CASE Heather * DCBS

From: WOOD Michael * DCBS
Sent: Wednesday, March 4, 2020 11:27 AM
To: 'Kay King'
Cc: CASE Heather * DCBS; WESCOTT Sky I * DCBS; MCLAUGHLIN Dave * DCBS; LOVE Julie A * DCBS; STAPLETON Renee M * DCBS
Subject: RE: Employer Knowledge Rule
Attachments: CAC Minutes on Employer Knowledge.docx

Kay,

Thank you for your e-mail. To answer your question about the status of the proposal, we filed it as a formal proposal last week. Because the rule has been formally proposed and the formal comment period is now open, I am forwarding your e-mail to the affected rulemaking staff to be included in the formal record. However, that does not prevent you from making additional comments on the record during the public comment period.

The rulemaking filing, which includes the formal "statement of need," as well as the text of the proposed rule and the hearing and public comment schedule, can be found at https://osha.oregon.gov/OSHARules/proposed/2020/ltr-proposed-employer-knowledge.pdf. I would note that the description of the background currently includes a mistaken reference to a decision by the "Court of Appeals" – the key decision was in fact made by the Oregon Supreme Court.

With regard to the conversations about the potential rule proposal with the Construction Advisory Committee, you appear to have been given inaccurate or incomplete information. I have attached a document that includes references to the rule taken from the minutes of a number of CAC meetings over the five-year period that the rule has been in discussion.

To provide some further context, I have included (below) the text of a note that we sent to the Partnership Group and the Construction Advisory Committee last Wednesday about the decision to move ahead with proposing the rule.

Thank you for taking the time to make your feelings known.

Michael

Michael Wood, Administrator
Oregon OSHA
Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

"Good afternoon everyone,

I wanted to let you all know that I approved our filing of the proposed Employer Knowledge rule today. I do not lightly disregard the concerns expressed by those who spoke at the last CAC and those who contacted me directly, as well as the recommendation by the employer representatives on the Partnership Group who voted that the rulemaking be delayed. However, I — along with the worker representatives who voted on the same motion — believe the time has come to move forward with a formal proposal.

In response to at least some of the written comments and discussion, I do want to emphasize that the draft rule is only NOW a proposed rule. There has been no formal proposal until this point. And the public comment period is decidedly

EXHIBIT O-1

not over — in the formal sense, it is just now beginning. So the decision about whether to adopt the rule is not yet made, nor could it be.

I know some of you will be disappointed by this decision, and it is not one I take lightly. But I do firmly believe the time has come to take the next step in the rulemaking process.

Michael"

From: Kay King <kay@rrking.net>
Sent: Tuesday, March 3, 2020 4:32 PM
To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: Employer Knowledge Rule

Dear Michael

I am writing with concerns over the proposed new "Employer Knowledge" rule.

Words like "reasonable diligence" make my skin crawl. It's absurd the further I read in the proposed rule when I consider it suggests we take reasonable care and
As if we had known of the incident ahead of time. It suggests that that the employer could have taken reasonable care assuming we knew what the violation was
And assumes it could have been forseen ahead of time.

I am very concerned to learn that it appears the proposed rule was not brought to the CAC committee before it was essentially put into final form.
You mentioned recently that " the ship had already sailed". Does that mean you would be proposing this without bringing it up to CAC for input in a timely order of events?

The verbiage of this proposed rule is extremely frightening to an employer dealing with 75 employees, all of whom are working on sides independently
From each other. The wording includes words like "person in control"." any manager" or "lead worker." It creates even stricter liability for employers for the volitive acts of its employers , or "agents.

I've been a little busy fighting the Gross Receipts Tax which will tax every dollar coming in our doors—not the profit left. And the Cap and Trade bill which would zap an extra .72 cent /gallon tax on our fuel. Both of Which in our industry would constitute
Many businesses, like ours, to consider shutting our doors. As a result, this proposed new OSHA rule has just come to my attention.

Can you please give me an update on where this proposed rule is at this point?
What is your intent in proposing this new ruling? Your goals in proposing yet another rule?

Thank you.
Kay King

Excerpts from Oregon OSHA Construction Advisory Committee Minutes re Employer Knowledge
(since December 2014 *CBI Services* decision by Oregon Supreme Court)
As of February 10, 2020

Oregon OSHA Construction Advisory Committee -- January 6, 2015

Adrian Albrich, Alta Schafer, Barry Moreland, Bob Hall, Bret Taylor, Brian Silbernagel, Chris Ottoson, Chuck Stahl, Cindy Regier, Dede Montgomery, David Parsons, Donald A. Berg, Doug Rodgers, Gary Beck Ian Chase, Jeff Wilson, Joe Johnson, Jonathan Murders, Kevin Wheatcroft, Marilyn Schuster, Mark Tobiasson, Michael Wood, Michelle Potter, Nathan Taylor, Paul Johnston Jr., Peggy Munsell, Randy Lovell, Russell Nicolai, Scott Peabody, Tony Howard

"On December 26, 2014 the Supreme Court decision reversed the reasoning of the Court of Appeals in the CBI Services case regarding employer knowledge. OR-OSHA v CBI Services_SC061183 (12-26-14).pdf"

Note: Not mentioned in the minutes for the February 3, March 3, April 7, May 5, and June 2 meetings.

Oregon OSHA Construction Advisory Committee – July 7, 2015

Alta Schafer, Bret Taylor, Brian Silbernagel, Chris Ottoson, Clark Vermillion, David Davidson, David Douglas, David Zagorodney, Dawn Morse, Doug Rodgers, Emily Nye, Eric Fullan, Gary Beck, Glenn Curry, Ian Chase, Jeff Wilson, Johnny Sandoval, Kevin Wheatcroft, Marilyn Schuster, Mark Hillyard, Mark Tobiasson, Melissa Diede, Michael Wood, Michelle Brunetto, Pat Brunson, Peggy Munsell, Scott Ray, Steve Spurlock, Tony Howard

"Employer Knowledge Work Group meetings are scheduled at the Durham/Tigard Facility; located behind the Bridgeport Mall. The Supreme Court affirmed the CBI Services decision of the Court of Appeals on other grounds. At issue in this case is what the statute means when it says that an employer 'could not with the exercise of reasonable diligence know' of a violation. The Court of Appeals held that the statutory phrase not to whether an employer 'could know – in the sense of being capable of knowing – of the violation; rather the phrase refers to whether, taking into account a number of specified factors, an employer 'should know of the violation…..The Supreme Court also noted, the term 'reasonable diligence' is delegative in nature and that they ordinarily; review as an agency's interpretation and application of the term to determine whether they comport with the range of discretion afforded the agency under law. Oregon OSHA has not fleshed out by administrative rule or in policy 'reasonable diligence'.

"The case was remanded to the Worker's Compensation Board for further proceedings. This was a fall protection issue on a water tank with a 32 foot fall hazard. Scaffolding was present on the inside of the tank but not on the outside where the employee was exposed (not wearing a harness and a lanyard) and another employee in a lift (wearing a harness and a lanyard but the lanyard was not secured to the lift.)

