

CASE Heather * DCBS

From: CASE Heather * DCBS
Sent: Wednesday, March 18, 2020 2:32 PM
To: 'Trask, Ana'; WESCOTT Sky I * DCBS
Cc: Thompson, Guy
Subject: RE: 2020.03.18 LT Oregon Occupational Safety and Health

Hello Mr. Thompson-

We have received your request for extension of the comment period regarding our Employer Knowledge rulemaking and our Penalty Adjustment rulemaking. Oregon OSHA has come to this conclusion, and is taking action to cancel and reschedule our public hearings, as well as extend our comment period.

I am sending notice of this out to interested parties who are signed up for our rulemaking notices today. If you are not signed up on our mailing list, this can be accomplished at the bottom of our homepage, osha.oregon.gov.

Oregon OSHA will continue accepting public comment as we have been (beginning February 26, 2020), until two weeks after our final hearing. That date is not yet known (as the new hearings have not been scheduled), but will likely be in late September.

I encourage you to sign up for proposed rulemaking notices, as once we re-schedule our public hearings, we will be providing our legal required notice through those channels.

Thank you,

Heather Case
Policy Analyst/Administrative Rules Coordinator
Oregon OSHA
503-947-7449
heather.case@oregon.gov
osha.oregon.gov



From: Trask, Ana <ana.trask@stoel.com>
Sent: Wednesday, March 18, 2020 2:19 PM
To: CASE Heather * DCBS <Heather.Case@oregon.gov>; Sky.J.Wescott@oregon.gov
Cc: Thompson, Guy <guy.thompson@stoel.com>
Subject: 2020.03.18 LT Oregon Occupational Safety and Health

Good Afternoon:

Please see the attached from Guy Thompson. A hard-copy will follow via U.S. Certified mail.

Thank you,

Ana Trask | Practice Assistant to Eric A. Grasberger, Mario R. Nicholas and Guy J. Thompson
STOEL RIVES LLP | 760 SW Ninth Avenue, Suite 3000 | Portland, OR 97205
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March 18, 2020

Guy J. Thompson
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**VIA ELECTRONIC MAIL AND
CERTIFIED U.S. MAIL**

Ms. Heather Case, Rules Coordinator
Mr. Sky Wescott, Compliance Officer
Oregon Occupational Safety and Health
350 Winter St NE
Salem, OR 97309-0405
Heather.Case@oregon.gov
Sky.J.Wescott@oregon.gov

**Re: Request for Extension of Public Comment Period for Oregon OSHA's Proposed
Rules Increasing Certain Penalties and Clarifying Employer Responsibilities /s/**

Dear Ms. Case and Mr. Wescott:

On February 26, 2020, Oregon Occupational Safety and Health ("Oregon OSHA") announced it proposes new rules (1) to increase certain minimum and maximum penalties for alleged violations and (2) to clarify certain employer obligations under the general administrative rules. The public comment periods for these proposed rule changes are set to close on May 1, and May 29, 2020, respectively. Stoel Rives LLP ("Stoel Rives") represents a significant number of employers within the State who will be affected by these proposed rules.

As you are aware, the recent COVID-19 pandemic has led to widespread and unprecedented workplace disruptions. Employers are currently focused on the survival of their business and we respectfully request that the respective public comment periods for these rule changes be extended for at least ninety (90) days to facilitate full and meaningful public participation and review. Under this timeline, we request that the public comment period for the proposed penalty rules close August 1, 2020, with comments on the employer obligation clarifications due August 31, 2020.

Very truly yours,

/s/ Guy J. Thompson



COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Case@oregon.gov
Sky.I.Wescott@oregon.gov
Tech.Web@oregon.gov

Heather Case
Sky Wescott
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Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-3



COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in [~~brackets with line through~~] and added text is in **bold and underlined**.



COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

- a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.^[3]

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.



COMMENTS ON OREGON OSHA PROPOSED RULES

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.^[4]

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

- b. The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining “reasonable diligence”, OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not “anticipate” that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. *See OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).



COMMENTS ON OREGON OSHA PROPOSED RULES

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA’s proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.



COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

- III. OR-OSHA’s proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in [brackets with line through] and added text is in italics and underlined):

- (1) Employers’ Responsibilities.

* * * * *

~~{(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.}~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent’s actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~{(i) The violation was both isolated and unpredictable; or}~~

~~{(ii)}~~ (i) The violation was the result of ~~[unpreventable]~~ employee misconduct *that was not encouraged or condoned by the employer.*



COMMENTS ON OREGON OSHA PROPOSED RULES

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work[~~;~~ and ~~does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [~~brackets with line through~~] and added text is in *italics and underlined*.



COMMENTS ON OREGON OSHA PROPOSED RULES

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAD 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAD 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation **will** [~~shall~~] be determined by the Compliance Officer and **will** [~~shall~~] 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



COMMENTS ON OREGON OSHA PROPOSED RULES

- (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~~] **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 be likely that~~] **that the likelihood** 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~~] **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA’s compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA’s basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is “High.” OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes “would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments.”

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a “substantial probability” that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer’s beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer’s right to have all of the evidence considered by the administrative law judge should be paramount.



COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any "willful" failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere "clarification" without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer "fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706" if the violation is determined to be "willful." The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a "not to exceed \$5,000" penalty for such conduct.

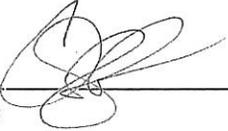
The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.



COMMENTS ON OREGON OSHA PROPOSED RULES

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,



Signature

Chris Duffin

Name

LMC Construction

Company

7/31/2020

Date

COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Case@oregon.gov
Sky.I.Wescott@oregon.gov
Tech.Web@oregon.gov

Heather Case
Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose any attempt to hold the employer responsible for an employee's misconduct. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-4

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

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COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

Pursuant to ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.^{3]}

The Administrator further testified:

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

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COMMENTS ON OREGON OSHA PROPOSED RULES

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.^[4]

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

- b. The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the Oregon Safe Employment Act (“OSEA”).

Even if there were a need for a rule defining “reasonable diligence”, OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not “anticipate” that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

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hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA’s proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

III. OR-OSHA’s proposed amendment to OAR 437-001-0760(1)(f)(A) & (B) is unnecessary and imposes an impermissible strict-liability standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). Oregon’s courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court’s consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as a “Rogue Supervisor” defense in the first instance and the “unforeseeable employee misconduct” defense in the other. The “Rogue Supervisor” defense involves the evaluation of misconduct by an employee acting in a supervisory role. The “unforeseeable employee misconduct” defense involves the evaluation of misconduct by an employee who is not acting in a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee’s misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR-OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. Indeed, the Supreme Court has long held that once it interprets a statute, that interpretation is deemed to have been enacted by the legislature at the time of the promulgation of the statute. The Court therefore has repeatedly held that no state agency can adopt rules or otherwise act in a manner inconsistent with its interpretation of the underlying applicable statutes. The proposed changes to this rule would negate the Supreme Court’s interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency’s authority and should not be adopted.

We suggest revising the proposed amendment as follows (removed text is in ~~brackets with line through~~ and added text is in italics and underlined):

(1) Employers’ Responsibilities.

COMMENTS ON OREGON OSHA PROPOSED RULES

* * * * *

~~[(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.]~~

(A) The employer is *not* responsible for violations unless ~~[neither the employer nor any agent of]~~ the employer knew or with the exercise of reasonable diligence could have known about the violation.

~~[Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.]~~

(B) The employer is not responsible for a violation when ~~[no agent of the employer had actual knowledge of the presence of the violation and~~ *the violation was the result of misconduct by a supervisor or employee that was not encouraged or condoned by the employer.*

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[[ii) The violation was the result of unpreventable employee misconduct.]~~

We do not believe that any employer should ever be liable for a serious violation if the violation was "unpredictable." We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees or supervisors not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a serious violation if the employer had provided the training and

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equipment necessary and the employee nevertheless elects to violate the regulations while the employer is not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA's own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee's failure to comply with the employer's policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term "unpreventable employee misconduct." The proposed definition puts the burden on the employer to prove that it "had developed and implemented measures that identified any violation" of its policies or procedures. The proposed amendment is a drastic change that would shift the burden of proof to the employer. It is a well-established principle under Oregon law that employee misconduct is evidence that serves to negate the existence of an employer's constructive knowledge of a violation, which OR-OSHA has the burden of proving. It is unacceptable for OR-OSHA to skirt its burden of proof by shifting it to employers.

Moreover, the proposed rule is untenable. There would never be a violation if an employer successfully put in place measures to identify and eliminate *any* violation of safe work rules. The proposed definition of "unpreventable employee misconduct" defines employee misconduct out of existence.

We ask OR-OSHA to reconsider the need to add a definition of "unpreventable employee misconduct" or adopt the alternative definition proposed above.

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

(1) The probability of an accident that could result in an injury or illness from a violation **will** [~~shall~~] be determined by the Compliance Officer and **will** [~~shall~~] 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;

COMMENTS ON OREGON OSHA PROPOSED RULES

- (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]~~ **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 be likely that]~~ **that the likelihood** 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]~~ **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA's compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA's basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is "High." OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes "would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments."

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation

COMMENTS ON OREGON OSHA PROPOSED RULES

results in a “substantial probability” that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer’s beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer’s right to have all of the evidence considered by the administrative law judge should be paramount.

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator’s Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any “willful” failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere “clarification” without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer “fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706” if the violation is determined to be “willful.” The current maximum penalty is \$1,000 per violation.⁸ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification

COMMENTS ON OREGON OSHA PROPOSED RULES

for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a "not to exceed \$5,000" penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,


Signature

George H. Williams, Jr.
Name

Tenco Engineered Products, Inc.
Company

August 3, 2020
Date

COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Casc@oregon.gov
Sky.I.Wescott@oregon.gov
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Heather Case
Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-5

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in [~~brackets with line through~~] and added text is in **bold and underlined**.

COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.³

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

COMMENTS ON OREGON OSHA PROPOSED RULES

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct. ^[4]

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

b. The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining “reasonable diligence”, OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not “anticipate” that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

COMMENTS ON OREGON OSHA PROPOSED RULES

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)'s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA's proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer's workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that "could" occur in the workplace.

III. OR-OSHA's proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in ~~brackets with line through~~ and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

~~{(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.}~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~{(i) The violation was both isolated and unpredictable; or}~~

~~{(ii)}~~ (i) The violation was the result of ~~[unpreventable]~~ employee misconduct that was not encouraged or condoned by the employer.

COMMENTS ON OREGON OSHA PROPOSED RULES

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work[~~and does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [~~brackets with line through~~] and added text is in *italics and underlined*.

COMMENTS ON OREGON OSHA PROPOSED RULES

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation will [~~shall~~] be determined by the Compliance Officer and will [~~shall~~] 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

COMMENTS ON OREGON OSHA PROPOSED RULES

- (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]~~ **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 be likely that]~~ **that the likelihood** 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]~~ **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA's compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA's basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is "High." OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes "would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments."

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a "substantial probability" that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer's beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer's right to have all of the evidence considered by the administrative law judge should be paramount.

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any "willful" failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere "clarification" without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer "fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706" if the violation is determined to be "willful." The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a "not to exceed \$5,000" penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

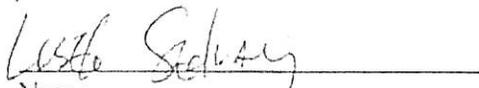
COMMENTS ON OREGON OSHA PROPOSED RULES

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

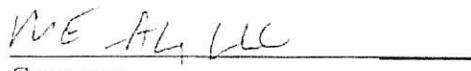
Sincerely,



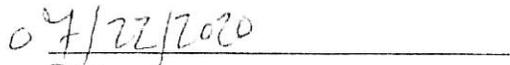
Signature



Name



Company



Date

Hello OR OSHA Team,

My name is Laszlo Szalvay and I employ over 175 Oregonians within the personal services sector here in Oregon. I employ Oregonians across five counties.

I am writing to you today, because your proposed sweeping changes (<https://osha.oregon.gov/OSHARules/proposed/2020/text-chngs-2-penalties.pdf>, <https://osha.oregon.gov/OSHARules/proposed/2020/text-chngs-2-employer-knowledge.pdf>) are unsuitable for the Oregon business community. Your proposed changes are inappropriate, dangerous and a clear overreach of the intended legislation.

