Oregon
Kate Brown, Governor

Department of Consumer and Business Services
Oregon Occupational Safety & Health Division (Oregon OSHA)
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osha.oregon.gov

February 26, 2020

Text of changes
January 23, 2019 Federal Register
January 15, 2020 Federal Register

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

Public Hearings Canceled/Comment Period Extended. See details here

Public Hearings Scheduled for:

Date	Time	Location
March 27, 2020	10:00 am	Oregon OSHA Bend Field Office 1230 NE 3rd St, Ste A-115 Bend, OR 97701
April 13, 2020	10:00 am	Oregon OSHA Portland Field Office 16760 SW Upper Boones Ferry Rd Tigard, OR 97224

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

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

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

Please visit our web site osha.oregon.gov Click 'Rules and laws' in the Common resources column and view our proposed rules, or select other rule activity from this page.

When does this happen: Adoption tentatively will be in May 2020.

To get a copy: Our web site – osha.oregon.gov Rules and laws, then, Proposed rules
Or call 503-947-7449

To comment: Department of Consumer and Business Services/Oregon OSHA
350 Winter Street NE
Salem OR 97301-3882
E-mail – tech.web@oregon.gov
Fax – 503-947-7461

Comment period closes: **May 1, 2020**

Oregon OSHA contact: **Heather Case, Central Office @ 503-947-7449**
or email at heather.case@oregon.gov

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

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARING*

A Statement of Need and Fiscal Impact accompanies this form.

Department of Consumer and Business Services/Oregon OSHA		OAR 437
Agency and Division		Administrative Rules Chapter Number
Heather Case	350 Winter Street NE Salem OR 97301-3882	503-947-7449
Rules Coordinator	Address	Telephone

RULE CAPTION

Oregon OSHA's proposed increase of certain minimum and maximum penalties for alleged violations.

Hearing Date	Time	Location	Hearings Officer
March 27, 2020	10:00 am	Oregon OSHA Bend Field Office 1230 NE 3rd Street Suite A-115 Bend, OR 97701	Heather Case
April 13, 2020	10:00 am	Oregon OSHA Portland Field Office 16760 SW Upper Boones Ferry Rd Tigard, OR 97224	Heather Case

Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION

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

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

Other Authority

ORS 654.001 through 654.295
Stats. Implemented

RULEMAKING SUMMARY

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

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

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

INDIVIDUAL RULE SUMMARY (By rule number)

Provide a brief summary of the rule (if new adoption), or a brief summary of changes made to the rule (if amending)

437-001-0060- Makes language regarding issuance of a penalty permissive rather than mandatory.

437-001-0096- Removed penalty language from rule.

437-001-0135- Substantively changes language regarding determination of high, medium, and low probability.

437-001-0145- Changes in base penalties and table amounts.

437-001-0155- Changes language regarding calculation of failure-to-abate penalties and proposed decrease in minimum daily penalty.

437-001-0160- Changes language to allow employer's activities across fixed sites to be managed in a fasion more consistent with non-fixed sites.

437-001-0165- Changes maximum and minimum penalty amounts.

437-001-0170- Clarifies language that willful violations remain an option for these failures to report.

437-001-0171- Clarifies language that willful violations remain an option for these penalties.

437-001-0175- Change in maximum and minimum penalty amounts.

437-001-0180- Clarifies language that willful violations remain an option for these penalties.

437-001-0225- Clarifies language that willful violations remain an option for these penalties.

437-001-0740- Clarifies language that willful violations remain an option for these penalties.

Please visit the rules and laws section of our website at osha.oregon.gov/rules and select *proposed rules* in the rule making column to view our proposed rules.

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

Signature

May 1, 2020

Last Day for Public Comment

Last day to submit written comments to the Rules Coordinator

Michael D. Wood 2/26/2020

Printed name Date

*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00pm on the preceding workday. ARC 920-2005

Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Consumer and Business Services/Oregon OSHA	OAR 437
Agency and Division	Administrative Rules Chapter Number

In the Matter of:

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

Rule Caption: Oregon OSHA's proposed increase of certain minimum and maximum penalties for alleged violations.