"Meetings are scheduled for the 4th Wednesday thru November from 1:00 - 4:30) New location for Oregon OSHA's Portland field office; behind the Bridgeport Mall Durham Plaza 16760 SW Upper Boones Ferry Rd, STE 200 Tigard, OR 97224:

"July 22
August 26
September 23
October 28
November 25"

Oregon OSHA Construction Advisory Committee – August 4, 2015

Alta Schafer, Chris Ottoson, David Davidson, David Zagorodney, Dede Montgomery, Doug Rogers, Gary Beck, Glenn Curry, Jeff Wilson, Kevin Wheatcroft, Lisa Holland, Marilyn Schuster, Mark Hillyard, Mark Tobiasson, Michael Wood, Mike LaVella, Mike Riffe, Nathan Taylor, Pat Brunson, Robert Miller, Roger Dale-Moore, Scott Peabody

"Employer Knowledge Work Group - The group met on July 22, 2015. Meetings are scheduled for the 4th Wednesday thru November from 1:00 - 4:30) At the new location for Oregon OSHA's Portland field office; behind the Bridgeport Mall Durham Plaza 16760 SW Upper Boones Ferry Rd, STE 200 Tigard, OR 97224.

"The remaining dates are:

August 26, 2015
September 23, 2015
October 28, 2015
November 25, 2015."

Oregon OSHA Construction Advisory Committee – September 1, 2015

Alta Schafer, Barry Moreland, Becky Yang, Bret Taylor, Bruce Roller, Chris Miller, Chris Ottoson, Clark Vermillion, Cody Adams, David Davidson, Demetra Star, Dick Classen, Doug Rodgers, Eliot Lapidus, Eric Fullan, Gary Beck, Glenn Curry, Ian Chase, Jake Welch, Jeff Wilson, John Pierce, Joe Bowers, Mark Tobiasson, Michael Wood, Mike Riffe, Milton Stamp, Nikolas Wenzel, Nathan Taylor, Paul Magrone, Peggy Munsell, Quinn Steelman, Robert Miller, Roger Dale-Moore, Russell Nicolai, Scott Ray, Tom Bozicevic

"Employer Knowledge Work Group - Meetings are scheduled for the 4th Wednesday thru November from 1:00 - 4:30) At the new location for Oregon OSHA's Portland field office; behind the Bridgeport Mall Durham Plaza 16760 SW Upper Boones Ferry Rd, STE 200 Tigard, OR 97224

"The remaining dates are:

~~September 23, 2015~~ cancelled
October 28, 2015
November 25, 2015"

Oregon OSHA Construction Advisory Committee – October 6, 2015

Bret Taylor, Chris Miller, Chris Ottoson, Clark Vermillion, David Davidson, David Douglas, David Zagorodney, DeDe Montgomery, Demetra Star, Doug Rodgers, Eliot Lapidus, Emily Nye, Gary Beck, Jeff Wilson, Kevin Wheatcroft, Lisa Holland, Mark Tobiasson, Mary Lou Wilson, Mike Riffe, Pat Brunson, Peggy Munsell, Robert Miller, Scott Ray, Stephanie Ficek, Tom Bozicevic

"Employer Knowledge Work Group - Oregon OSHA cancelled the Oct. 28 and Nov. 25 meetings. They will be rescheduled – date and time TBD."

Oregon OSHA Construction Advisory Committee – December 1, 2015

Alta Schafer, Bret Taylor, Brian Silbernagel, Bruce Roller, Chris Ottoson, Clark Vermillion, David Davidson, Dick Classen, Doug Rodgers, Eliot Lapidus, Emily Nye, Glenn Curry, Lisa Holland, Marilyn Schuster, Mark Tobiasson, Mark Hillyard, Melissa Diede, Mike Riffe, Nathan Taylor, Pat Brunson, Peggy Munsell, Roger Dale-Moore, Russell Nicolai, Tony Howard, Travis Stone

"Employer Knowledge Work Group - The meetings will start again the beginning of 2016. Meetings will be located at Oregon OSHA's Portland field office; behind the Bridgeport Mall Durham Plaza 16760 SW Upper Boones Ferry Rd, STE 200 Tigard, OR 97224"

Note: Not mentioned in the minutes of the January 5 meeting.

Oregon OSHA Construction Advisory Committee – February 2, 2016

Adrian Albrich, Alta Schafer, Bob Trotter, Bret Taylor, Brian Silbernagel, Bruce Roller, David Davidson, David Douglas, Dede Montgomery, Demetra Star, Doug Rodgers, Eliot Lapidus, Gary Beck, Glenn Curry, Jeff Wilson, Jeremiah Murphy, Marilyn Schuster, Mark Hillyard, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Michael Wood, Mike Riffe, Pat Brunson, Paul Magrone, Peggy Munsell, Robert Miller, Roger Dale-Moore

"Some possible rulemaking for the next year-
PELs - there are about 5 that OR-OSHA is looking into
Temp Agencies
Penalties- depending on what Fed OSHA does
Silica & Beryllium
Employer Knowledge"

Note: Not mentioned in the minutes for March 1 or April 4

Oregon OSHA Construction Advisory Committee – May 3, 2016

Barry Moreland, Brian Silbernagel, Bruce Roller, Candice Vinson, Chris Ottoson, Cindy Regier, David Davidson, Dede Montgomery, Eliot Lapidus, Emily Nye, Eric Fullan, David McLaughlin, Gary Beck, Glenn Curry, Illa Gilbert-Jones, Jeff Wilson, Jim Mahar, Kathleen Fenton, Kevin Wheatcroft, Lisa Pickert, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Mike Riffe, Paul Magrone, Peggy Munsell, Roger Dale-Moore, Roy Kroker, Russell Nicolai, Stephanie Ficek, Tony Howard

"Employer Knowledge: Oregon OSHA reconvened the employer knowledge workgroup on April 28. Oregon OSHA is developing a rule draft as a result of the CBI Services decision by the Oregon Supreme Court (http://static.legalsolutions.thomsonreuters.com/pdf/341P3d701.pdf), which encouraged Oregon OSHA to provide more explicit guidance as to when an employer would be protected from citation because the employer would be unable to know of a violation even with the exercise of reasonable diligence. An additional meeting is scheduled on May 20 from 10 a.m. – 1 p.m. at the Portland field office."

Oregon OSHA Construction Advisory Committee – June 7, 2016

Alta Schafer, Bret Taylor, Bruce Roller, Bryan Davis, Bryon Snapp, Candice Vinson, Clark Vermillion, David Davidson, Dede Montgomery, Demetra Star, Eliot Lapidus, Emily Nye, Gary Beck, Glenn Curry, Greg Heroveld, Illa Gilbert-Jones, Jeff Wilson, Jeremiah Murphy, Jim Gibson, Lisa Holland, Lisa Pickert, Mark Hillyard, Mary Lou Wilson, Melissa Diede, Mike LaVella, Pat Brunson, Paul Magrone, Rick McMurry, Roger Dale-Moore, Robert Miller

"Employer Knowledge (Division 1)

"Summary: Oregon OSHA plans to complete rulemaking that addresses the issue of employer knowledge and the role of reasonable diligence in determining whether an employer has "constructive knowledge" of a violation in the worksite.

"Timetable: Oregon OSHA had initial discussions with a small group of stakeholders in July and August, 2015 and reconvened on April 28, 2016. A meeting was held on May 20, 2016 with more discussion around the proposed rule language for employer knowledge and reasonable diligence. There was a suggestion to convene a smaller sub-group to discuss rule language.