As employers, we have so many issues including COVID-19, social unrest, increases to minimum wage, uncertainty about Federal unemployment benefit extensions, uncertainty about Police funding, uncertainty about what K-12 Schools will look like, customer demand concerns, employee anxiety, new OHA health sector based standards. The last thing we need to worry about is a **\$130,000+ fine for a paperwork error** or a **13,453% increase to certain OSHA violations**.

You do not have my support for these proposed changes. Attached via pdf is a letter outlining my thoughts on this matter. As a taxpayer and employer of many Oregonians, I'm asking that you read it and respond in due course with thoughts on each bullet point. Should you have any questions or concerns please do not hesitate to contact me via email or phone. You can reach me at +1.360.399.6545.

For visibility, I have added to copy Senator Wyden's Office as well as State Rep. Neron's Office, as well as numerous City Councilmembers.

--

Laszlo Szalvay

Message Envy TeamLaszlo

www.teamLaszlo.com

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--

Laszlo Szalvay
Massage Envy TeamLaszlo
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+1.360.399.6545

BRITTON Theresa L. * DCBS

From: WESCOTT Sky I * DCBS
Sent: Monday, July 27, 2020 12:44 PM
To: 'Massage Envy TeamLaszlo'; Heather.Case@oregon.gov
Cc: Armitage, Ree (Wyden); City of Sherwood; Corey Kearsley; REP Neron
Subject: RE: OSHA sweeping Changes inappropriate for the Oregon business Community

Hi Laszlo!

We have received your comments on the proposed rules related to employer penalties and employer knowledge. Thank you very much for your input! Because the rulemaking record is opening we will not be responding to individual comments at this time. However, all comments will be addressed in the supporting documentation when a final decision is made.

Sincerely,

-Sky Wescott
Oregon OSHA
Technical Section
503-378-3272

From: Massage Envy TeamLaszlo <team.meal.llc@gmail.com>
Sent: Friday, July 24, 2020 6:34 PM
To: DCBS WEB TECH * DCBS <TECH.WEB@oregon.gov>; Heather.Case@oregon.gov; WESCOTT Sky I * DCBS <Sky.I.Wescott@oregon.gov>
Cc: Armitage, Ree (Wyden) <Ree_Armitage@wyden.senate.gov>; City of Sherwood <colemanb@sherwoodoregon.gov>; Corey Kearsley <corey@sherwoodchamber.org>; REP Neron <Rep.CourtneyNeron@oregonlegislature.gov>
Subject: OSHA sweeping Changes inappropriate for the Oregon business Community

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--

Laszlo Szalvay
Massage Envy TeamLaszlo
www.teamLaszlo.com
+1.360.399.6545

BRITTON Theresa L * DCBS

From: WESCOTT Sky I * DCBS
Sent: Monday, July 27, 2020 12:50 PM
To: 'Massage Envy TeamLaszlo'; ANSARY Raihana * GOV
Cc: Bruce Coleman; Heather.Case@oregon.gov; Armitage, Ree (Wyden); Corey Kearsley; REP Neron; GUINEY Bryan * BIZ
Subject: RE: OSHA sweeping Changes inappropriate for the Oregon business Community

Good afternoon all!

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Sincerely,

-Sky Wescott
Oregon OSHA
Technical Section
503-378-3272

From: Massage Envy TeamLaszlo <team.meal.llc@gmail.com>
Sent: Monday, July 27, 2020 11:42 AM
To: ANSARY Raihana * GOV <Raihana.ANSARY@oregon.gov>
Cc: Bruce Coleman <ColemanB@sherwoodoregon.gov>; DCBS WEB TECH * DCBS <TECH.WEB@oregon.gov>; Heather.Case@oregon.gov; WESCOTT Sky I * DCBS <Sky.I.Wescott@oregon.gov>; Armitage, Ree (Wyden) <Ree_Armitage@wyden.senate.gov>; Corey Kearsley <corey@sherwoodchamber.org>; REP Neron <Rep.CourtneyNeron@oregonlegislature.gov>; GUINEY Bryan * BIZ <Bryan.Guiney@oregon.gov>
Subject: Re: OSHA sweeping Changes inappropriate for the Oregon business Community

Raihana,

Thanks for the response. Please see attached letter. Lots of detail. Please call or write with any follow up questions.

Cheers,

On Mon, Jul 27, 2020 at 11:33 AM ANSARY Raihana * GOV <Raihana.ANSARY@oregon.gov> wrote:

Bruce, thanks for passing this along. Laszlo, can you please forward the letter that you wrote?

Thanks,

Raihana Ansary

Regional Solutions Coordinator – Metro Region (Clackamas, Multnomah and Washington Counties)

Office of Governor Kate Brown

1600 SW Fourth Avenue, Suite 109

Portland, Oregon 97201

(503) 339-5223

Raihana.Ansary@oregon.gov

www.regionalsolutions.oregon.gov

From: Bruce Coleman [mailto:ColemanB@SherwoodOregon.gov]

Sent: Sunday, July 26, 2020 5:50 AM

To: Massage Envy TeamLaszlo <team.meal.llc@gmail.com>; DCBS WEB TECH * DCBS <TECH.WEB@oregon.gov>;
Heather.Case@oregon.gov; WESCOTT Sky I * DCBS <Sky.I.Wescott@oregon.gov>

Cc: Armitage, Ree (Wyden) <Ree_Armitage@wyden.senate.gov>; Corey Kearsley <corey@sherwoodchamber.org>; REP
Neron <Rep.CourtneyNeron@oregonlegislature.gov>; ANSARY Raihana * GOV <Raihana.ANSARY@oregon.gov>;
GUINEY Bryan * BIZ <Bryan.Guiney@oregon.gov>

Subject: RE: OSHA sweeping Changes inappropriate for the Oregon business Community

Hi Laszlo – thanks for copying me. I have also send this to Raihana Ansary, the head of the Metro area Regional Solutions Team and Bryan Guiney who is our partner with Business Oregon, the State’s economic development agency, to ask for their assistance. Thanks

Bruce

Bruce Coleman

Economic Development Manager

City of Sherwood

22560 SW Pine Street

Sherwood, OR 97140

Office: 503-625-4206 | Mobile: 503.217.9012

colemanb@sherwoodoregon.gov

www.sherwoodoregon.gov/economicdevelopment

From: Massage Envy TeamLaszlo <team.meal.llc@gmail.com>

Sent: Friday, July 24, 2020 6:34 PM

To: tech.web@oregon.gov; Heather.Case@oregon.gov; Sky.I.Wescott@oregon.gov

Cc: Armitage, Ree (Wyden) <Ree_Armitage@wyden.senate.gov>; Bruce Coleman <ColemanB@SherwoodOregon.gov>;

Corey Kearsley <corey@sherwoodchamber.org>; Rep Neron <Rep.CourtneyNeron@oregonlegislature.gov>

Subject: OSHA sweeping Changes inappropriate for the Oregon business Community

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you are expecting this email and/or know the content is safe.

Hello OR OSHA Team,

My name is Laszlo Szalvay and I employ over 175 Oregonians within the personal services sector here in Oregon. I employ Oregonians across five counties.

I am writing to you today, because your proposed sweeping changes (<https://osha.oregon.gov/OSHARules/proposed/2020/text-chngs-2-penalties.pdf>, <https://osha.oregon.gov/OSHARules/proposed/2020/text-chngs-2-employer-knowledge.pdf>) are unsuitable for the Oregon business community. Your proposed changes are inappropriate, dangerous and a clear overreach of the intended legislation.

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--

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--

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+1.360.399.6545

BRITTON Theresa L * DCBS

From: LOVE Julie A * DCBS
Sent: Monday, July 27, 2020 12:53 PM
To: WESCOTT Sky I * DCBS
Cc: MCLAUGHLIN Dave * DCBS; STAPLETON Renee M * DCBS; BRITTON Theresa L * DCBS
Subject: FW: OSHA sweeping Changes inappropriate for the Oregon business Community
Attachments: 2020_OSHA_letter.pdf

Sorry I forgot to include the attachment for your records. I know you have received this through Mr. Szakvay, but I sent a response to the Sherwood Chamber as well.

Julie

From: LOVE Julie A * DCBS <Julie.A.Love@oregon.gov>
Sent: Monday, July 27, 2020 12:46 PM
To: Corey Kearsley <corey@sherwoodchamber.org>
Cc: WESCOTT Sky I * DCBS <Sky.I.Wescott@oregon.gov>; MCLAUGHLIN Dave * DCBS <Dave.McLaughlin@oregon.gov>; STAPLETON Renee M * DCBS <Renee.M.Stapleton@oregon.gov>
Subject: Re: OSHA sweeping Changes inappropriate for the Oregon business Community

Corey,

Thank you for passing this message on to us at Oregon OSHA. Yes, we have received Mr. Szalvay's comments on the proposed rules related to employer penalties and employer knowledge. Because the rulemaking record is open we will not be responding to individual comments at this time, but all comments will be addressed in the supporting documentation when a final decision is made.

In regards to your Sherwood Chamber weekly meeting, I am extremely proud of Larry Fipps and the rest of our consultation team for their extraordinary abilities to assist employers and employer groups. Happy to hear his presentation was well-received by your members.

Julie

Julie Love
Deputy Administrator
Oregon OSHA
(503) 947-7445 (office)
(971) 719-6878 (cell)
(503) 947-7461 (fax)
julie.a.love@oregon.gov



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may be subject to Oregon Public Records Law*

EXHIBIT D-6

and may therefore be disclosed to third parties.

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From: Corey Kearsley <corey@sherwoodchamber.org>
Sent: Monday, July 27, 2020 12:13 PM
To: LOVE Julie A * DCBS
Subject: FW: OSHA sweeping Changes inappropriate for the Oregon business Community

Hi Julie,

Corey Kearsley from the Sherwood Chamber here. We spoke a few months ago and you helped us line up Larry Fipps as a guest for our weekly call with the Sherwood business community to discuss the impacts of COVID-19 in the workplace. Thank you again for your assistance. We thought it was very helpful.

I thought I'd forward to you a letter produced by one of our community business owners regarding some proposed Oregon OSHA changes. See below and the attached. It appears that he sent it to a few others at Oregon OSHA but I thought I'd pass it along to you in case you haven't seen it yet.

I know that he would appreciate any question, comments, or clarifications.

Thanks.

Corey

Corey Kearsley
Executive Director
Sherwood Area Chamber of Commerce
www.sherwoodchamber.org
facebook.com/SherwoodChamber
[@sherwoodchamber](https://twitter.com/sherwoodchamber)
503-625-7800

From: Massage Envy TeamLaszlo <team.meal.llc@gmail.com>
Sent: Friday, July 24, 2020 6:34 PM
To: tech.web@oregon.gov; Heather.Case@oregon.gov; Sky.I.Wescott@oregon.gov
Cc: Armitage, Ree (Wyden) <Ree_Armitage@wyden.senate.gov>; City of Sherwood <colemanb@sherwoodoregon.gov>; Corey Kearsley <corey@sherwoodchamber.org>; Rep Neron <Rep.CourtneyNeron@oregonlegislature.gov>
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--

Laszlo Szalvay
Massage Envy TeamLaszlo
www.teamLaszlo.com
+1.360.399.6545

COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Case@oregon.gov
Sky.I.Wescott@oregon.gov
Tech.Wcb@oregon.gov

Heather Case
Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-7

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in [~~brackets with line through~~] and added text is in bold and underlined.

COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.³

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

COMMENTS ON OREGON OSHA PROPOSED RULES

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.⁴

The Court of Appeals held that it would be inconsistent with Oregon law "to allow [OR-OSHA] to make out a prima facie case by taking the 'reasonable diligence' component for granted."⁵ Instead, the court decided, OR-OSHA "must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed."⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

b. The proposed definition of "reasonable diligence" imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining "reasonable diligence", OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that "could" occur and then take measures that eliminate the hazard or violation.

OR-OSHA's proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not "anticipate" that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) ("Under our construction of ORS 654.086(2), the statute remains fault-based.") (*CBI Services I*).

COMMENTS ON OREGON OSHA PROPOSED RULES

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)'s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA's proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer's workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that "could" occur in the workplace.

III. OR-OSHA's proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in [brackets with line through] and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

~~[(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.]~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[(#)i] The violation was the result of [unpreventable] employee misconduct that was not encouraged or condoned by the employer.~~

COMMENTS ON OREGON OSHA PROPOSED RULES

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work[~~and does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [~~brackets with line through~~] and added text is in *italics and underlined*.