Statutory Authority: ORS 654.025(2) and 656.726(4)

Stats. Implemented: ORS 654.001 through 654.295; 654.412 through 654.423; 654.760 through 654.780

Need for the Rule(s):

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

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

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

Documents Relied Upon, and where they are available:

OAR 437, Division 1, General Administrative Rules

Fiscal and Economic Impact:

Statement of Cost of Compliance:

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

In relation to all employers affected by the proposed rule, it must first be noted that the proposed changes in the rule do not affect the cost of complying with existing Oregon OSHA rules nor do these proposed changes create any new requirements for employers. The only financial impact is on those employers who receive a violation that carries a penalty. For that reason (as has been the case with past changes to the penalty rules), Oregon OSHA believes that there will be no "cost of compliance" for businesses of any size or any other employer covered by the rule. Any change in the penalty structure, by its very nature, affects the cost of *non*-compliance with Oregon OSHA rules, not the cost of complying with them. This rule does not change the compliance obligations of the employer; it just changes the penalties of non-compliance.

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

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

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

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

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

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

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

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

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

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

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

Even without repeat violations or the evidence of willful conduct, Oregon OSHA currently has the authority to issue penalties of up to $12,471 per violation, but in practice the majority of penalties are much lower. Most penalties result from the identification of a "serious" violation, where a serious injury or death could result. However, nearly two-thirds of violations cited by Oregon OSHA continue to be considered "other-than-serious

"with no penalty attached. Overall, more than half of Oregon OSHA inspections result in no penalties at all, either because there were no violations issued or because the violations issued carried no penalties. There is no reason to believe this will change as a result of the revised penalty rules.

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

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

<u>Summary of Changes by rule number and Potential Fiscal Impact on Non-Compliant Employers</u>

437-001-0060 Advance Notice

The only substantive change in the proposed draft of OAR 437-006-0060 is to make the language regarding issuance of a penalty permissive rather than mandatory. For this reason, to the extent it has any effect, it would be to potentially reduce the cost. However, no such penalty has been assessed during at least the past 15 years.

437-001-0096 Red Warning Notice

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

437-001-0135 Evaluation of Probability to Establish Penalties

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

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

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

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

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

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

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

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

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

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

437-001-0160 Penalty Criteria – Repeat Violation

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

437-001-0165 Determination of Penalty – Repeat Violation

There are two substantive changes in this section other than the modified maximum penalties for such violations. One involves restoring the administrator's discretion in repeat violations, which was discussed in an earlier section. The other adds a 3rd and 4th repeat penalty amount to the discussion of Other-than-Serious repeat penalties (it was not updated in a previous rulemaking, when the administrator's discretion for both 3rd and 4th Serious and Other-than-Serious repeats was replaced as the "default" approach by the additional language on the existing table). This change is not expected to affect average penalty amounts.

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

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

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

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

The change to this rule simply clarifies that willful violations remain an option for such failures, and would be penalized accordingly in those infrequent situations where they might occur. Because of their infrequency (and

the infrequency of the underlying violation itself), Oregon OSHA does not anticipate a significant impact on either average or overall penalties.

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

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

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

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

437-001-0225 Penalty for Falsification

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

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

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

How were small businesses involved in the development of this rule?

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

Administrative Rule Advisory Committee consulted?: Yes, in addition to discussions with other advisory groups and with an ad hoc committee assembled for the purpose, Oregon OSHA presented this rulemaking to the Oregon OSHA Partnership Committee for comment on several pre-proposal drafts as well as any potential fiscal impact of these rules.

If not, why?:

Signature	Printed name	Date
	Michael A. Wood	2/26/2020

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007

HOUSING COST IMPACT STATEMENT

FOR ESTIMATING THE EFFECT OF A PROPOSED RULE OR ORDINANCE ON THE COST OF DEVELOPING A *TYPICAL 1,200 SQ FT DETACHED SINGLE FAMILY DWELLING ON A 6,000 SQ FT PARCEL OF LAND.
(ORS 183.534)
FOR ADMINISTRATIVE RULES

AGENCY NAME: DCBS/Oregon OSHA
ADDRESS: 350 Winter Street NE
CITY/STATE: Salem OR 97301-3882
PHONE: 503-947-7449

PERMANENT: XX
TEMPORARY:

HEARING DATE: 03/27, 04/13, 2020
EFFECTIVE DATE: May 2020

BELOW PLEASE PROVIDE A DESCRIPTION OF THE ESTIMATED SAVINGS OR ADDITIONAL COSTS THAT WILL RESULT FROM THIS PROPOSED CHANGE.

PROVIDE A BRIEF EXPLANATION OF HOW THE COST OR SAVINGS ESTIMATE WAS DETERMINED.

IDENTIFY HOW CHANGE IMPACTS COSTS IN CATEGORIES SPECIFIED

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

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

List of rules adopted or amended:

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

Materials and labor costs increase or savings:
None.

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

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

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

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

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