"Oregon OSHA staff contact: Bryon Snapp, Oregon OSHA, 350 Winter Street NE, Salem OR 97301-3882. Telephone: 503-947-7448. E-mail: bryon.m.snapp@oregon.gov"

Oregon OSHA Construction Advisory Committee – July 5, 2016

Alta Schafer, Bill Haskins, Bruce Roller, Chris Gillett, Chris Ottoson, Cindy Regier, Clark Vermillion, David Davidson, David Douglas, Gary Beck, Glenn Curry, Illa Gilbert-Jones, Jeff Wilson, Mark Hillyard, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Michael Wood, Mike Riffe, Nathan Taylor, Pat Brunson, Paul Magrone, Peggy Munsell, Roger Dale-Moore, Robert Miller, Travis Stone

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"Update: Oregon OSHA is continuing to line up sub-group participants.

"Oregon OSHA staff contact: Bryon Snapp, Oregon OSHA, 350 Winter Street NE, Salem OR 97301-3882. Telephone: 503-947-7448. E-mail: bryon.m.snapp@oregon.gov"

Note: Not mentioned in the minutes for August 2.

Oregon OSHA Construction Advisory Committee – September 6, 2016

Alta Schafer, Bret Taylor, Brian Silbernagel, Bruce Roller, Bryan Davis, Candice Teague, Chris Ottoson, Clark Vermillion, David Douglas, Eliot Lapidus, Emily Crews, Gary Beck, Jeff Wilson, Jeremy Lawson, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Mike Riffe, Nathan Taylor, Pat Brunson, Paul Magrone, Roger Dale-Moore, Ryan Schurr

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"Oregon OSHA staff contact: Bryon Snapp, Oregon OSHA, 350 Winter Street NE, Salem OR 97301-3882. Telephone: 503-947-7448. E-mail: bryon.m.snapp@oregon.gov"

Oregon OSHA Construction Advisory Committee – October 4, 2016

Alta Schafer, Andy Collins, Barb Epstien, Barry Moreland, Bret Taylor, Bruce Roller, Bryan Davis, Bryon Snapp, Clark Vermillion, David Douglas, Demetra Star, Eliot Lapidus, Emily Crews, Gary Beck, Illa Gilbert-Jones, Jeff Wilson, Jennifer Carter, Jeremy Lawson, Kevin Wheatcroft, LaChelle, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Michael Wood, Michelle Brunetto, Nathan Taylor, Renee Stapleton Roger Dale-Moore, Ryan Schurr, Scott Ray, Tony Howard

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"Oregon OSHA staff contact: Bryon Snapp, Oregon OSHA, 350 Winter Street NE, Salem OR 97301-3882. Telephone: 503-947-7448. E-mail: bryon.m.snapp@oregon.gov"

Note: Not mentioned in the minutes for November 1 or December 6

Oregon OSHA Construction Advisory Committee – January 3, 2017

Aaron Corvin, Alta Schafer, Bret Taylor, Brian Silbernagel, Bruce Roller, Candice Teague, Chris Ottoson, Clark Vermillion, Dan Cain, David Davidson, Dawn Morse, Dede Montgomery, Denyse Fields, Eliot Lapidus, Emily Crews, Eric Fullan, George Goodman, Jeff Wilson, Lisa Holland, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Paul Magrone, Renee Stapleton, Robert Miller, Russell Nicolai, Ryan Schurr, Tony Howard, Trena VanDeHey

"Employer Knowledge: The Employer Knowledge workgroup will meet on January 17, 2017 at the Portland Field Office."

Oregon OSHA Construction Advisory Committee – February 7, 2017

Aaron Corvin, Alta Schafer, Barry Moreland, Bret Taylor, Bruce Roller, Bryan Davis, Bryan Ortiz, Chris Ottoson, Clark Vermillion, Clint Elliott, David Douglas, Dede Montgomery, Eliot Lapidus, Emily Crews, Gary Beck, Jeff Wilson, Jeremy Lawson, Jim Hayden, Jim Mahar, Julie Love, Lisa Pickert ,Mark Hillyard, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Nathan Taylor, Scott Peabody, Steve Spurlock, Tom Deines, Tony Howard, Trena VanDeHey

"Employer Knowledge: The Employer Knowledge workgroup will meet on March 30, 2017 at the Portland Field Office."

Oregon OSHA Construction Advisory Committee – March 14, 2017

Aaron Corvin, Alta Schafer, Barb Epstien, Bryan Davis, Bryan Ortiz, Candice Teague, Clark Vermillion, Clint Elliott, David Davidson, Emily Crews, Jeff Wilson, Julie Love, Kevin Wheatcroft, Mark Tobiasson, Mary Lou Wilson, Matt Enos, Melissa Diede, Michelle Brunetto, Renee Stapleton, Robert Miller, Rod Brunetto, Scott Peabody, Tom Deines

"Employer Knowledge-Oregon OSHA plans to complete rulemaking that addresses the issue of employer knowledge and the role of reasonable diligence in determining whether an employer has 'constructive knowledge' of a violation in the worksite.

"The smaller sub-group will meet to discuss rule language on March 30, 2017."

Note: Not mentioned in the minutes for the April 4, May 2, June 6, July 11, or August 1 meetings.

Oregon OSHA Construction Advisory Committee – September 5, 2017

Aaron Colmone, Alta Schafer, Barb Epstien, Barry Sandgren, Bryan Davis, Chris Miller, Chris Ottoson, Clint Elliott, Cody Adams, Dan Cain, David Davidson, Emily Crews, Eric Brothers, Eric Fullan, Jeff Luyet, Jeff Wilson, Jeremy Lawson, Lisa Pickert, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Michael Netsch, Nathan Taylor, Pamela Fisher, Paul Magrone, Scott Peabody, Steve Spurlock, Tim Nelson, Tom Deines, Tony Howard

"Employer Knowledge: The small group will meet on September 21, 2017."

NOTE: The regular October meeting was replaced with a training session, and there was no meeting in November. Not mentioned in the minutes for December 5, January 2, February 6, March 6, April 3, May 1, June 5, July 3, August 7, or September 4.

Oregon OSHA Construction Advisory Committee – October 2, 2018

Al Lee, Alta Schafer, Barb Epstien, Brian Silbernagel, Bryon Snapp, Chris Grover, Clark Vermillion, Clint Elliott, David Davidson, Demetra Star, Dennis Bonin, Dennis Cox, Doug Biron, Emily Crews, Eric Fullan, Jeff Wilson, Jeremy Lawson, Julie Love, Laird Blanchard, Lane Ellison, Mark Tobiasson, Melissa Diede, Michael Wood, Mike Riffe, Robert Miller, Ryan Leffel, Soren Bjerregaard, Stephen Heaven, Tom Deines, Tony Howard

"Employer Knowledge-Employer Knowledge will get going again soon."

Oregon OSHA Construction Advisory Committee – November 6, 2018

Al Lee, Alta Schafer, Barb Epstien, Brian Silbernagel, Bryan Ortiz, Bryon Snapp, Clark Vermillion, David Davidson, Emily Crews, Eric Borgen, Eric Fullan, George Goodman, Jeff Luyet, Jeff Wilson, Julie Love, Kim Gamble, Laird Blanchard, Lane Ellison, Lisa Pickert, Melissa Diede, Mike Riffe, Pat Brunson, Paul Magrone, Phillip Wade, Robert Henderson, Roy Shawgo, Roy Shawgo IV, Ryan Leffel, Scott Ray, Soren Bjerregaard, Steve Huson, Tony Howard

"Employer Knowledge-A preproposal draft has been written and will be presented to the Partnership Committee at their next meeting."