COMMENTS ON OREGON OSHA PROPOSED RULES

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation will [~~shall~~] be determined by the Compliance Officer and will [~~shall~~] 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

COMMENTS ON OREGON OSHA PROPOSED RULES

- (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]~~ **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 be likely that]~~ **that the likelihood** 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]~~ **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA's compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA's basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is "High." OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes "would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments."

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a "substantial probability" that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer's beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer's right to have all of the evidence considered by the administrative law judge should be paramount.

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any "willful" failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere "clarification" without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

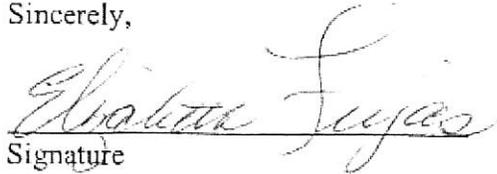
Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer "fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706" if the violation is determined to be "willful." The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a "not to exceed \$5,000" penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

COMMENTS ON OREGON OSHA PROPOSED RULES

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,


Signature

ELIZABETH FUJAS
Name

Rising Sun Farms, Inc
Company

7/25/20
Date

BRITTON Theresa L * DCBS

From: Sue Parelius <sue@risingsunfarms.com>
Sent: Tuesday, July 28, 2020 11:45 AM
To: heather.case@oregon.gov; WESCOTT Sky I * DCBS; DCBS WEB TECH * DCBS
Cc: Elizabeth Fugas
Subject: Proposed Oregon OSHA rules
Attachments: Oregon OSHA Proposed Rules.pdf

Good morning,

Please see our comments regarding the proposed OSHA rules.

Have a great day!

Sue Parelius
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August 28, 2020

Via Email: sky.i.wescott@oregon.gov; tech.web@oregon.gov

Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

**Re: Comments on Oregon OSHA's Proposed Amendments in General
Administrative Rules to Clarify Employers' Responsibilities**

Dear Mr. Wescott:

As an Oregon employer in Northeast Oregon, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding:

- (1) Re-Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

Woodgrain Millwork opposes OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" because they are unnecessary and because the proposed language in those definitions appear to be an impermissible attempt to replace the fault-based system the legislature intended with one tied to strict liability in the context of an employer's constructive knowledge of violative conditions. We also oppose the proposed supplementation of OAR 437-001-0760(1) relating to Employer Responsibilities which utilizes the proposed newly defined terms. Because the proposed rules are inconsistent with the fault-based system enacted by the legislature, those rules are invalid as written, and should not be adopted. We oppose any attempt to hold the employer responsible for the unforeseeable misconduct of employees, including supervisory employees. Doing so negates any concept of a fault-based system.

OR-OSHA's Proposed Amendments to "Clarify Employers' Responsibilities"

I. Proposed Text.

OR-OSHA proposes adding definitions of "reasonable diligence" and "unpreventable employee misconduct" to OAR 437-001-0015. The proposed language provides¹:

¹ In all excerpts of proposed amendments here and below, removed text is in [brackets with line through] and added text is in bold and underlined.

EXHIBIT D-8

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Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

* * * * *

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

(a) The employer had devices, safeguards, rules, procedures, or other methods in place to eliminate or safely control the hazard or prevent the violation.

(b) The employer had effectively communicated to employees the methods established under (a).

(c) The employer had provided employees with the necessary training, equipment, and materials to use and comply with the methods established under (a).

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a).

(e) The employer had taken effective correction action when a violation was identified under (d).

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

Pursuant to ORS 654.086(2), for a violation to be citable, OR-OSHA must prove:

That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a fault-based standard of care with regard to health and safety violations, and to then penalize only those employers that are found to have not been exercising "reasonable diligence" in the management of worksite safety and health. The statute limits liability to employers with knowledge of the alleged violative conditions or conduct. OSHA's proposed rules purport to expand liability by expanding the word "employer" as used in ORS 654.086(2) to include employees whom OR-OSHA deems to be "agents of the employer." The Oregon Supreme Court has explicitly held on numerous occasions that expanding language in a statute through an administrative rule is beyond the statutory authority of the agency. In other words, the proposed amendments illegally expand the knowledge of the employer requirement in the statute to include "agents" of the employer.

We view OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" as both unnecessary and as illegal attempts to impose a strict liability standard that was never intended or authorized by the legislature.

- a) The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the OR-OSHA’s interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.³

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they’ve anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.⁴

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

The Court correctly held that ORS 654,086(2) requires that OR-OSHA has the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have foreseen an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet. The specific reasons why an employer could or could not have known of an alleged violation are inherently fact specific and involve questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

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employees had already corrected the violative condition, etc. Efforts to craft definitions that put inherently fact specific determinations into a “cookie-cutter” or “check the box” system are doomed to failure.

- b) The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the Oregon Safe Employment Act (“OSEA”).

The Supreme Court in *CBI Services I* did not suggest the phrase “reasonable diligence” be defined. Rather it only asked for input as to the agency’s interpretation of the phrase as it applied to evaluating the constructive employer knowledge issue. Even if there were an actual need for a rule defining “reasonable diligence” OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not for the purpose of penalizing employers even though they are making reasonable and appropriate efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation. If an employer succeeded in doing these things, there would never be a violation. To the extent that an employer fails to achieve such unachievable perfection, the automatic result under the proposed rule is a finding of constructive employer knowledge, strict liability is being applied.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated that the alleged hazard or violation was capable of occurring on a worksite without regard to whether the alleged violation was very unlikely to occur, or even virtually unforeseeable. If the employer did not “anticipate” that a very unlikely hazard or violation was capable of existing, and then take steps which prevented such occurrence, then the employer would by this definition automatically be found to have not exercised reasonable diligence. Once that finding is in place, the result is a finding that the employer had constructive knowledge of the violation. This is inconsistent with any notion of a fault-based system, since it excludes any real evaluation of the reasonableness of the employer’s actions.

In addition, the proposed language would allow OR-OSHA to prove constructive knowledge even if an employer did anticipate that the cited violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, employers must not only make a “reasonable” effort to eliminate all violations, they must also actually eliminate any possible hazard that could ever exist. Again, we oppose such a system because it imposes impermissible strict liability on employers.

The context of ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a fault-based standard that truly turns on an examination of the specific circumstances of each case. Requiring an employer to

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

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anticipate *all* potential violations that *could* possibly occur (meaning, per the Supreme Court in *CBI Services I*, were capable of occurring), in the workplace, and then to “eliminate” them, is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will take reasonable steps to anticipate those hazards in the workplace that are “likely” to result in harm to its employees. A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonably diligent employer will manage the hazard in such a way as to mitigate employee exposure.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence” at all. If, however, OR-OSHA chooses to proceed, its definition must capture the statutory intent to only cite those employers who are not making a reasonable attempt to identify and deal with hazards in the workplace. As currently written, OR-OSHA’s proposed definition is untenable.

c) Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

d) The proposed definition of “unpreventable employee misconduct.”

This proposed definition improperly attempts to make employers responsible for all violative conduct of any employee, meaning those that are acting in a supervisory capacity, as well as those that are non-supervisory employees. The Proposed Rule states in part:

“Where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the

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employer could not have prevented. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements: ...

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a)."

As noted above, the Supreme Court in *CBI Services I* noted that the word "could" as used in ORS 654.086(2) meant "was capable of." Given that, "could not have prevented" above actually reads: "And does so in a manner that the employer was not capable of preventing."

It should be noted that employers could be found to be "capable of" accomplishing almost anything on their worksites given unlimited resources and time. Given that, as written this rule results in virtually no act of employees falling within the definition of unpreventable employee misconduct. Again, this is manifestly inconsistent with any notion of a "fault-based" system.

Similarly, subsection (d) of the rule says that no defense based on employee misconduct can be established unless the employer demonstrates that, among other things, it had developed a program which actually identified "any violation." The rule sets a bar that no employer could ever reach. No concept of reasonableness can be found here, yet it is that concept that is the cornerstone of the underlying enabling statute.

In addition, by stating that "the employer must demonstrate all of the following elements:" OR-OSHA is again attempting to switch the burden of proof relative to constructive employer knowledge on to the employer. Since the 1978 *Skirvin* decision, and right up through the 2019 *CBI Services II* case, the Court of Appeals has consistently rejected such attempts by the agency. Yet here we are again. Evidence related to employee misconduct, including the misconduct of supervisory employees, is simply not an affirmative defense that must be proven by the employer.

The well-settled law in Oregon is that Employer Knowledge, including constructive employer knowledge related to the foreseeability of misconduct, is in the first instance something OR-OSHA must establish in order to meet its *prima facie* burden of proof. If the agency has put on sufficient evidence in this regard it can avoid having the citation vacated before the employer even starts to put on its case. After the agency meets this burden in its initial presentation, then and only then does the employer need to present whatever evidence it chooses to try to overcome the evidence OR-OSHA put on during its case-in-chief.

If the agency chooses to proceed with defining Unpreventable Employee Misconduct, then it should propose something consistent with the terms of the underlying enabling legislation. As a starting point, it should recognize that use of the word "unpreventable" is misplaced. The correct term is "unforeseeable," for that is the concept that should always be evaluated in determining whether an employer is responsible for the bad acts of employees. If the conduct was unforeseeable under the pertinent circumstances then it was not reasonably preventable.

We would suggest the following as an acceptable alternative to the proposed definition:

Unforeseeable employee misconduct – Where a supervisory or non-supervisory employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer under the pertinent facts did not reasonably anticipate. The following factors are examples of what may be evaluated in considering whether unforeseeable misconduct occurred at a worksite:

- (a) The employer did not have reasonable devices, safeguards, rules, procedures, or other methods in place to abate or safely control the hazard or prevent the violation.
- (b) The employer had not effectively communicated to employees the methods established under (a).
- (c) The employer had not provided employees with the necessary training, equipment, and materials to use in complying with the methods established under (a).
- (d) The employer had not developed and implemented measures to audit the effectiveness of its safety program,
- (e) The employer had not taken effective corrective action when a hazard or a violation was identified.
- (f) The employer was not in compliance with OAR 437-001-0760(1)(a) or (b).

III. OR-OSHA's Proposed Amendment to OAR 437-001-0760(1)(f)(A) & (B) is Unnecessary and Imposes an Impermissible Strict-Liability Standard on the Employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). These amendments flow from, and are tied to the proposed definitions discussed above. Oregon's courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court's consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as the "Rogue Supervisor" defense in the first instance and the "unforeseeable employee misconduct" defense in the other. The "Rogue Supervisor" defense involves the evaluation of misconduct by an employee acting in a supervisory role. The "unforeseeable employee misconduct" defense involves the evaluation of misconduct by an employee who is not acting in

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a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee's misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR-OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. Indeed, the Supreme Court has long held that once it interprets a statute, that interpretation is deemed to have been enacted by the legislature at the time of the promulgation of the statute. The Court therefore has repeatedly held that no state agency can adopt rules or otherwise act in a manner inconsistent with its interpretation of the underlying applicable statutes. The proposed changes to this rule would negate the Supreme Court's interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency's authority and should not be adopted.

We suggest revising the proposed amendment as follows (removed text is in [brackets with line through] and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

(f) [~~The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees~~]

(A) The employer is not responsible for violations unless [~~neither the employer nor any agent of~~] the employer knew or with the exercise of reasonable diligence could have known about the violation.

[~~Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.~~]

(B) The employer is not responsible for a violation when [~~no agent of the employer had actual knowledge of the presence of the violation and~~] the violation was the result of misconduct by a supervisor or employee that was not reasonably foreseeable.

**Woodgrain Millwork
Lumber Division
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~~[(i) The violation was both isolated and unpredictable; or]~~

~~[[ii) The violation was the result of unpreventable employee misconduct.]~~

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something of which a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not automatically result in a citation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged or condoned employees or supervisors who did not comply with the code or the employer’s safe work policies, then such employer should be subject to a citation. Likewise, if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violations, or otherwise did not have an effective and enforced safety program, then there is a basis for a citable violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a violation if the employer had provided the training and equipment necessary, and implemented and enforced its safety program, and the employee nevertheless elects to violate the regulations without the knowledge of the employer.

ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)), recognize that employees are required to comply with safety regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so. If the employer has knowledge, or ought to have known, of the employee’s failure to comply with the employer’s policies and the code or the employer encouraged the violation, then the employer should be subject to a citation. However, if the employee’s failure to comply with safe work policies and/or OSHA codes was not reasonably foreseeable, no citation should issue.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the suggested alternatives. OR-OSHA’s proposals do not appear to be intended to make Oregon employees safer but rather seem directed at making it easier for OR-OSHA to issue and sustain more citations.

