472 and \$135,382 will be assessed at the Administrator's discretion after a consideration of the facts.¶¶

(2) An employer who knowingly makes any false statement, representation, or certification regarding the correction of a violation, and that violation is found to have caused or materially contributed to the death of any employee, shall be penalized according to the provisions of ORS 654.991(3). In such cases, the Administrator shall contact the appropriate local district attorney for assistance and possible prosecution.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295

AMEND: 437-001-0740

RULE SUMMARY: Clarifies language that willful violations remain an option for these penalties.

Note: This summary statement is the same as the statement previously filed.

CHANGES TO RULE:

437-001-0740

Falsification or Failure to Keep and Post Records or Make Reports ¶¶

Oregon OSHA will cite employers who fail to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 (except 437-001-0704 which is addressed in 437-001-0170) or 437-001-0706. Citations will be other than serious' and carry a penalty of at least \$100 but not more than \$1000 for each violation.¶¶

NOTE In the event that such a violation is determined to be willful, a penalty between \$9,472 and \$135,382 will be assessed at the Administrator's discretion after a consideration of the facts. ¶¶

Note: ORS 654.991(3) provides that anybody who knowingly makes a false statement, representation, or certification in any application, record, report, plan, or other document filed or required by ORS 654.001 to 654.295, will, on conviction, be fined not more than \$10,000 or be imprisoned for not more than 6 months, or both. Also, ORS 654.086(1)(e) provides for civil penalties for falsification of a document.

Statutory/Other Authority: ORS 654.025(2), 656.726(4)

Statutes/Other Implemented: ORS 654.001 - 654.295