NOTE: The draft referenced in the minutes was distributed with the November meeting minutes and December meeting agenda on November 29, 2018.

Oregon OSHA Construction Advisory Committee – December 4, 2018

Al Lee, Alta Schafer, Barb Epstien, Brian Silbernagel, Bryan Ortiz, Bryon Snapp, Chris Ottoson, Chuck Stahl, Clark Vermillion, Dale Lindstrom, David Davidson, Dede Montgomery, Dennis Barlow, Dennis Bonin, Dennis Cox, Emily Crews, Eric Borgen, Eric Fullan, George Goodman, Ian Chase, Jared Williams, Jeff Carlson, Jeff Wilson, Lane Ellison, Mark Tobiasson, Melissa Diede, Mike Riffe, Nathan Taylor, Robert Henderson, Robert Miller, Roy Shawgo, Roy Shawgo IV, Ryan Leffel, Scott Ray, Sean Tinker, Soren Bjerregaard, Tom Deines, Trena VanDeHey

"Employer Knowledge-A preproposal draft has been written and handed out to the group.

"George commented that this draft is very similar to the one proposed in 2016. He said that under F(a) and B, they state the word adequate, but they don't define adequate. Adequate is just a substitute for another word. They think that if OSHA can find the violation, then the employer can find it. He thinks that the rule needs more work and not anywhere close to being done.

"If you look at the transcript of when Michael testified at the CBI case, it was reasonable and this proposed rule is nothing that he said in the case.

"He also said that if this gets adopted then you as the employer will have to prove that you didn't have knowledge rather than having OSHA prove that you did.

"He also stated that 75% of citations are based on constructive knowledge; Bryon Snapp said that he did not have the exact percentage is but he says it is over 50%.

"Constructive knowledge is could have known with reasonable diligence.

"Bryon said that this is not a final rule, this is what is proposed and the group will get together and discuss and suggest changes.

"Ian said that the rule makes it sound like employers should just strive for being adequate, not for excellence.

"The group agreed that the group needs to meet before the February 15th Partnership meeting. Even it has to be broken up meet with a few people at a time."

Oregon OSHA Construction Advisory Committee – January 8, 2019

Al Lee, Alta Schafer, Barb Epstien, Bret Taylor, Bryan Ortiz, Bryon Snapp, Chuck Stahl, David Davidson, Dennis Barlow, Dennis Bonin, Emily Crews, Eric Fullan, Jeff Carlson, Jeff Wilson, Jeremy Lawson, Jim Gibson, Laird Blanchard, Lane Ellison, Lisa Pickert, Mark Tobiasson, Melissa Diede, Mike Reno, Mike Riffe, Nathan Taylor, Renee Stapleton, Robert Miller, Roy Shawgo, Rich McMurry, Sean Tinker, Soren Bjerregaard, Stephen Heaven, Tom Deines, Tony Howard, Trena VanDeHey

"Employer Knowledge-There is a small advisory meeting in January and then a partnership meeting in February to discuss the preproposal."

Oregon OSHA Construction Advisory Committee – February 5, 2019

Alta Schafer, Barb Epstien, Barry Moreland, Brad Wolf, Bryan Ortiz, Bryon Snapp, Chris Grover, Dale Lindstrom, Dennis Barlow, Dennis Cox, Ian Chase, Lane Ellison, Mark Hillyard, Mike Riffe, Nathan Taylor, Renee Stapleton, Soren Bjerregaard, Stephen Heaven

"Employer Knowledge-The small advisory group met and Oregon OSHA is hoping to have a draft to this group soon."

Note: There was no March meeting because of the GOSH conference.

Oregon OSHA Construction Advisory Committee – April 2, 2019

Al Lee, Alta Schafer, Barb Epstien, Barry Moreland, Bob Howdbrson, Bryan Ortiz, Bryon Snapp, Chris Ottoson, Chuck Stahl, Clark Vermillion, David Davidson, Dede Montgomery, Dennis Cox, Emily Crews, Eric Bongen, Ian Chase, Jeff Wilson, Jeremy Lawson, Laird Blanchard, Lane Ellison, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Michael Wood, Nick Naramore, Pat Brunson, Paul Magrone, Renee Stapleton, Rick Freese, Robert Miller, Ryan Leffel, Sean Tinker, Stephen Heaven, Steve Fegler, Tony Howard

"Employer Knowledge-The draft hasn't been updated since the last meeting yet. They are working on it and will present the revised draft to the stakeholder group again."

Oregon OSHA Construction Advisory Committee – May 7, 2019

Al Lee, Alta Schafer, Andy Collins, Barb Epstien, Barry Moreland, Bryan Ortiz, Bryon Snapp, Caleb Harris, Chris Ottoson, Clark Vermillion, Dave McLaughlin, Dede Montgomery, Dennis Barlow, Dennis Bonin, Dennis Cox, Emily Crews, Eric Elkins, Ian Chase, Jeff Luyet, Jeremy Lawson, Laird Blanchard, Mark Hillyard, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Megan McDonald, Michael Wood, Mike Riffe, Nathan Taylor, Paul Magrone, Renee Stapleton, Robert Henderson, Robert Miller, Roy Shawgo, Ryan Leffel, Sean Tinker, Soren Bjerregaard, Tony Howard, Will Sims

"The revised draft is being presented to the Partnership Advisory Committee mid-May."

Oregon OSHA Construction Advisory Committee – June 4, 2019

Al Lee, Alta Schafer, Barry Moreland, Blake Reichel, Bryon Snapp, Chris Ottoson, Clark Vermillion, Dave McLaughlin, Demetra Star, Dennis Barlow, Dennis Bonin, Dennis Cox, Emily Crews, Eric Bongen, Julie Love, Laird Blanchard, Lendel Delcid, Lynn Craig, Mark Hillyard, Mark Spring, Mark Tobiasson, Mary Lou Wilson, Melissa Diede, Nathan Taylor, Paul Magrone, Renee Stapleton, Rick Freese, Robert Henderson, Robert Miller, Roy Shawgo, Sean Tinker, Shawna Bergern, Stephen Heaven, Wil Sims

"Employer Knowledge & Penalties-Oregon OSHA is holding a fiscal impact meeting for both topics."

Oregon OSHA Construction Advisory Committee – July 2, 2019

Al Lee, Alta Schafer, Barb Epstien, Barry Moreland, Chris Ottoson, Dave McLaughlin, David Davidson, Dede Montgomery, Emily Crews, Eric Halme, Holt Andron, Jeff Wilson, Kathleen Kincade, Kim Gable, Laird Blanchard, Lendel Del Cid, Logan Grubb, Lynn Craig, Mark Tobiasson, Michael Wood, Mike Riffe, Nathan Taylor, Paul Magrone, Renee Stapleton, Robert Henderson, Sean Tinker, Soren Bjerregaard

"Penalties and Employer Knowledge--Both draft rules have had the language finalized and will go to a fiscal impact committee."

