



Oregon OSHA Decision-making Framework on COVID-19 Temporary Rulemaking

Background

As a result of the immediate risks highlighted by the current public and occupational health crisis, Oregon OSHA is developing an enforceable workplace health temporary rule addressing COVID-19, with the expectation that the rule will be in place by September 1, 2020.

Oregon OSHA plans to rely upon as much collaboration and consultation with experts and stakeholders as the timeframes involved and other circumstances allow. However, Oregon OSHA will ultimately need to make a decision on a wide range of issues in order to determine exactly which provisions to include in the temporary rule. In order to better describe the context in which such decisions must be made, Oregon OSHA has developed this summary framework, consisting of several critical principles.

Principle 1: COVID-19 is a genuine hazard, not only in a broad public health sense, but also in relation to individual workers in a wide variety of workplaces.

While certain questions about the nature and details of the hazard will no doubt continue to be the subject of public health debate for many years to come, Oregon OSHA approaches this rulemaking with the clear recognition that COVID-19 is a genuine hazard, and it is a hazard (although perhaps to varying degrees) to everyone of working age who might encounter it. While the risk of death or long-term effects may be more serious for those with certain pre-existing conditions or for older workers, no worker is free from risk when encountering the disease.

Principle 2: It is not possible for even the most well-crafted rule to eliminate the risks of contracting COVID-19 in the workplace.

Even if resources were unlimited, no activity that involves contact between people will ever be free of risk. In developing the temporary rule, Oregon OSHA recognizes that the only realistic goal of a rule addressing COVID-19 in the workplace is risk reduction, not risk elimination. That is true of almost every rule, but certain rules provide a greater level of certainty that if the employer and the workers both follow the regulatory provisions, there is almost no chance of a related injury. But other rules – those involving the use of motor vehicles on our roads and highways, for example – must rely upon strategies to significantly reduce the risk of death or serious physical injury, even though those risks clearly cannot be eliminated. COVID-19 falls into the latter category – risk reduction.

Principle 3: When risks cannot realistically be eliminated, providing workers as much information about those risks as possible is greatly preferred over uninformed risk where workers are not provided such information.

Workplace health and safety regulations do not rely upon the acceptance of risks, even by the “informed consent” of workers, because the workplace itself creates an inherent pressure that restricts the freedom of such choices. However, to the degree that risks cannot be eliminated, workplace health and safety rules place a premium on informing workers about applicable risks and ensuring that they understand the reason for the protective measures that they are being required to apply. COVID-19 demands such sharing of information with workers.

Principle 4: In the context of temporary rulemaking, the assessment of feasibility – while necessarily abbreviated – must be conducted deliberately and thoughtfully

In rulemaking, the concept of “feasibility” refers to the financial and technical ability of an industry – or any group of employers – to collectively implement the rule being considered. Even if a rule represents a feasible choice for the industry and for normal operations, “infeasibility” – at least of the technical kind – remains a defense for employers otherwise subject to citation. Put simply, workplace health and safety rules never prohibit the work in question from being performed. If it truly cannot be performed in accordance with the rule in question, then it must be performed as safely as possible.

Therefore, in developing a temporary rule to address an impending emergency, Oregon OSHA may need to make compromises as to the level of worker protection that is feasible. Also, Oregon OSHA will need to make those assessments more conservatively in the recognition that employers face exceptional resource constraints in the current emergency that may make provisions that are entirely appropriate for a longer term or permanent rule infeasible in the context of a temporary rule.

Principle 5: Oregon OSHA’s regulation of a workplace – and the employer’s compliance with those regulations – cannot preclude the need for more sweeping public health regulation.

Obviously, in the context of closures ordered by those with authority over the broader public health, the question of feasibility is subject to those broader concerns, and the limitations on workplace health and safety regulation are no longer appropriate. Just as workplace use of a chemical that has been banned from all use is prohibited without regard to questions of feasibility, employers who have been directed to close or otherwise modify their operations by another public entity must do so and are subject to Oregon OSHA enforcement activity to the degree that workers are put at risk by their failure to do so – and without regard to any infeasibility defense that might otherwise be mounted.

This means that questions of whether particular activities should simply be prohibited remain within the scope of the Oregon Health Authority and the Governor’s Office. When one recognizes that Oregon OSHA’s own rulemaking will be restricted by the feasibility concerns already described, it is important to recognize that the presence of and compliance with Oregon OSHA rules does not guarantee that the activity is sufficiently safe to continue. Rather, the Oregon OSHA rule *presumes* the work must continue and is structured accordingly. In the current pandemic, it has proven necessary – and may well again be appropriate – to suspend certain work activities. The fact that Oregon OSHA itself will not make such a determination does not mean that it cannot or should not be made by others who are considering the broad public health context.