**Woodgrain Millwork
Lumber Division
1917 Jackson Ave.
La Grande, Oregon 97850**



Sincerely,

A handwritten signature in cursive script, appearing to read "Tom Lovlien".

Tom Lovlien
Vice President, Lumber and Composites
Woodgrain Millwork, Inc.
1917 Jackson Ave
La Grande, OR 97850

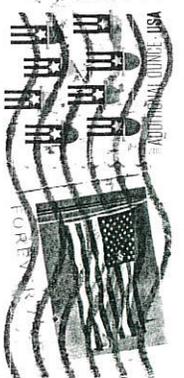


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Sky Westcott
Oregon - Occupational Health & Safety Division
Oregon Dept. of Consumer & Business Services
350 Winter Street NE
Salem, OR 97301-3882

97301-387599



From: Laurie Kendall
To: WESCOTT Sky I * DCBS; DCBS WEB TECH * DCBS
Subject: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities
Date: Thursday, August 20, 2020 2:00:03 PM
Attachments: image001.png

Dear Mr. Wescott:

As an Oregon Construction Trade Association, the Associated Builders and Contractors is writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding:

- (1) Re-Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

We oppose OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" because they are unnecessary and because the proposed language in those definitions appear to be an impermissible attempt to replace the fault-based system the legislature intended with one tied to strict liability in the context of an employer's constructive knowledge of violative conditions. We also oppose the proposed supplementation of OAR 437-001-0760(1) relating to Employer Responsibilities which utilizes the proposed newly defined terms. Because the proposed rules are inconsistent with the fault-based system enacted by the legislature, those rules are invalid as written, and should not be adopted. We oppose any attempt to hold the employer responsible for the unforeseeable misconduct of employees, including supervisory employees. Doing so negates any concept of a fault-based system.

OR-OSHA's Proposed Amendments to "Clarify Employers' Responsibilities"

I. Proposed Text.

OR-OSHA proposes adding definitions of "reasonable diligence" and "unpreventable employee misconduct" to OAR 437-001-0015. The proposed language provides^[1]:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

* * * * *

Unpreventable employee misconduct – Where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a

EXHIBIT D-9

manner that the employer could not have prevented. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

-
(a) The employer had devices, safeguards, rules, procedures, or other methods in place to eliminate or safely control the hazard or prevent the violation.

-
(b) The employer had effectively communicated to employees the methods established under (a).

-
(c) The employer had provided employees with the necessary training, equipment, and materials to use and comply with the methods established under (a).

-
(d) The employer had developed and implemented measures that identified any violation of the methods established under (a).

-
(e) The employer had taken effective correction action when a violation was identified under (d).

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

-
(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

-
(i) The violation was both isolated and unpredictable; or

-
(ii) The violation was the result of unpreventable employee

misconduct.

II. Comments on the Proposed Amendments.

Pursuant to ORS 654.086(2), for a violation to be citable, OR-OSHA must prove:

That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a fault-based standard of care with regard to health and safety violations, and to then penalize only those employers that are found to have not been exercising "reasonable diligence" in the management of worksite safety and health. The statute limits liability to employers with knowledge of the alleged violative conditions or conduct. OSHA's proposed rules purport to expand liability by expanding the word "employer" as used in ORS 654.086(2) to include employees whom OR-OSHA deems to be "agents of the employer." The Oregon Supreme Court has explicitly held on numerous occasions that expanding language in a statute through an administrative rule is beyond the statutory authority of the agency. In other words, the proposed amendments illegally expand the knowledge of the employer requirement in the statute to include "agents" of the employer.

We view OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" as both unnecessary and as illegal attempts to impose a strict liability standard that was never intended or authorized by the legislature.

a) The proposed definition of "reasonable diligence" is unnecessary.

In CBI Services II, the Oregon Court of Appeals held that OR-OSHA cannot impose a "rebuttable presumption" of knowledge on employers regarding occupational safety violations.^[2] In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the OR-OSHA's interpretation and application of "reasonable diligence." The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they're able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer's able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee's duties or from things closely relate [sic] to those duties.^[3]

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.^[4]

The Court of Appeals held that it would be inconsistent with Oregon law "to allow [OR-OSHA] to make

out a prima facie case by taking the 'reasonable diligence' component for granted."^[5] Instead, the court decided, OR-OSHA "must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed."^[6]

The Court correctly held that ORS 654,086(2) requires that OR-OSHA has the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have foreseen an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet. The specific reasons why an employer could or could not have known of an alleged violation are inherently fact specific and involve questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employees had already corrected the violative condition, etc. Efforts to craft definitions that put inherently fact specific determinations into a "cookie-cutter" or "check the box" system are doomed to failure.

- b) The proposed definition of "reasonable diligence" imposes a strict liability standard that is contrary to the language of the Oregon Safe Employment Act ("OSEA").

The Supreme Court in CBI Services I did not suggest the phrase "reasonable diligence" be defined. Rather it only asked for input as to the agency's interpretation of the phrase as it applied to evaluating the constructive employer knowledge issue. Even if there were an actual need for a rule defining "reasonable diligence" OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based^[7] and not for the purpose of penalizing employers even though they are making reasonable and appropriate efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that "could" occur and then take measures that eliminate the hazard or violation. If an employer succeeded in doing these things, there would never be a violation. To the extent that an employer fails to achieve such unachievable perfection, the automatic result under the proposed rule is a finding of constructive employer knowledge, strict liability is being applied.

OR-OSHA's proposed language would require an employer who is cited to prove that it anticipated that the alleged hazard or violation was capable of occurring on a worksite without regard to whether the alleged violation was very unlikely to occur, or even virtually unforeseeable. If the employer did not "anticipate" that a very unlikely hazard or violation was capable of existing, and then take steps which prevented such occurrence, then the employer would by this definition automatically be found to have not exercised reasonable diligence. Once that finding is in place, the result is a finding that the employer had constructive knowledge of the violation. This is inconsistent with any notion of a fault-based system, since it excludes any real evaluation of the reasonableness of the employer's actions.

In addition, the proposed language would allow OR-OSHA to prove constructive knowledge even if an employer did anticipate that the cited violation could occur, unless the employer took "measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations." Under the proposed language, employers must not only make a "reasonable" effort to eliminate all violations, they must also actually eliminate any possible hazard that could ever exist. Again, we oppose such a system because it imposes impermissible strict liability on employers.

The context of ORS 654.086(2)'s use of the term "reasonable" in the phrase "reasonable diligence" demands that any definition of the term reflect a fault-based standard that truly turns on an examination of the specific circumstances of each case. Requiring an employer to anticipate all potential violations that could possibly occur (meaning, per the Supreme Court in CBI Services I, were capable of occurring), in the workplace, and then to "eliminate" them, is not remotely reasonable. No employer can be expected to eliminate every hazard that "could" occur.

A reasonably diligent employer will take reasonable steps to anticipate those hazards in the workplace that are "likely" to result in harm to its employees. A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonably diligent employer will manage the hazard in such a way as to mitigate employee exposure.

We ask OR-OSHA to reconsider the need to add a definition of "reasonable diligence" at all. If, however, OR-OSHA chooses to proceed, its definition must capture the statutory intent to only cite those employers who are not making a reasonable attempt to identify and deal with hazards in the workplace. As currently written, OR-OSHA's proposed definition is untenable.

c) Proposed alternative definition of "reasonable diligence."

If OR-OSHA will not withdraw its proposal to add a definition of "reasonable diligence," we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer's workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that "could" occur in the workplace.

d) The proposed definition of "unpreventable employee misconduct."

This proposed definition improperly attempts to make employers responsible for all violative conduct of any employee, meaning those that are acting in a supervisory capacity, as well as those that are non-supervisory employees. The Proposed Rule states in part:

"Where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer could not have prevented. To establish unpreventable employee misconduct, the employer must

demonstrate all of the following elements: ...

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a)."

As noted above, the Supreme Court in *CBI Services I* noted that the word "could" as used in ORS 654.086(2) meant "was capable of." Given that, "could not have prevented" above actually reads: "And does so in a manner that the employer was not capable of preventing."

It should be noted that employers could be found to be "capable of" accomplishing almost anything on their worksites given unlimited resources and time. Given that, as written this rule results in virtually no act of employees falling within the definition of unpreventable employee misconduct. Again, this is manifestly inconsistent with any notion of a "fault-based" system.

Similarly, subsection (d) of the rule says that no defense based on employee misconduct can be established unless the employer demonstrates that, among other things, it had developed a program which actually identified "any violation." The rule sets a bar that no employer could ever reach. No concept of reasonableness can be found here, yet it is that concept that is the cornerstone of the underlying enabling statute.

In addition, by stating that "the employer must demonstrate all of the following elements:" OR-OSHA is again attempting to switch the burden of proof relative to constructive employer knowledge on to the employer. Since the 1978 *Skirvin* decision, and right up through the 2019 *CBI Services II* case, the Court of Appeals has consistently rejected such attempts by the agency. Yet here we are again. Evidence related to employee misconduct, including the misconduct of supervisory employees, is simply not an affirmative defense that must be proven by the employer.

The well-settled law in Oregon is that Employer Knowledge, including constructive employer knowledge related to the foreseeability of misconduct, is in the first instance something OR-OSHA must establish in order to meet its prima facie burden of proof. If the agency has put on sufficient evidence in this regard it can avoid having the citation vacated before the employer even starts to put on its case. After the agency meets this burden in its initial presentation, then and only then does the employer need to present whatever evidence it chooses to try to overcome the evidence OR-OSHA put on during its case-in-chief.

If the agency chooses to proceed with defining Unpreventable Employee Misconduct, then it should propose something consistent with the terms of the underlying enabling legislation. As a starting point, it should recognize that use of the word "unpreventable" is misplaced. The correct term is "unforeseeable," for that is the concept that should always be evaluated in determining whether an employer is responsible for the bad acts of employees. If the conduct was unforeseeable under the pertinent circumstances then it was not reasonably preventable.

We would suggest the following as an acceptable alternative to the proposed definition:

Unforeseeable employee misconduct – Where a supervisory or non-supervisory employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided,

developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer under the pertinent facts did not reasonably anticipate. The following factors are examples of what may be evaluated in considering whether unforeseeable misconduct occurred at a worksite:

- (a) The employer did not have reasonable devices, safeguards, rules, procedures, or other methods in place to abate or safely control the hazard or prevent the violation.
- (b) The employer had not effectively communicated to employees the methods established under (a).
- (c) The employer had not provided employees with the necessary training, equipment, and materials to use in complying with the methods established under (a).
- (d) The employer had not developed and implemented measures to audit the effectiveness of its safety program,
- (e) The employer had not taken effective corrective action when a hazard or a violation was identified.
- (f) The employer was not in compliance with OAR 437-001-0760(1)(a) or (b).

III. OR-OSHA's Proposed Amendment to OAR 437-001-0760(1)(f)(A) & (B) is Unnecessary and Imposes an Impermissible Strict-Liability Standard on the Employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). These amendments flow from, and are tied to the proposed definitions discussed above. Oregon's courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court's consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as the "Rogue Supervisor" defense in the first instance and the "unforeseeable employee misconduct" defense in the other. The "Rogue Supervisor" defense involves the evaluation of misconduct by an employee acting in a supervisory role. The "unforeseeable employee misconduct" defense involves the evaluation of misconduct by an employee who is not acting in a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee's misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR- OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. Indeed, the Supreme Court has long held that once it interprets a statute, that interpretation is deemed to have been enacted by the legislature at the time of the promulgation of the statute. The Court therefore has repeatedly held that no state agency can adopt rules or otherwise act in a manner inconsistent with its interpretation of the underlying applicable statutes. The proposed changes to this rule would negate the Supreme

Court's interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency's authority and should not be adopted.

We suggest revising the proposed amendment as follows (removed text is in ~~brackets with line through~~) and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

(f) ~~[The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees]~~

(A) The employer is not responsible for violations unless ~~[neither the employer nor any agent of]~~ the employer knew or with the exercise of reasonable diligence could have known about the violation.

~~[Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.]~~

(B) The employer is not responsible for a violation when ~~[no agent of the employer had actual knowledge of the presence of the violation and the violation was the result of misconduct by a supervisor or employee that was not reasonably foreseeable.~~

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[[ii) The violation was the result of unpreventable employee misconduct.]~~

We do not believe that any employer should ever be liable for a serious violation if the violation was "unpredictable." We do not believe that any employer should be penalized for something of which a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not automatically result in a citation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged or condoned employees or supervisors who did not comply with the code or the employer's safe work policies, then such employer should be subject to a citation. Likewise, if there is evidence establishing that the

employer had historically failed to discipline employees when it became aware of their violations, or otherwise did not have an effective and enforced safety program, then there is a basis for a citable violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a violation if the employer had provided the training and equipment necessary, and implemented and enforced its safety program, and the employee nevertheless elects to violate the regulations without the knowledge of the employer.