Note: Not mentioned in the minutes for the August 6, September 3, or October 1 meetings.

Oregon OSHA Construction Advisory Committee – November 5, 2019

Al Lee, Alta Schafer, Andy Colins, Barb Epstien, Becky, Blake Reichel, Bri Hume, Brian Ortiz, Bryon Snapp, Clark Vermillion, Connor Toney, Dale Lindstrom, Dave McLaughlin, David Davidson, Dennis Barlow, Dennis Bonin, Dennis Cox, Eric Bongen, Eric Fullan, George Goodman, Ian Chace, Jared Ottinger, Jeff Luyet, Jeff Wilson, Julie Love, Laird Blanchard, Lon Steel, Mark Hillyard, Mark Tobiasson, Mary Lou Wilson, Matt Kaiser, Megan McDonald, Michelle Brunetto, Nathan Taylor, Pat Brunson, Paul Johnston, Paulo Pinto, Rick McMurry, Robert Henderson, Roy Shawgo, Ryan Leffel, Tony Hannan, Tony Howard, Troy Stroud

"Employer Knowledge and Penalty Updates-There is a Fiscal Impact Advisory Committee that will meet in January."

Oregon OSHA Construction Advisory Committee – December 3, 2019

Al Lee, Alta Schafer, Andy Colins, Barb Epstien, Blake Reichel, Bryan Ortiz, Bryon Snapp, Chris Grover, Chris Jordan, Chris Miller, Dale Lindstrom, David Davidson, David Palmer, Dennis Barlow, Dennis Bonin, Eric Bongen, Jacob Tijerina, Jake Errico, Jared Ottinger, Jeff Wilson, Jeremy Lawson, Laird Blanchard, Lon Steel, Mark Hillyard, Mark Melton, Mark Tobiasson, Mary Lou Wilson, Michael Wood, Mike Riffe, Nathan Taylor, Paul Magrone, Renee Stapleton, Robert Miller, Steve Barrett, Steven Heaven, Steve Spurlock, Stone Travis, Tony Hannan, Tony Howard, Troy Stroud, Warren Jackson

"Employer Knowledge and Penalty Updates-There is a Fiscal Impact Advisory Committee that will meet in January to discuss both of these subjects."

Oregon OSHA Construction Advisory Committee – January 7, 2020

Al Lee, Alta Schafer, Andy Colins, Anna Kelly, Barb Epstien, Barry Moreland, Blake Reichel, Bri Hume, Brian Ortiz, Bryon Snapp, Chris Jordan, Chris Miller, Chris Ottoson, Clark Vermillion, Dale Lindstrom, David Davidson, David Palmer, Dede Montgomery, Dennis Barlow, Dennis Cox, Emily Crews, Eric Connelly, Eric Fullan, Jake Errico, Jared Ottinger, Jeff Wilson, Jeremy Lawson, Judy Cushing, Laird Blanchard, Lane Ellison, Lynn Craig, Mark Spring, Mark Tobiasson, Mike Jacobs, Nathan Taylor, Nevin McLain, Pat Brunson, Paul Magrone, Renee Stapleton, Robert Henderson, Robert Miller, Roy Shawgo, Sean Tinker, Steve Barrett, Stephen Heaven, Steve Spurlock, Tom Sowa, Tony Howard, Will Sims

"Employer Knowledge and Penalty Updates-There is a Fiscal Impact Advisory Committee that will meet in January to discuss both of these subjects."

CASE Heather * DCBS

From: WOOD Michael * DCBS
Sent: Friday, March 6, 2020 1:08 PM
To: WESCOTT Sky I * DCBS; CASE Heather * DCBS; STAPLETON Renee M * DCBS; MCLAUGHLIN Dave * DCBS
Subject: FW: Employer Knowledge Rule

Also FYI and for the record

From: WOOD Michael * DCBS
Sent: Friday, March 6, 2020 1:04 PM
To: 'Kay King' <kay@rrking.net>
Subject: RE: Employer Knowledge Rule

Kay,

My use of the phrase "rulemaking package" refers to the rulemaking filing itself, which can be found at https://osha.oregon.gov/OSHARules/proposed/2020/ltr-proposed-employer-knowledge.pdf..

The current issue of the Oregon OSHA Resource can be found at https://osha.oregon.gov/OSHARules/proposed/2020/ltr-proposed-employer-knowledge.pdf.

Michael

Michael Wood, Administrator
Oregon OSHA
Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

From: Kay King <kay@rrking.net>
Sent: Friday, March 6, 2020 12:58 PM
To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: RE: Employer Knowledge Rule

Michael
Where does one obtain the "rulemaking package"?
And may I request a copy of the Oregon OSHA Rescource?
Thanks
Kay King
PO Box 219
Florence, OR 97439

From: WOOD Michael * DCBS [mailto:Michael.Wood@oregon.gov]
Sent: Friday, March 06, 2020 12:39 PM
To: Kay King
Cc: CASE Heather * DCBS; STAPLETON Renee M * DCBS; MCLAUGHLIN Dave * DCBS; WESCOTT Sky I * DCBS
Subject: RE: Employer Knowledge Rule

EXHIBIT D-2

Kay,

The rulemaking package explains the context of the rule, and we will be providing additional information at the hearings themselves (as well as in the soon-to-be published issue of the *Oregon OSHA Resource*).. For the time being, that is the only answer I can provide to your questions about the purpose of the rule (which really appear to be a single question). Ultimately, I will need to make a decision about whether to adopt the rule as proposed, adopt a revised version of the proposal, go back to redevelop a new proposal, or discontinue the rulemaking effort altogether.

Because I will ultimately be the decision maker on the rule, and because comments and responses can sometimes be misconstrued to indicate that a final decision has been made and what that final decision will be, I will not be engaging in any extended discussion about the rule and the arguments for or against it until such a decision has been made.

Michael

Michael Wood, Administrator
Oregon OSHA
Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

From: Kay King <kay@rrking.net>
Sent: Wednesday, March 4, 2020 11:42 AM
To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: RE: Employer Knowledge Rule

Michael
Thank you for your timely response.
I have printed the hearing dates and locations.
I do not see where discussion or input was included in the Partnership Group or CAC meetings?
I still would like for you to answer my question from my original email
That is restated below:

What is your intent in proposing this new ruling?
What are Your goals in proposing yet another rule?
Why is there need for this rule? What are you hoping to gain from this rule that you do not already have?

Thank you
Kay King

From: WOOD Michael * DCBS [mailto:Michael.Wood@oregon.gov]
Sent: Wednesday, March 04, 2020 11:27 AM
To: Kay King
Cc: CASE Heather * DCBS; WESCOTT Sky I * DCBS; MCLAUGHLIN Dave * DCBS; LOVE Julie A * DCBS; STAPLETON Renee M * DCBS
Subject: RE: Employer Knowledge Rule

Kay,

Thank you for your e-mail. To answer your question about the status of the proposal, we filed it as a formal proposal last week. Because the rule has been formally proposed and the formal comment period is now open, I am forwarding your e-mail to the affected rulemaking staff to be included in the formal record. However, that does not prevent you from making additional comments on the record during the public comment period.

The rulemaking filing, which includes the formal "statement of need," as well as the text of the proposed rule and the hearing and public comment schedule, can be found at https://osha.oregon.gov/OSHARules/proposed/2020/ltr-proposed-employer-knowledge.pdf. I would note that the description of the background currently includes a mistaken reference to a decision by the "Court of Appeals" – the key decision was in fact made by the Oregon Supreme Court.

With regard to the conversations about the potential rule proposal with the Construction Advisory Committee, you appear to have been given inaccurate or incomplete information. I have attached a document that includes references to the rule taken from the minutes of a number of CAC meetings over the five-year period that the rule has been in discussion.

To provide some further context, I have included (below) the text of a note that we sent to the Partnership Group and the Construction Advisory Committee last Wednesday about the decision to move ahead with proposing the rule.

Thank you for taking the time to make your feelings known.

Michael

Michael Wood, Administrator
Oregon OSHA
Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

"Good afternoon everyone,

I wanted to let you all know that I approved our filing of the proposed Employer Knowledge rule today. I do not lightly disregard the concerns expressed by those who spoke at the last CAC and those who contacted me directly, as well as the recommendation by the employer representatives on the Partnership Group who voted that the rulemaking be delayed. However, I — along with the worker representatives who voted on the same motion — believe the time has come to move forward with a formal proposal.

In response to at least some of the written comments and discussion, I do want to emphasize that the draft rule is only NOW a proposed rule. There has been no formal proposal until this point. And the public comment period is decidedly not over — in the formal sense, it is just now beginning. So the decision about whether to adopt the rule is not yet made, nor could it be.

I know some of you will be disappointed by this decision, and it is not one I take lightly. But I do firmly believe the time has come to take the next step in the rulemaking process.

Michael"

From: Kay King <kay@rrking.net>
Sent: Tuesday, March 3, 2020 4:32 PM

To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: Employer Knowledge Rule

Dear Michael

I am writing with concerns over the proposed new "Employer Knowledge" rule.

Words like "reasonable diligence" make my skin crawl. It's absurd the further I read in the proposed rule when I consider it suggests we take reasonable care and
As if we had known of the incident ahead of time. It suggests that that the employer could have taken reasonable care assuming we knew what the violation was
And assumes it could have been forseen ahead of time.

I am very concerned to learn that it appears the proposed rule was not brought to the CAC committee before it was essentially put into final form.
You mentioned recently that " the ship had already sailed". Does that mean you would be proposing this without bringing it up to CAC for input in a timely order of events?

The verbiage of this proposed rule is extremely frightening to an employer dealing with 75 employees, all of whom are working on sides independently
From each other. The wording includes words like "person in control"." any manager" or "lead worker." It creates even stricter liability for employers for the volitive acts of its employers , or "agents.

I've been a little busy fighting the Gross Receipts Tax which will tax every dollar coming in our doors—not the profit left. And the Cap and Trade bill which would zap an extra .72 cent /gallon tax on our fuel. Both of Which in our industry would constitute
Many businesses, like ours, to consider shutting our doors. As a result, this proposed new OSHA rule has just come to my attention.

Can you please give me an update on where this proposed rule is at this point?
What is your intent in proposing this new ruling? Your goals in proposing yet another rule?

Thank you.
Kay King

CASE Heather * DCBS

From: WOOD Michael * DCBS
Sent: Friday, March 6, 2020 1:07 PM
To: WESCOTT Sky I * DCBS; MCLAUGHLIN Dave * DCBS; CASE Heather * DCBS; STAPLETON Renee M * DCBS
Subject: FW: Employer Knowledge Rule

FYI and for the record

From: Kay King <kay@rrking.net>
Sent: Friday, March 6, 2020 12:55 PM
To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: RE: Employer Knowledge Rule

Alright, Michael, I respect that.
Kay

From: WOOD Michael * DCBS [mailto:Michael.Wood@oregon.gov]
Sent: Friday, March 06, 2020 12:39 PM
To: Kay King
Cc: CASE Heather * DCBS; STAPLETON Renee M * DCBS; MCLAUGHLIN Dave * DCBS; WESCOTT Sky I * DCBS
Subject: RE: Employer Knowledge Rule

Kay,

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Michael

Michael Wood, Administrator
Oregon OSHA
Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

From: Kay King <kay@rrking.net>
Sent: Wednesday, March 4, 2020 11:42 AM

EXHIBIT D-3

To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: RE: Employer Knowledge Rule

Michael
Thank you for your timely response.
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I do not see where discussion or input was included in the Partnership Group or CAC meetings?
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Sent: Wednesday, March 04, 2020 11:27 AM
To: Kay King
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Subject: RE: Employer Knowledge Rule

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Thank you for taking the time to make your feelings known.

Michael

Michael Wood, Administrator
Oregon OSHA

Department of Consumer and Business Services
(503)947-7400 (desk)
(503)707-0996 (mobile voice and text)

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Sent: Tuesday, March 3, 2020 4:32 PM
To: WOOD Michael * DCBS <Michael.Wood@oregon.gov>
Subject: Employer Knowledge Rule

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From each other. The wording includes words like "person in control"." any manager" or "lead worker." It creates even stricter liability for employers for the volitive acts of its employers , or "agents.

I've been a little busy fighting the Gross Receipts Tax which will tax every dollar coming in our doors—not the profit left.

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Many businesses, like ours, to consider shutting our doors. As a result, this proposed new OSHA rule has just come to my attention.

Can you please give me an update on where this proposed rule is at this point?
What is your intent in proposing this new ruling? Your goals in proposing yet another rule?

Thank you.
Kay King

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,

EXHIBIT D-4

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
Direct: (503) 294-9168 | Fax: (503) 220-2480
ana.trask@stoel.com | www.stoel.com

CASE Heather * DCBS

From: WESCOTT Sky I * DCBS
Sent: Wednesday, March 18, 2020 5:15 PM
To: 'Troy Stroud'
Subject: RE: "reasonable diligence" and "unpreventable employee misconduct"

Mr. Stroud,

Thank you for your email. Regarding your inquiry into an extension of the comment period for our Employer Knowledge rulemaking, Oregon OSHA is currently taking action to reschedule our public hearings due to cancellations by the venues in light of the current COVID19 status, and will be extending our comment period. A notice was sent 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. If you have not already done so, you may review the proposed rule documents and the text of the proposed rule on the Oregon OSHA website here: https://osha.oregon.gov/OSHARules/proposed/2020/ltr-proposed-employer-knowledge.pdf

Thank you for taking the time to make your feelings known. I am adding your comment to the formal record.

Please let me know if I can be of any other assistance.

Sincerely,

Sky Wescott
Oregon OSHA
Technical Section
503-378-3272 (main)
503-947-7440 (desk)

From: Troy Stroud <troy.stroud@essexgc.com>
Sent: Wednesday, March 18, 2020 2:58 PM
To: WESCOTT Sky I * DCBS <Sky.I.Wescott@oregon.gov>
Cc: –tech.web@oregon.gov <???tech.web@oregon.gov>
Subject: "reasonable diligence" and "unpreventable employee misconduct"

Dear Ski,

I am writing to ensure that comment time will be extended due to the cancellation of the public hearings. I am apposed to the current administrative rule changes as they try to usurp previously decided case law. As a member of the construction community I request that the hearings be extended into the foreseeable future to allow for full participation in the current discussion.