ORS 654.022, and OR-OSHA's own regulations (OAR 437-001-0760(2)(a)), recognize that employees are required to comply with safety regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so. If the employer has knowledge, or ought to have known, of the employee's failure to comply with the employer's policies and the code or the employer encouraged the violation, then the employer should be subject to a citation. However, if the employee's failure to comply with safe work policies and/or OSHA codes was not reasonably foreseeable, no citation should issue.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the suggested alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but rather seem directed at making it easier for OR-OSHA to issue and sustain more citations.

Sincerely,
Laurie Kendall
ABC Pacific Northwest Chapter
President/CEO
2201 NE Columbia Blvd, Box 1
Portland, OR 97211
Direct: 503-726-5440
Cell: 971-226-4140



[1] In all excerpts of proposed amendments here and below, removed text is in [brackets with line through] and added text is in bold and underlined.

[2] *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

[3] *Id.* at 836.

[4]

Id.

[5] *Id.* at 838.

[6] *Id.*

[7] The OSEA is fault-based. *See OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

August 17, 2020

Via Email: sky.i.wescott@oregon.gov; tech.web@oregon.gov

Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

**Re: Comments on Oregon OSHA's Proposed Amendments in General
Administrative Rules to Clarify Employers' Responsibilities**

Dear Mr. Wescott:

As an Oregon employer we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding:

- (1) Re-Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

We oppose OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" because they are unnecessary and because the proposed language in those definitions appear to be an impermissible attempt to replace the fault-based system the legislature intended with one tied to strict liability in the context of an employer's constructive knowledge of violative conditions. We also oppose the proposed supplementation of OAR 437-001-0760(1) relating to Employer Responsibilities which utilizes the proposed newly defined terms. Because the proposed rules are inconsistent with the fault-based system enacted by the legislature, those rules are invalid as written, and should not be adopted. We oppose any attempt to hold the employer responsible for the unforeseeable misconduct of employees, including supervisory employees. Doing so negates any concept of a fault-based system.

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EXHIBIT D-10

then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

* * * * *

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

(a) The employer had devices, safeguards, rules, procedures, or other methods in place to eliminate or safely control the hazard or prevent the violation.

(b) The employer had effectively communicated to employees the methods established under (a).

(c) The employer had provided employees with the necessary training, equipment, and materials to use and comply with the methods established under (a).

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a).

(e) The employer had taken effective correction action when a violation was identified under (d).

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

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violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

Pursuant to ORS 654.086(2), for a violation to be citable, OR-OSHA must prove:

That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a fault-based standard of care with regard to health and safety violations, and to then penalize only those employers that are found to have not been exercising "reasonable diligence" in the management of worksite safety and health. The statute limits liability to employers with knowledge of the alleged violative conditions or conduct. OSHA's proposed rules purport to expand liability by expanding the word "employer" as used in ORS 654.086(2) to include employees whom OR-OSHA deems to be "agents of the employer." The Oregon Supreme Court has explicitly held on numerous occasions that expanding language in a statute through an administrative rule is beyond the statutory authority of the agency. In other words, the proposed amendments illegally expand the knowledge of the employer requirement in the statute to include "agents" of the employer.

We view OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" as both unnecessary and as illegal attempts to impose a strict liability standard that was never intended or authorized by the legislature.

a) The proposed definition of "reasonable diligence" is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a

“rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the OR-OSHA’s interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.³

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they’ve anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.⁴

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

The Court correctly held that ORS 654,086(2) requires that OR-OSHA has the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have foreseen an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet. The specific reasons why an employer could or could not have known of an alleged violation are inherently fact specific and involve questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employees had already corrected the violative condition, etc. Efforts to craft definitions that put inherently fact specific determinations into a “cookie-cutter” or “check the box” system are doomed to failure.

- b) The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the Oregon Safe Employment Act (“OSEA”).

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

The Supreme Court in *CBI Services I* did not suggest the phrase “reasonable diligence” be defined. Rather it only asked for input as to the agency’s interpretation of the phrase as it applied to evaluating the constructive employer knowledge issue. Even if there were an actual need for a rule defining “reasonable diligence” OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not for the purpose of penalizing employers even though they are making reasonable and appropriate efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation. If an employer succeeded in doing these things, there would never be a violation. To the extent that an employer fails to achieve such unachievable perfection, the automatic result under the proposed rule is a finding of constructive employer knowledge, strict liability is being applied.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated that the alleged hazard or violation was capable of occurring on a worksite without regard to whether the alleged violation was very unlikely to occur, or even virtually unforeseeable. If the employer did not “anticipate” that a very unlikely hazard or violation was capable of existing, and then take steps which prevented such occurrence, then the employer would by this definition automatically be found to have not exercised reasonable diligence. Once that finding is in place, the result is a finding that the employer had constructive knowledge of the violation. This is inconsistent with any notion of a fault-based system, since it excludes any real evaluation of the reasonableness of the employer’s actions.

In addition, the proposed language would allow OR-OSHA to prove constructive knowledge even if an employer did anticipate that the cited violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, employers must not only make a “reasonable” effort to eliminate all violations, they must also actually eliminate any possible hazard that could ever exist. Again, we oppose such a system because it imposes impermissible strict liability on employers.

The context of ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a fault-based standard that truly turns on an examination of the specific circumstances of each case. Requiring an employer to anticipate *all* potential violations that *could* possibly occur (meaning, per the Supreme Court in *CBI Services I*, were capable of occurring), in the workplace, and then to “eliminate” them, is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will take reasonable steps to anticipate those hazards in the workplace that are “likely” to result in harm to its employees. A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

cannot be completely eliminated, a reasonably diligent employer will manage the hazard in such a way as to mitigate employee exposure.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence” at all. If, however, OR-OSHA chooses to proceed, its definition must capture the statutory intent to only cite those employers who are not making a reasonable attempt to identify and deal with hazards in the workplace. As currently written, OR-OSHA’s proposed definition is untenable.

c) Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

d) The proposed definition of “unpreventable employee misconduct.”

This proposed definition improperly attempts to make employers responsible for all violative conduct of any employee, meaning those that are acting in a supervisory capacity, as well as those that are non-supervisory employees. The Proposed Rule states in part:

“Where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer *could not have prevented*. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements: ...

(d) The employer had developed and implemented measures *that identified any violation* of the methods established under (a).”

As noted above, the Supreme Court in *CBI Services I* noted that the word “could” as used in ORS 654.086(2) meant “was capable of.” Given that, “could not have prevented” above actually reads: “And does so in a manner that the employer was not capable of preventing.”

It should be noted that employers could be found to be “capable of” accomplishing almost anything on their worksites given unlimited resources and time. Given that, as written this rule results in virtually no act of employees falling within the definition of unpreventable employee misconduct. Again, this is manifestly inconsistent with any notion of a “fault-based” system.

Similarly, subsection (d) of the rule says that no defense based on employee misconduct can be established unless the employer demonstrates that, among other things, it had developed a program which actually identified “any violation.” The rule sets a bar that no employer could ever reach. No concept of reasonableness can be found here, yet it is that concept that is the cornerstone of the underlying enabling statute.

In addition, by stating that “the employer must demonstrate all of the following elements:” OR-OSHA is again attempting to switch the burden of proof relative to constructive employer knowledge on to the employer. Since the 1978 *Skirvin* decision, and right up through the 2019 *CBI Services II* case, the Court of Appeals has consistently rejected such attempts by the agency. Yet here we are again. Evidence related to employee misconduct, including the misconduct of supervisory employees, is simply not an affirmative defense that must be proven by the employer.

The well-settled law in Oregon is that Employer Knowledge, including constructive employer knowledge related to the foreseeability of misconduct, is in the first instance something OR-OSHA must establish in order to meet its *prima facie* burden of proof. If the agency has put on sufficient evidence in this regard it can avoid having the citation vacated before the employer even starts to put on its case. After the agency meets this burden in its initial presentation, then and only then does the employer need to present whatever evidence it chooses to try to overcome the evidence OR-OSHA put on during its case-in-chief.

If the agency chooses to proceed with defining Unpreventable Employee Misconduct, then it should propose something consistent with the terms of the underlying enabling legislation. As a starting point, it should recognize that use of the word “unpreventable” is misplaced. The correct term is “unforeseeable,” for that is the concept that should always be evaluated in determining whether an employer is responsible for the bad acts of employees. If the conduct was unforeseeable under the pertinent circumstances then it was not reasonably preventable.

We would suggest the following as an acceptable alternative to the proposed definition:

Unforeseeable employee misconduct – Where a supervisory or non-supervisory employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer under the pertinent facts did not reasonably anticipate. The

following factors are examples of what may be evaluated in considering whether unforeseeable misconduct occurred at a worksite:

- (a) The employer did not have reasonable devices, safeguards, rules, procedures, or other methods in place to abate or safely control the hazard or prevent the violation.
- (b) The employer had not effectively communicated to employees the methods established under (a).
- (c) The employer had not provided employees with the necessary training, equipment, and materials to use in complying with the methods established under (a).
- (d) The employer had not developed and implemented measures to audit the effectiveness of its safety program,
- (e) The employer had not taken effective corrective action when a hazard or a violation was identified.
- (f) The employer was not in compliance with OAR 437-001-0760(1)(a) or (b).

III. OR-OSHA's Proposed Amendment to OAR 437-001-0760(1)(f)(A) & (B) is Unnecessary and Imposes an Impermissible Strict-Liability Standard on the Employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). These amendments flow from, and are tied to the proposed definitions discussed above. Oregon's courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court's consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as the "Rogue Supervisor" defense in the first instance and the "unforeseeable employee misconduct" defense in the other. The "Rogue Supervisor" defense involves the evaluation of misconduct by an employee acting in a supervisory role. The "unforeseeable employee misconduct" defense involves the evaluation of misconduct by an employee who is not acting in a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee's misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR-OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. Indeed, the Supreme Court has long held that once it interprets a statute, that

interpretation is deemed to have been enacted by the legislature at the time of the promulgation of the statute. The Court therefore has repeatedly held that no state agency can adopt rules or otherwise act in a manner inconsistent with its interpretation of the underlying applicable statutes. The proposed changes to this rule would negate the Supreme Court's interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency's authority and should not be adopted.

We suggest revising the proposed amendment as follows (removed text is in [brackets with line through] and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

(f) ~~[The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees]~~

(A) The employer is not responsible for violations unless ~~[neither the employer nor any agent of]~~ the employer knew or with the exercise of reasonable diligence could have known about the violation.

~~[Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.]~~

(B) The employer is not responsible for a violation when ~~[no agent of the employer had actual knowledge of the presence of the violation and~~ the violation was the result of misconduct by a supervisor or employee that was not reasonably foreseeable.

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[(ii) The violation was the result of unpreventable employee misconduct.]~~

We do not believe that any employer should ever be liable for a serious violation if the violation was "unpredictable." We do not believe that any employer should be penalized for something of which a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not automatically result in a citation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged or condoned employees or supervisors who did not comply with the code or the employer's safe work policies, then such employer should be subject to a citation. Likewise, if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violations, or otherwise did not have an effective and enforced safety program, then there is a basis for a citable violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a violation if the employer had provided the training and equipment necessary, and implemented and enforced its safety program, and the employee nevertheless elects to violate the regulations without the knowledge of the employer.

ORS 654.022, and OR-OSHA's own regulations (OAR 437-001-0760(2)(a)), recognize that employees are required to comply with safety regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so. If the employer has knowledge, or ought to have known, of the employee's failure to comply with the employer's policies and the code or the employer encouraged the violation, then the employer should be subject to a citation. However, if the employee's failure to comply with safe work policies and/or OSHA codes was not reasonably foreseeable, no citation should issue.

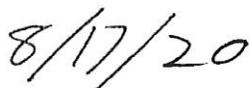
Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the suggested alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but rather seem directed at making it easier for OR-OSHA to issue and sustain more citations.

Sincerely,


Signature


Name


Company



COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Case@oregon.gov
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Heather Case
Sky Wescott
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Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in [~~brackets with line through~~] and added text is in **bold and underlined**.

COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.^[3]

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

COMMENTS ON OREGON OSHA PROPOSED RULES

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.^[4]

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

- b. The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining “reasonable diligence”, OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not “anticipate” that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. *See OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

COMMENTS ON OREGON OSHA PROPOSED RULES

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA’s proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

- III. OR-OSHA’s proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in ~~[brackets with line through]~~ and added text is in italics and underlined):

(1) Employers’ Responsibilities.

* * * * *

~~[(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.]~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent’s actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[(ii)]~~ (i) The violation was the result of ~~[unpreventable]~~ employee misconduct that was not encouraged or condoned by the employer.

COMMENTS ON OREGON OSHA PROPOSED RULES

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work [~~and does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [~~brackets with line through~~] and added text is in *italics and underlined*.

COMMENTS ON OREGON OSHA PROPOSED RULES

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation will [~~shall~~] be determined by the Compliance Officer and will [~~shall~~] 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

COMMENTS ON OREGON OSHA PROPOSED RULES

- (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]~~ **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 be likely that]~~ **that the likelihood** 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]~~ **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA's compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA's basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is "High." OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes "would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments."

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a "substantial probability" that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer's beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer's right to have all of the evidence considered by the administrative law judge should be paramount.

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any “willful” failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere “clarification” without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

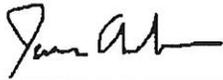
Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer “fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706” if the violation is determined to be “willful.” The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a “not to exceed \$5,000” penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

COMMENTS ON OREGON OSHA PROPOSED RULES

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,



Signature

Jenna Anderson, PHR

Name

Community Management, Inc.

Company

8/28/2020

Date

COMMENTS ON OREGON OSHA PROPOSED RULES

By Email: Heather.Case@oregon.gov
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Heather Case
Sky Wescott
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Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-12

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in ~~[brackets with line through]~~ and added text is in **bold and underlined**.

COMMENTS ON OREGON OSHA PROPOSED RULES

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.^[3]

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

COMMENTS ON OREGON OSHA PROPOSED RULES

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.^[4]

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

- b. The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining “reasonable diligence”, OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not “anticipate” that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. *See OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

COMMENTS ON OREGON OSHA PROPOSED RULES

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)'s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA's proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer's workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

COMMENTS ON OREGON OSHA PROPOSED RULES

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

III. OR-OSHA’s proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in [brackets with line through] and added text is in italics and underlined):

(1) Employers’ Responsibilities.

* * * * *

~~[(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.]~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent’s actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[(ii)]~~ The violation was the result of ~~[unpreventable]~~ employee misconduct that was not encouraged or condoned by the employer.

COMMENTS ON OREGON OSHA PROPOSED RULES

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware of. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work[~~;~~ and ~~does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [brackets with line through] and added text is in *italics and underlined*.

COMMENTS ON OREGON OSHA PROPOSED RULES

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation **will** [~~shall~~] be determined by the Compliance Officer and **will** [~~shall~~] 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

COMMENTS ON OREGON OSHA PROPOSED RULES

- (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]~~ **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 be likely that]~~ **that the likelihood** an accident could occur **is what the compliance officer would consider to be normal;**
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 - (c) High – If the factors considered indicate ~~[it would be very likely that]~~ **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA's compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA's basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is "High." OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes "would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments."

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a "substantial probability" that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer's beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer's right to have all of the evidence considered by the administrative law judge should be paramount.

COMMENTS ON OREGON OSHA PROPOSED RULES

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any "willful" failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere "clarification" without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer "fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706" if the violation is determined to be "willful." The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a "not to exceed \$5,000" penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

COMMENTS ON OREGON OSHA PROPOSED RULES

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,



Signature

LAVINIA PETRE

Name

HILLSBORO AERO ACADEMY

Company

07/30/2020

Date

HILLSBORO AERO
ACADEMY

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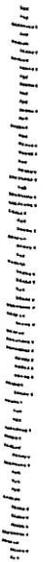


Heather Case
Sky Westcott

Oregon Department of Safety & Health Division
Oregon Department of Consumer and
Business Services
350 Winkler Street NE
Salem, OR 97301-3882

AND 2720 60 05210 500

973013882 0017



September 3, 2020

Via Email: sky.i.wescott@oregon.gov; tech.web@oregon.gov

Sky Wescott
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Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

**Re: Comments on Oregon OSHA's Proposed Amendments in General
Administrative Rules to Clarify Employers' Responsibilities**

Dear Mr. Wescott:

As the executive representing the franchised car and truck dealers of Oregon, I am writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division ("OR-OSHA").

(1) Administrative Rules to Clarify Employers' Responsibilities

We also oppose the proposed supplementation of OAR 437-001-0760(1) relating to Employer Responsibilities which utilizes the proposed newly defined terms. Because the proposed rules are inconsistent with the fault-based system enacted by the legislature, those rules are invalid as written, and should not be adopted. We oppose any attempt to hold the employer responsible for the unforeseeable misconduct of employees, including supervisory employees. Doing so negates any concept of a fault-based system.

Proposed Amendments to "Clarify Employers' Responsibilities"

I. Comments on the Proposed Amendments OAR 437-001-0760.

Pursuant to ORS 654.086(2), for a violation to be citable, OR-OSHA must prove:

That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a fault-based standard of care with regard to health and safety violations, and to then penalize only those employers that are found to have not been exercising "reasonable diligence" in the management of worksite safety and health. The statute limits liability to employers with knowledge of the alleged violative conditions or conduct. OSHA's proposed rules purport to expand liability by expanding the word "employer" as used in ORS 654.086(2) to include employees whom OR-OSHA deems to be "agents of the employer." The Oregon Supreme Court has explicitly held on numerous occasions that

EXHIBIT D-13

expanding language in a statute through an administrative rule is beyond the statutory authority of the agency. In other words, the proposed amendments illegally expand the knowledge of the employer requirement in the statute to include “agents” of the employer.

We view OR-OSHA’s proposed definitions of “reasonable diligence” and “unpreventable employee misconduct” as both unnecessary and as illegal attempts to impose a strict liability standard that was never intended or authorized by the legislature.

The context of ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a fault-based standard that truly turns on an examination of the specific circumstances of each case. Requiring an employer to anticipate *all* potential violations that *could* possibly occur (meaning, per the Supreme Court in *CBI Services I*, were capable of occurring), in the workplace, and then to “eliminate” them, is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will take reasonable steps to anticipate those hazards in the workplace that are “likely” to result in harm to its employees. A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonably diligent employer will manage the hazard in such a way as to mitigate employee exposure.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence” at all. If, however, OR-OSHA chooses to proceed, its definition must capture the statutory intent to only cite those employers who are not making a reasonable attempt to identify and deal with hazards in the workplace. As currently written, OR-OSHA’s proposed definition is untenable.

The proposed definition of “unpreventable employee misconduct.”

This proposed definition improperly attempts to make employers responsible for all violative conduct of any employee, meaning those that are acting in a supervisory capacity, as well as those that are non-supervisory employees.

If the agency chooses to proceed with defining Unpreventable Employee Misconduct, then it should propose something consistent with the terms of the underlying enabling legislation. As a starting point, it should recognize that use of the word “unpreventable” is misplaced. The correct term is “unforeseeable,” for that is the concept that should always be evaluated in determining whether an employer is responsible for the bad acts of employees. If the conduct was unforeseeable under the pertinent circumstances then it was not reasonably preventable.

II. OR-OSHA’s Proposed Amendment to OAR 437-001-0760(1)(f)(A) & (B) is Unnecessary and Imposes an Impermissible Strict-Liability Standard on the Employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). These amendments flow from, and are tied to the proposed definitions discussed above. Oregon’s courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee

misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court's consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as the "Rogue Supervisor" defense in the first instance and the "unforeseeable employee misconduct" defense in the other. The "Rogue Supervisor" defense involves the evaluation of misconduct by an employee acting in a supervisory role. The "unforeseeable employee misconduct" defense involves the evaluation of misconduct by an employee who is not acting in a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee's misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR-OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. The proposed changes to this rule would negate the Supreme Court's interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency's authority and should not be adopted.

We do not believe that any employer should ever be liable for a serious violation if the violation was "unpredictable." We do not believe that any employer should be penalized for something of which a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not automatically result in a citation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged or condoned employees or supervisors who did not comply with the code or the employer's safe work policies, then such employer should be subject to a citation. Likewise, if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violations, or otherwise did not have an effective and enforced safety program, then there is a basis for a citable violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a violation if the employer had provided the training and equipment necessary, and implemented and enforced its safety program, and the employee nevertheless elects to violate the regulations without the knowledge of the employer.

ORS 654.022, and OR-OSHA's own regulations (OAR 437-001-0760(2)(a)), recognize that employees are required to comply with safety regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so. If the employer has knowledge, or ought to have known, of the employee's failure to comply with the employer's policies and the code or the employer encouraged the violation, then the employer should be subject to a citation. However, if the employee's failure to comply with safe work policies and/or OSHA codes was not reasonably foreseeable, no citation should issue.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the suggested alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but rather seem directed at making it easier for OR-OSHA to issue and sustain more citations.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Remensperger", with a long horizontal flourish extending to the right.

Greg Remensperger
Executive Vice President
Oregon Automobile Dealers Association



"An Equal Opportunity Employer"

P.O. Box 276 / Lyons, Oregon 97358
503-859-2121
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August 17, 2020

Via Email: sky.i.wescott@oregon.gov; tech.web@oregon.gov

Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

**Re: Comments on Oregon OSHA's Proposed Amendments in General
Administrative Rules to Clarify Employers' Responsibilities**

Dear Mr. Wescott:

As an Oregon manufacturer providing a safe workplace for nearly 500 employees, Freres Lumber Co., Inc., is writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding:

- (1) Re-Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

We oppose OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable employee misconduct" because they are unnecessary and because the proposed language in those definitions appear to be an impermissible attempt to replace the fault-based system the legislature intended with one tied to strict liability in the context of an employer's constructive knowledge of violative conditions. We also oppose the proposed supplementation of OAR 437-001-0760(1) relating to Employer Responsibilities which utilizes the proposed newly defined terms. Because the proposed rules are inconsistent with the fault-based system enacted by the legislature, those rules are invalid as written, and should not be adopted. We oppose any attempt to hold the employer responsible for the unforeseeable misconduct of employees, including supervisory employees. Doing so negates any concept of a fault-based system.

OR-OSHA's Proposed Amendments to "Clarify Employers' Responsibilities"

- I. Proposed Text.

EXHIBIT D-14

misconduct” to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

* * * * *

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

(a) The employer had devices, safeguards, rules, procedures, or other methods in place to eliminate or safely control the hazard or prevent the violation.

(b) The employer had effectively communicated to employees the methods established under (a).

(c) The employer had provided employees with the necessary training, equipment, and materials to use and comply with the methods established under (a).

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a).

(e) The employer had taken effective correction action when a violation was identified under (d).

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers’ Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to

¹ In all excerpts of proposed amendments here and below, removed text is in [brackets with line through] and added text is in bold and underlined.

identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

Pursuant to ORS 654.086(2), for a violation to be citable, OR-OSHA must prove:

That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a fault-based standard of care with regard to health and safety violations, and to then penalize only those employers that are found to have not been exercising "reasonable diligence" in the management of worksite safety and health. The statute limits liability to employers with knowledge of the alleged violative conditions or conduct. OSHA's proposed rules purport to expand liability by expanding the word "employer" as used in ORS 654.086(2) to include employees whom OR-OSHA deems to be "agents of the employer." The Oregon Supreme Court has explicitly held on numerous occasions that expanding language in a statute through an administrative rule is beyond the statutory authority of the agency. In other words, the proposed amendments illegally expand the knowledge of the employer requirement in the statute to include "agents" of the employer.

We view OR-OSHA's proposed definitions of "reasonable diligence" and "unpreventable

employee misconduct” as both unnecessary and as illegal attempts to impose a strict liability standard that was never intended or authorized by the legislature.

a) The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the OR-OSHA’s interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.³

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they’ve anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.⁴

The Court of Appeals held that it would be inconsistent with Oregon law “to allow [OR-OSHA] to make out a prima facie case by taking the ‘reasonable diligence’ component for granted.”⁵ Instead, the court decided, OR-OSHA “must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed.”⁶

The Court correctly held that ORS 654,086(2) requires that OR-OSHA has the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have foreseen an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet. The specific reasons why an employer could or could not have known of an alleged violation are inherently fact specific and involve questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

employees had already corrected the violative condition, etc. Efforts to craft definitions that put inherently fact specific determinations into a “cookie-cutter” or “check the box” system are doomed to failure.