EXHIBIT D-5

Thank you,

Troy Stroud
Safety Director
Essex General Construction Inc
troy.stroud@essexgc.com
Phone: 541-342-4509 | Fax: 541-342-6938
Mobile: 541-844-6337

www.essexgc.com | Eugene | Portland
4284 W 7th Ave Eugene, OR 97402

Essex
GENERAL CONSTRUCTION, INC.
CCB# OR 54531 | WA ESSEXGC852JC

Stoel Rives LLP

March 18, 2020

Guy J. Thompson
D. 503.294.9278
guy.thompson@stoel.com

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 Heath ("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,

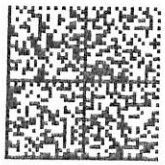
/s/ Guy J. Thompson

EXHIBIT D-6

Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205

CERTIFIED MAIL®

9414 7266 9904 2162 7073 41



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0000346489 MAR 18 2020

RETURN RECEIPT REQUESTED

Ms. Heather Case
Mr. Sky Wescott
Oregon Occupational Safety and Health
350 Winter St NE
Salem, OR 97309-0405

CASE Heather * DCBS

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

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
Direct: (503) 294-9168 | Fax: (503) 220-2480
ana.trask@stoel.com | www.stoel.com

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 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 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.**

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

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-based[7] 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 follows[8]:

> 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 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.

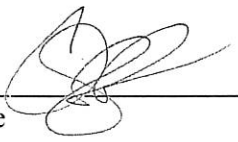
Similarly, OR-OSHA proposes amending OAR 437-001-0740 to give the Administrator discretion to impose a maximum penalty of $135,538 when an employer "fail[s] to keep the records, post the summaries, or make the reports required by OAR 437-001-0700 . . . or 437-001-0706" if the violation is determined 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-8

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 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.**

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.

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:

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[2] *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).
[3] *Id.* at 836.

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

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-based[7] 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

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[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)(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.

* * * * *

~~[(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

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;

(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.[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

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

Temco Engineered Products, Inc.
Company

August 3, 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 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-9

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 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.**

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

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-based[7] 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 follows[8]:

> 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.

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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

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 you 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

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**.

EXHIBIT D-10

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
Massage Envy TeamLaszlo
www.teamLaszlo.com
+1.360.399.6545

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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

Massage Envy TeamLaszlo

www.teamLaszlo.com

+1.360.399.6545

--

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!

We have received your comments on the proposed rules related to employer penalties and employer knowledge. Thank you very much for you 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: 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,

EXHIBIT D-11

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

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

Massage Envy TeamLaszlo

www.teamLaszlo.com

+1.360.399.6545

--

Laszlo Szalvay
Massage Envy TeamLaszlo
www.teamLaszlo.com
+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

EXHIBIT D-12

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

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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
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.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 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-13

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 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.**

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

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-based[7] 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 follows[8]:

> 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,

Elizabeth Fujas

Signature

Elizabeth Fujas

Name

Rising Sun Farms, Inc

Company

1/25/20

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:

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EXHIBIT D-14

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 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.**

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.**
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> **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. <u>The proposed definition of "reasonable diligence" imposes a strict liability standard that is contrary to the language of the OSEA.</u>

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-based[7] 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

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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.

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.
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> 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 follows[8]:

> 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.

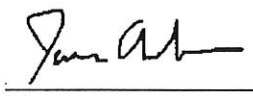
OR-OSHA proposes an amendment to OAR 437-001-0170 to give the Administrator the discretion to assess a penalty of up to $135,382 for any "willful" failure to report an occupational fatality, catastrophe, or accident. Under the current rule, the maximum penalty is $12,675. OR-OSHA understated the proposed 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,



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
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 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 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.**

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

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> **(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.**
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(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.

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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]

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

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-based[7] 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.

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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.

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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 follows[8]:

> 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,

Signature

LAVINIA PETRE

Name

HILLSBORO AERO ACADEMY

Company

07/30/2020

Date

HILLSBORO AERO
ACADEMY
3565 NE Cornell Road
Hillsboro, OR 97124

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MAILED FROM ZIP CODE 97124

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

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97301$3882 C017

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-16

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 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.**

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

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-based[7] 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

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[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.

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

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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.

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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,

Becky Van Atta
Chief Financial Officer
Vanco Contracting, LLC

July 31, 2020

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

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> **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.

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:

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[2] *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).
[3] *Id.* at 836.

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

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-based[7] 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

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[4] *Id.*
[5] *Id.* at 838.
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[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)(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.

* * * * *

~~[(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

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;

(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.[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

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

ROB OAGNON

Name

N.W. CALIBER INC.

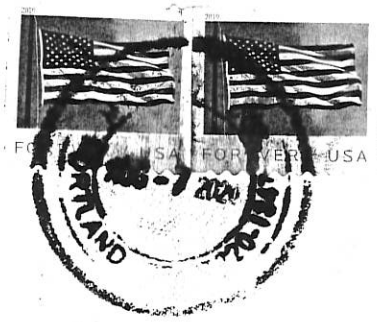
Company

8-7-2020

Date

NW Caliber, Inc.
accuracy integrity quality

16179 SE 98th Avenue, Bldg. A
Clackamas, Oregon 97015



O.S.H.A.
350 WINTER ST. N.E.
SALEM, OR. 97301-3882

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 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-18

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 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.**

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

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-based[7] 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

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[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 follows[8]:

> 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 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

Wayne Watson
Name

LIT Workshop
Company

8/6/2020
Date

Freres
LUMBER CO., INC.
"An Equal Opportunity Employer"
P.O. Box 276 / Lyons, Oregon 97358
503-859-2121
Fax 503-859-2112

August 17, 2020

By Email: Gary.L.Robertson@oregon.gov
Tech.Web@oregon.gov

Gary L. Robertson
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 Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Mr. Robertson:

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) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

I. Comments on Oregon OSHA's Proposed Amendment to OAR 437-001-0135 regarding the Evaluation of Probability to Establish Penalties.

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

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(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.

Compliance officers lack the training and experience to identify what is "normal." Very frequently the compliance officer inspecting a site has no practical work experience in the trade/industry being inspected. We are also concerned that "normal" is not a defined term. There will be no consistency between compliance officers evaluating similar situations, not to

mention likely inconsistencies among the judgments over time of a given compliance officer. The idea that a compliance officer can fairly and consistently judge "normal" is, simply put, absurd.

The proposed changes appear to be designed to prevent the independent trier of fact from actually evaluating, and potentially adjusting, 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 present ORS 654.086(2) requires that OR-OSHA establish that there is 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 conclusion regarding probability, and these factors should be designed so as to be reviewable by an administrative law judge to ensure that the probability determination fairly reflects the circumstances on the worksite under scrutiny.

If OR-OSHA concludes that it is likely a serious injury would occur as a result of a violation, 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, or arbitrarily concludes is "normal." We ask OR-OSHA to revise these proposed amendments. An employer's statutory right to have the penalty set by OR-OSHA reviewed by a judge in an independent proceeding cannot be negated through an administrative rule that purports to make compliance officers' excessive discretion into the final word.