- b) The proposed definition of “reasonable diligence” imposes a strict liability standard that is contrary to the language of the Oregon Safe Employment Act (“OSEA”).

The Supreme Court in *CBI Services I* did not suggest the phrase “reasonable diligence” be defined. Rather it only asked for input as to the agency’s interpretation of the phrase as it applied to evaluating the constructive employer knowledge issue. Even if there were an actual need for a rule defining “reasonable diligence” OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not for the purpose of penalizing employers even though they are making reasonable and appropriate efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that “could” occur and then take measures that eliminate the hazard or violation. If an employer succeeded in doing these things, there would never be a violation. To the extent that an employer fails to achieve such unachievable perfection, the automatic result under the proposed rule is a finding of constructive employer knowledge, strict liability is being applied.

OR-OSHA’s proposed language would require an employer who is cited to prove that it anticipated that the alleged hazard or violation was capable of occurring on a worksite without regard to whether the alleged violation was very unlikely to occur, or even virtually unforeseeable. If the employer did not “anticipate” that a very unlikely hazard or violation was capable of existing, and then take steps which prevented such occurrence, then the employer would by this definition automatically be found to have not exercised reasonable diligence. Once that finding is in place, the result is a finding that the employer had constructive knowledge of the violation. This is inconsistent with any notion of a fault-based system, since it excludes any real evaluation of the reasonableness of the employer’s actions.

In addition, the proposed language would allow OR-OSHA to prove constructive knowledge even if an employer did anticipate that the cited violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, employers must not only make a “reasonable” effort to eliminate all violations, they must also actually eliminate any possible hazard that could ever exist. Again, we oppose such a system because it imposes impermissible strict liability on employers.

The context of ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a fault-based standard that truly turns on an examination of the specific circumstances of each case. Requiring an employer to anticipate *all* potential violations that *could* possibly occur (meaning, per the Supreme Court in

⁷ The OSEA is fault-based. See *OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) (“Under our construction of ORS 654.086(2), the statute remains fault-based.”) (*CBI Services I*).

CBI Services I, were capable of occurring), in the workplace, and then to “eliminate” them, is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will take reasonable steps to anticipate those hazards in the workplace that are “likely” to result in harm to its employees. A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonably diligent employer will manage the hazard in such a way as to mitigate employee exposure.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence” at all. If, however, OR-OSHA chooses to proceed, its definition must capture the statutory intent to only cite those employers who are not making a reasonable attempt to identify and deal with hazards in the workplace. As currently written, OR-OSHA’s proposed definition is untenable.

c) Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

d) The proposed definition of “unpreventable employee misconduct.”

This proposed definition improperly attempts to make employers responsible for all violative conduct of any employee, meaning those that are acting in a supervisory capacity, as well as those that are non-supervisory employees. The Proposed Rule states in part:

“Where an employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer *could not have prevented*. To establish unpreventable employee misconduct, the employer must demonstrate all of

the following elements: ...

(d) The employer had developed and implemented measures that identified any violation of the methods established under (a)."

As noted above, the Supreme Court in *CBI Services I* noted that the word "could" as used in ORS 654.086(2) meant "was capable of." Given that, "could not have prevented" above actually reads: "And does so in a manner that the employer was not capable of preventing."

It should be noted that employers could be found to be "capable of" accomplishing almost anything on their worksites given unlimited resources and time. Given that, as written this rule results in virtually no act of employees falling within the definition of unpreventable employee misconduct. Again, this is manifestly inconsistent with any notion of a "fault-based" system.

Similarly, subsection (d) of the rule says that no defense based on employee misconduct can be established unless the employer demonstrates that, among other things, it had developed a program which actually identified "any violation." The rule sets a bar that no employer could ever reach. No concept of reasonableness can be found here, yet it is that concept that is the cornerstone of the underlying enabling statute.

In addition, by stating that "the employer must demonstrate all of the following elements:" OR-OSHA is again attempting to switch the burden of proof relative to constructive employer knowledge on to the employer. Since the 1978 *Skirvin* decision, and right up through the 2019 *CBI Services II* case, the Court of Appeals has consistently rejected such attempts by the agency. Yet here we are again. Evidence related to employee misconduct, including the misconduct of supervisory employees, is simply not an affirmative defense that must be proven by the employer.

The well-settled law in Oregon is that Employer Knowledge, including constructive employer knowledge related to the foreseeability of misconduct, is in the first instance something OR-OSHA must establish in order to meet its *prima facie* burden of proof. If the agency has put on sufficient evidence in this regard it can avoid having the citation vacated before the employer even starts to put on its case. After the agency meets this burden in its initial presentation, then and only then does the employer need to present whatever evidence it chooses to try to overcome the evidence OR-OSHA put on during its case-in-chief.

If the agency chooses to proceed with defining Unpreventable Employee Misconduct, then it should propose something consistent with the terms of the underlying enabling legislation. As a starting point, it should recognize that use of the word "unpreventable" is misplaced. The correct term is "unforeseeable," for that is the concept that should always be evaluated in determining whether an employer is responsible for the bad acts of employees. If the conduct was unforeseeable under the pertinent circumstances then it was not reasonably preventable.

We would suggest the following as an acceptable alternative to the proposed definition:

Unforeseeable employee misconduct – Where a supervisory or non-supervisory employee intentionally violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work; and does so in a manner that the employer under the pertinent facts did not reasonably anticipate. The following factors are examples of what may be evaluated in considering whether unforeseeable misconduct occurred at a worksite:

- (a) The employer did not have reasonable devices, safeguards, rules, procedures, or other methods in place to abate or safely control the hazard or prevent the violation.
- (b) The employer had not effectively communicated to employees the methods established under (a).
- (c) The employer had not provided employees with the necessary training, equipment, and materials to use in complying with the methods established under (a).
- (d) The employer had not developed and implemented measures to audit the effectiveness of its safety program,
- (e) The employer had not taken effective corrective action when a hazard or a violation was identified.
- (f) The employer was not in compliance with OAR 437-001-0760(1)(a) or (b).

III. OR-OSHA's Proposed Amendment to OAR 437-001-0760(1)(f)(A) & (B) is Unnecessary and Imposes an Impermissible Strict-Liability Standard on the Employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(A) & (B). These amendments flow from, and are tied to the proposed definitions discussed above. Oregon's courts have interpreted ORS 654.086(2) as requiring consideration of unforeseeable employee misconduct during the evaluation of whether an employer should be found to have constructive knowledge of a violation. This holding stems from the Oregon Supreme Court's consistent interpretation of ORS 654.086(2) as confirming that the OSEA is a fault-based system.

There are two sub-parts to the employee misconduct issue. These have been described by the courts as the "Rogue Supervisor" defense in the first instance and the "unforeseeable employee misconduct" defense in the other. The "Rogue Supervisor" defense involves the evaluation of misconduct by an employee acting in a supervisory role. The "unforeseeable employee misconduct" defense involves the evaluation of misconduct by an employee who is not acting in a supervisory role. The only difference is the level of proof that would be pertinent to evaluating the facts of a given case. Understandably, evidence that the employer should not be responsible for the violative acts of a supervisor should be more persuasive than the evidence that would relate simply to an hourly employee's misconduct.

The proposed amendment to OAR 437-001-0760(1)(f)(A) would eliminate the Rogue Supervisor part of the employee misconduct defense entirely. The remainder of the amendments to the rule would virtually eliminate the remainder of that defense as it applies to other employees. OR-OSHA has no statutory authority to negate or limit appellate court interpretations of it enabling legislation. Indeed, the Supreme Court has long held that once it interprets a statute, that interpretation is deemed to have been enacted by the legislature at the time of the promulgation of the statute. The Court therefore has repeatedly held that no state agency can adopt rules or otherwise act in a manner inconsistent with its interpretation of the underlying applicable statutes. The proposed changes to this rule would negate the Supreme Court's interpretation of ORS 654.086(2) as creating a fault-based system. These proposed changes are therefore beyond the Agency's authority and should not be adopted.

We suggest revising the proposed amendment as follows (removed text is in ~~brackets with line through~~ and added text is in italics and underlined):

(1) Employers' Responsibilities.

* * * * *

~~(f) [The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees]~~

(A) The employer is *not* responsible for violations unless ~~[neither the employer nor any agent of]~~ the employer knew or with the exercise of reasonable diligence could have known about the violation.

~~[Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.]~~

(B) The employer is not responsible for a violation when ~~[no agent of the employer had actual knowledge of the presence of the violation and~~ *the violation was the result of misconduct by a supervisor or employee that was not reasonably foreseeable.*

~~[(i) The violation was both isolated and unpredictable; or]~~

~~[(ii) The violation was the result of unpreventable employee misconduct.]~~

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something of which a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not automatically result in a citation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged or condoned employees or supervisors who did not comply with the code or the employer’s safe work policies, then such employer should be subject to a citation. Likewise, if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violations, or otherwise did not have an effective and enforced safety program, then there is a basis for a citable violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work. An employer should not, however, be liable for a violation if the employer had provided the training and equipment necessary, and implemented and enforced its safety program, and the employee nevertheless elects to violate the regulations without the knowledge of the employer.

ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)), recognize that employees are required to comply with safety regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so. If the employer has knowledge, or ought to have known, of the employee’s failure to comply with the employer’s policies and the code or the employer encouraged the violation, then the employer should be subject to a citation. However, if the employee’s failure to comply with safe work policies and/or OSHA codes was not reasonably foreseeable, no citation should issue.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the suggested alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but rather seem directed at making it easier for OR-OSHA to issue and sustain more citations.

Sincerely,

Robert Freres, Jr
Signature

Robert Freres, Jr
Name

Freres Lumber Co. Inc.
Company



Heather Case
Sky Wescott
Oregon Occupational Safety & Health Division
Oregon Department of Consumer and Business Services
350 Winter Street NE
Salem, OR 97301-3882

Re: Comments on Oregon OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities and Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Ms. Case and Mr. Wescott:

As an Oregon employer, we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 by the Oregon Occupational Safety & Health Division ("OR-OSHA"). This letter includes our comments regarding both:

- (1) Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities; and
- (2) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

We oppose OR-OSHA's proposed definition of "reasonable diligence" both because it is unnecessary and because the proposed language appears to be an impermissible attempt to impose a strict liability standard that was never intended by the legislature. We oppose the proposed changes to OAR 437-001-0135 because those changes would allow OR-OSHA to use subjective standards to arbitrarily determine the likelihood of an accident, discretion that could be abused to the detriment of Oregon employers. We oppose the proposed changes to increase the maximum penalties because those changes would give the OR-OSHA Administrator ("Administrator") unduly broad authority to impose massive penalties that could lead to the closure of Oregon businesses.

EXHIBIT D-15

Comments on OR-OSHA's Proposed Amendments in General Administrative Rules to Clarify Employers' Responsibilities

I. Proposed Text.

OR-OSHA proposes adding the definition of "reasonable diligence" to OAR 437-001-0015. The proposed language provides¹:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care where the employer identifies and anticipates hazards and violations that could occur in the workplace and then takes measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.

OR-OSHA also proposes amending OAR 437-001-0760 as follows:

(1) Employers' Responsibilities.

* * * * *

(f) The employer must exercise reasonable diligence to identify, evaluate, and control the employment activity and place of employment to ensure it is safe and healthful for all employees.

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent's actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

(i) The violation was both isolated and unpredictable; or

¹ In all excerpts of proposed amendments here and below, removed text is in [~~brackets with line through~~] and added text is in **bold and underlined**.

(ii) The violation was the result of unpreventable employee misconduct.

II. Comments on the Proposed Amendments.

We understand that under ORS 654.086(2), in order to prove a “serious” violation, OR-OSHA must prove:

1. That there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment; and
2. That the employer knew of the presence of the violation or, with the exercise of reasonable diligence, could have known of the presence of the violation.

The obvious intent of ORS 654.086(2) was to adopt a negligence standard of care with regard to health and safety violations and penalize only those employers that are not exercising “reasonable diligence” in the management of safety and health.

We view OR-OSHA’s proposed definition of “reasonable diligence” as both unnecessary and an attempt to impose a strict liability standard that was never intended or authorized by the legislature.

- a. The proposed definition of “reasonable diligence” is unnecessary.

In *CBI Services II*, the Oregon Court of Appeals held that OR-OSHA cannot impose a “rebuttable presumption” of knowledge on employers regarding occupational safety violations.² In reaching that conclusion, the Court of Appeals considered testimony from the current Administrator, Michael Wood, regarding the interpretation and application of “reasonable diligence.” The Administrator testified:

As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence and we disregard that presumption only in cases where the employer’s able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely relate [sic] to those duties.^[3]

² *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).

³ *Id.* at 836.

The Administrator further testified:

The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they've anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct. ^[4]

The Court of Appeals held that it would be inconsistent with Oregon law "to allow [OR-OSHA] to make out a prima facie case by taking the 'reasonable diligence' component for granted."⁵ Instead, the court decided, OR-OSHA "must show why the employer could, with reasonable diligence, have been aware of the violation that the agency inspector observed."⁶

We think OR-OSHA should have the burden to actually prove the specific facts that it believes demonstrates why a reasonable employer could have known of an alleged violation. This does not appear to be a terribly high hurdle for OR-OSHA to meet and it does not seem to be the type of issue that should be defined by a regulation that attempts to define what is reasonable. The specific reasons why an employer could or could not have known of an alleged violation are inherently case specific and involves questions that include, but are not limited to: whether the violation was something that was reasonably observable; how long the violative conduct existed; whether it had happened before; whether the employer had a reasonable opportunity to observe and correct it; and whether the employer had a reasonable belief that its employee had already corrected a violative condition, etc.

- b. The proposed definition of "reasonable diligence" imposes a strict liability standard that is contrary to the language of the OSEA.

Even if there were a need for a rule defining "reasonable diligence", OR-OSHA should draft the proposed definition with the intent of keeping the OSEA fault-based⁷ and not penalizing employers that are making reasonable efforts to provide a safe workplace.

The proposed definition would impose strict liability on Oregon employers as it requires that in order to be reasonably diligent an employer must anticipate any hazard and any violation that "could" occur and then take measures that eliminate the hazard or violation.

OR-OSHA's proposed language would require an employer who is cited to prove that it anticipated the alleged hazard or violation could occur even if the alleged violation was very unlikely to occur in the workplace. If the employer did not "anticipate" that a very unlikely

⁴ *Id.*

⁵ *Id.* at 838.

⁶ *Id.*

⁷ The OSEA is fault-based. *See OSHA v. CBI Servs., Inc.*, 356 Or. 577, 597 (2014) ("Under our construction of ORS 654.086(2), the statute remains fault-based.") (*CBI Services I*).

hazard or violation could exist then the employer would be found to be unreasonable and in violation of the regulations. This is wrong.

The proposed language would allow OR-OSHA to prove a serious violation even if an employer did anticipate that the violation could occur, unless the employer took “measures through the use of devices, safeguards, rules, procedures, or other methods that eliminate or safely control such hazards or prevent such violations.” Under the proposed language, an employer is liable if it did not eliminate a violation or hazard. That is strict liability. The proposal not only requires that employers take “reasonable” measures to eliminate the violation, it requires that the employer actually eliminate any possible hazard that could ever exist.

ORS 654.086(2)’s use of the term “reasonable” in the phrase “reasonable diligence” demands that any definition of the term reflect a standard that truly reflects what is reasonable for an employer to do or know under the circumstances.

Requiring an employer to anticipate *all* potential violations that *could* possibly occur in the workplace and then to “eliminate” them is not remotely reasonable. No employer can be expected to eliminate every hazard that “could” occur.

A reasonably diligent employer will attempt to anticipate those hazards in the workplace that are “likely” to result in harm to its employees.

A reasonably diligent employer will then take reasonable steps to eliminate those hazards that are likely to occur. If the hazard cannot be completely eliminated, a reasonable employer will manage the hazard in such a way as to attempt to prevent an injury.

We ask OR-OSHA to reconsider the need to add a definition of “reasonable diligence.” If, however, OR-OSHA deems it is necessary to attempt to define reasonable diligence, its definition must capture the statutory intent to only penalize those employers who are not making a reasonable attempt to identify hazards in the workplace. OR-OSHA’s proposed definition is completely untenable.

c. Proposed alternative definition of “reasonable diligence.”

If OR-OSHA will not withdraw its proposal to add a definition of “reasonable diligence,” we propose the following alternative definition:

Reasonable diligence – For purposes of ORS 654.086(2), a standard of care that a reasonable Oregon employer, in the same or similar industry, would employ in an attempt to identify hazards or violations that are likely to occur in the employer’s workplace and the standard of care that a reasonable employer, in the same or similar industry, would employ to mitigate such hazards or prevent such violations.

This language is consistent with a fault-based system and would essentially adopt a tort-based negligence standard that Oregon courts have significant experience interpreting. It would deter conduct that falls below a reasonable standard of care but not impose strict liability if an employer is unable to anticipate or eliminate every possible hazard or violation that “could” occur in the workplace.

III. OR-OSHA’s proposed amendment to OAR 437-001-0760(1)(f)(B)(i) is unnecessary and imposes an unreasonably high standard on the employer.

We further object to the proposed amendments to OAR 437-001-0760(1)(f)(B)(i). We suggest revising the proposed amendment as follows (removed text is in ~~[brackets with line through]~~ and added text is in italics and underlined):

(1) Employers’ Responsibilities.

* * * * *

~~{(f) The employer must exercise reasonable diligence to identify, evaluate, and control hazards in the place of employment to ensure it is safe and healthful for all employees.}~~

(A) The employer is responsible for violations unless neither the employer nor any agent of the employer knew or with the exercise of reasonable diligence could have known about the violation.

Exception: An agent’s actual knowledge of his or her own violative conduct is not attributed to the employer if the only employee exposed to the violation is the agent. In such cases, the agent will be considered only an employee and not an agent of the employer for purposes of this rule. This exception does not apply if any employee other than the agent is also exposed as a result of the violation.

(B) The employer is not responsible for a violation when no agent of the employer had actual knowledge of the presence of the violation and

~~{(i) The violation was both isolated and unpredictable; or}~~

~~{(ii)}~~ (i) The violation was the result of ~~[unpreventable]~~ employee misconduct *that was not encouraged or condoned by the employer.*

We do not believe that any employer should ever be liable for a serious violation if the violation was “unpredictable.” We do not believe that any employer should be penalized for something that a reasonable employer would not have been aware. In short, we want a fault-based system.

If an employer had no actual knowledge of the presence of the violation and was making a good faith effort to provide a safe workplace, the presence of the violation should not be a serious violation.

The proposed language holds Oregon employers to an unreasonable standard.

We would, however, agree that if OR-OSHA can prove the employer encouraged its employees not to comply with the code or if there is evidence establishing that the employer had historically failed to discipline employees when it became aware of their violation, then there is a basis for a serious violation.

We also agree that OR-OSHA should focus on whether the employee had been provided the appropriate equipment and training to safely perform the work.

An employer should not be liable for a serious violation if the employer had provided the training and equipment necessary and the employee nevertheless elects to violate the regulations while the employer or its agents are not observing the employee.

Oregon law, ORS 654.022, and OR-OSHA’s own regulations (OAR 437-001-0760(2)(a)) recognize that employees are required to comply with these regulations and that the code does not require supervision of all workers at all times (OAR 437-001-0760(1)(a)). Employers should be able to rely upon workers who have been properly trained and equipped to safely perform their work until such time as it is unreasonable for the employer to do so because the employer has knowledge of the employee’s failure to comply with the employer’s policies and the code or because the employer encouraged the violation.

We further object to the proposal to define the term “unpreventable employee misconduct” to require that in order to establish this as an affirmative defense that an employer must prove that it “had developed and implemented measures that identified any violation” of its policies or procedures.

We believe the language proposed to amend OAR 437-001-0015 be revised as follows⁸:

Unpreventable employee misconduct – Where an employee [~~intentionally~~] violates or does not use the devices, safeguards, rules, procedures, or other methods provided, developed, and implemented by the employer to safely accomplish the work[~~;~~ and ~~does so in a manner that the employer could not have prevented~~]. To establish unpreventable employee misconduct, the employer must demonstrate all of the following elements:

⁸ Removed text is in [~~brackets with line through~~] and added text is in *italics and underlined*.

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

Comments on Oregon OSHA's Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations

I. OAR 437-001-0135 Evaluation of Probability to Establish Penalties.

We also object to the proposed amendments to OAR 437-001-0135, which would base penalties on OR-OSHA's compliance officers' subjective opinions even if arbitrary.

The proposed text reads:

- (1) The probability of an accident that could result in an injury or illness from a violation **will** [~~shall~~] be determined by the Compliance Officer and **will** [~~shall~~] 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~~] **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 be likely that~~] **that the likelihood** 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~~] **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.

We see no need for these amendments. These changes simply make it easier for OR-OSHA to increase penalties on Oregon employers. OR-OSHA’s compliance officers should be required to articulate the reasons why a condition is likely or highly likely to result in an accident and these reasons should be evaluated by an independent fact finder—the administrative law judge.

The proposed changes appear to be designed to prevent the independent trier of fact from evaluating OR-OSHA’s basis for its probability rating. In our opinion, the likelihood that these subjective standards would be abused to the detriment of Oregon employers is “High.” OR-OSHA admits as much while attempting to downplay the effect in its April 24, 2020 notice letter. The notice indicates that the proposed changes “would be likely to generate a modest increase in the probability determinations, and therefore in the resulting penalty assessments.”

It is not reasonable for OR-OSHA to apply subjective standards to determine the probability of an accident. For a serious violation to be established ORS 654.086(2) requires that the violation results in a “substantial probability” that death or serious physical harm could result from the violation. Objective factors should be articulated to support the compliance officer’s beliefs regarding probability and these factors should be reviewable by an administrative law judge to ensure that the probability reflects reality.

If OR-OSHA concludes that it is likely that an accident would occur, it should be able to establish or explain that conclusion by reference to objective evidence about the hazard and the workplace conduct observed, rather than what a compliance officer subjectively thinks. We ask OR-OSHA to revise these proposed amendments. An employer’s right to have all of the evidence considered by the administrative law judge should be paramount.

Comments on Proposed Rule Changes Where Oregon OSHA Seeks to Expand the Administrator's Discretion to Impose Maximum Penalties for Nearly All Violations.

We oppose the several amendments proposed to empower the Administrator with apparently unfettered discretion to impose huge penalties arbitrarily. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740. These proposed changes would give the Administrator unconstrained discretion to impose penalties up to the proposed maximum penalty amount of \$135,382 for various code violations. The proposal increases penalties far beyond what is reasonable and are unnecessary. These proposals essentially give Oregon OSHA the ability to destroy small businesses and there is no evidence that increasing penalties will result in a safer workplace for Oregon employees.

OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to \$135,382 for any “willful” failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is \$12,675. OR-OSHA understated the proposed increase of \$122,707 as a mere “clarification” without any further explanation regarding why the increase is necessary to serve a legitimate regulatory purpose. By comparison, the maximum penalty under federal OSHA for the equivalent violation is \$24,441. *See* 20 C.F.R. § 702.204. We are not aware of, and OR-OSHA does not attempt to provide, any reason for this change. We consider a maximum penalty of \$25,000 for such conduct as more than a sufficient deterrent for such conduct.

Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of \$135,538 when an employer “fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706” if the violation is determined to be “willful.” The current maximum penalty is \$1,000 per violation.⁹ OR-OSHA gives no meaningful explanation for this proposed rule change. These kinds of paperwork violations are not directly related to whether the employer diligently manages to provide a safe workplace. Although the amendment would increase the maximum penalty from \$1,000 to \$135,538 – a 13,453.8% increase – OR-OSHA indicates it does not anticipate the potential impact as significant because it does not impose the penalty frequently. There is no legitimate regulatory purpose for such a huge increase and certainly no justification for a penalty of up to \$135,538. We propose that OR-OSHA adjust the proposed penalty to a “not to exceed \$5,000” penalty for such conduct.

The proposed amendments would give the Administrator unduly broad authority to impose penalties so significant that many Oregon businesses would be forced to close if the Administrator elected to seek the maximum penalty. We believe that the penalty increase is too great and that any proposed regulations set forth the specific factors that justify imposing a penalty greater than the minimum allowed rather than giving the Administrator unfettered discretion to decide how large the penalty for a particular employer should be in any given circumstance.

Thank you for the opportunity to comment on these proposed rule changes. We urge OR-OSHA to reconsider moving forward with the proposed rule changes or adopt the proposed alternatives. OR-OSHA's proposals do not appear to be intended to make Oregon employees safer but to make it easier for OR-OSHA to sustain large and arbitrary penalties.

Sincerely,

A handwritten signature in black ink, appearing to read "Becky Van Atta". The signature is written in a cursive, flowing style.

Becky Van Atta
Chief Financial Officer
Vanco Contracting, LLC

July 31, 2020