II. Comments on Proposed Rule Changes Whereby 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 without any checks and balances to guard against abuse. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740 are unjustified, and again, likely beyond the statutory authority of the agency. These proposed changes would give the Administrator unconstrained discretion to unilaterally 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 completely unjustified. These proposals essentially give Oregon OSHA the ability to destroy small businesses. Most disturbing, however, is that OR-OSHA does not even purport to provide a meaningful statement of need for such draconian discretion being given to its Administrator. There is no evidence indicating that increasing penalties in this manner 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 law for a comparable reporting 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. No penalty increase is needed in this area in Oregon. We consider a maximum penalty matching that of the federal system to be understandable due to the "at least as effective as" requirement imposed on State OSHA systems. Going over $100,000 above that maximum is an alarming attempted power grab by OR-OSHA.

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." That is an outrageous proposal for a record keeping violation. The current maximum penalty is $1,000 per violation. OR-OSHA gives no meaningful explanation for this proposed rule change.

These kinds of paperwork violations are not directly related to encouraging the employer to provide employees with a safe and healthy work environment. 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 financial impact as significant because it does not foresee imposing the penalty on a frequent basis. This allegation ignores the reality that imposing it just once involves a huge amount of money. There is no legitimate regulatory purpose for such a huge increase being tied to paperwork violations, and certainly no justification for a penalty of up to $135,538. We propose that OR-OSHA adjust the proposed rule to a "not to exceed $5,000" penalty for such willful 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 impose the maximum penalty. We believe that the proposed penalty increase is unjustifiably high. We suggest that any proposed regulations in this area set forth the specific factors that justify the Administrator exercising his/her discretion by imposing a penalty greater than the minimum rather than giving the Administrator unfettered discretion to decide how large the penalty should be against a particular employer. Again, there is no consistency among penalties assessed against various employers when the only criteria is how the Administrator feels on a given day.

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,

Robert Freres Jr

Signature

Robert Freres, Jr

Name

Freres Lumber Co. Inc.

Company

8/17/2020

Date

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

woodgrain lumber

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 provides[1]:

[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-20

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

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.

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

woodgrain lumber

(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.

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Lumber Division
1917 Jackson Ave.
La Grande, Oregon 97850

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

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[2] *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018).
[3] *Id.* at 836.
[4] *Id.*
[5] *Id.* at 838.
[6] *Id.*

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

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

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[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*).

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

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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Lumber Division
1917 Jackson Ave.
La Grande, Oregon 97850

> **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.

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

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

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

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
1917 Jackson Ave.
La Grande, Oregon 97850

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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

woodgrain lumber

Sincerely,

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

woodgrain
1917 Jackson Ave
La Grande, OR 97850

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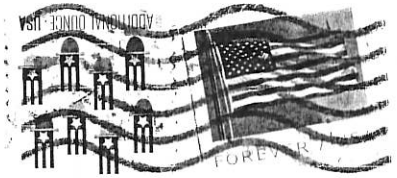

Sky Westcott
Oregon - Occupational Health + Safety Division
Oregon Dept. of Consumer + Business Services
350 Winter Street NE
Salem, OR 97301-3882

97301-387599

August 17, 2020

By Email: Gary.L.Robertson@oregon.gov
Tech.Web@oregon.gov

Gary L. Robertson
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 Increase of Certain Minimum and Maximum Penalties for Alleged Violations

Dear Mr. Robertson:

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) Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.

I. Comments on Oregon OSHA's Proposed Amendment to OAR 437-001-0135 regarding the Evaluation of Probability to Establish Penalties.

We object to the proposed amendments to OAR 437-001-0135, which would base penalties on the subjective opinions of OR-OSHA's compliance officers, 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;

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(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.

Compliance officers lack the training and experience to identify what is "normal." Very frequently the compliance officer inspecting a site has no practical work experience in the trade/industry being inspected. We are also concerned that "normal" is not a defined term. There will be no consistency between compliance officers evaluating similar situations, not to mention likely inconsistencies among the judgments over time of a given compliance officer. The idea that a compliance officer can fairly and consistently judge "normal" is, simply put, absurd.

The proposed changes appear to be designed to prevent the independent trier of fact from actually evaluating, and potentially adjusting, 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 present ORS 654.086(2) requires that OR-OSHA establish that there is 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 conclusion regarding probability, and these factors should be designed so as to be reviewable by an administrative law judge to ensure that the probability determination fairly reflects the circumstances on the worksite under scrutiny.

If OR-OSHA concludes that it is likely a serious injury would occur as a result of a violation, 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, or arbitrarily concludes is "normal." We ask OR-OSHA to revise these proposed amendments. An employer's statutory right to have the penalty set by OR-OSHA reviewed by a judge in an independent proceeding cannot be negated through an administrative rule that purports to make compliance officers' excessive discretion into the final word.

II. Comments on Proposed Rule Changes Whereby 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 without any checks and balances to guard against abuse. Specifically, the proposed changes to OAR 437-001-0170, OAR 437-001-0180, OAR 437-001-0225, and OAR 437-001-0740 are unjustified, and again, likely beyond the statutory authority of the agency. These proposed changes would give the Administrator unconstrained discretion to unilaterally 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 completely unjustified. These proposals essentially give Oregon OSHA the ability to destroy small businesses. Most disturbing, however, is that OR-OSHA does not even purport to provide a meaningful statement of need for such draconian discretion being given to its Administrator. There is no evidence indicating that increasing penalties in this manner 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 law for a comparable reporting 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. No penalty increase is needed in this area in Oregon. We consider a maximum penalty matching that of the federal system to be

understandable due to the "at least as effective as" requirement imposed on State OSHA systems. Going over $100,000 above that maximum is an alarming attempted power grab by OR-OSHA.

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." That is an outrageous proposal for a record keeping violation. The current maximum penalty is $1,000 per violation. OR-OSHA gives no meaningful explanation for this proposed rule change.

These kinds of paperwork violations are not directly related to encouraging the employer to provide employees with a safe and healthy work environment. 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 financial impact as significant because it does not foresee imposing the penalty on a frequent basis. This allegation ignores the reality that imposing it just once involves a huge amount of money. There is no legitimate regulatory purpose for such a huge increase being tied to paperwork violations, and certainly no justification for a penalty of up to $135,538. We propose that OR-OSHA adjust the proposed rule to a "not to exceed $5,000" penalty for such willful 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 impose the maximum penalty. We believe that the proposed penalty increase is unjustifiably high. We suggest that any proposed regulations in this area set forth the specific factors that justify the Administrator exercising his/her discretion by imposing a penalty greater than the minimum rather than giving the Administrator unfettered discretion to decide how large the penalty should be against a particular employer. Again, there is no consistency among penalties assessed against various employers when the only criteria is how the Administrator feels on a given day.

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

John Myers

Name

Company Roseburg Forest Products

8/07/20

Date

From:	John Myers
To:	ROBERTSON Gary L * DCBS; DCBS WEB TECH * DCBS
Subject:	Roseburg Forest Products comments on proposed penalty increases
Date:	Tuesday, August 18, 2020 7:40:24 AM
Attachments:	image001.gif Roseburg Forest Products comments on proposed increase of minimum and maximum penalties.pdf

Mr. Robertson, please see the attached concerns and comments on behalf of Roseburg Forest Products related to the proposed increase of minimum and maximum penalties for alleged violations.

Thank you for your review and consideration.

John

John Myers
Director of Environmental Health and Safety
johnmy@rfpco.com
Cell 541.409.7028
Desk 541.679.2708 x 52708