

Penalties Advisory Committee, SB 592 Implementation

July 20 2023, 1:00 pm – 3:00 pm

ZoomGov Meeting

Attendees

Oregon OSHA: Dave McLaughlin, Dennis Cherepanov, Greig Lowell, Jennifer Stewart, Julie Love, Kate Ryan, Lisa Appel, Matt Kaiser, Renee Stapleton, Theodore Bunch, Tracy Brown

Amanda Dalton, Betsy Earls, Bill Perry, Brian Clarke, Catie Theisen, Derek Sangston, Devon Morales, Elizabeth Remley, Erin Seiler, George Goodman, Hayley Watson, Ira Cuello-Martinez, Jamie P, Jean Jablonski, Jenny Dresler, Jesse Neilson, Jim Anderson, Josh Nasbe, Kate Suisman, Kevin Lyons, Kirsten Adams, Leila Wall, Lesley Tamura, Leslie, Liz Marquez Guitierrez, Maria Venegas, Mark Dvorscak, Mike Jacobs, Nargess Shadbeh, Nicole Mann, Nikodemus Corvus, Odalis Aguilar, Prociwkn, Sammi Teo, Steven Melton, Tasha Chapman, Thomas Baker, Tony Howard, Wayne Oja, Whitney Perez

Agenda

1:00-1:05 Opening, Welcome and General Information
1:05-1:45 Civil Penalties – SB592
1:45-2:50 Division 1 Changes
2:50-3:00 Next Steps

Jennifer Stewart started the meeting at 1:02 p.m.

1:00-1:05 Opening, Welcome and General Information

- Introductions
- Review of the information/resources for the meeting
 - Oregon OSHA Division 1 rule 7-20-23
 - Bulletin 1 Sample 7-20-23
 - Serious Penalty Matrix 7-20-23

1:05-1:45 Civil Penalties – SB592

- Summary provided of the 5 options for the serious civil penalty with \$1116 to \$15625. This is not inclusive of the section of 592 that talks about if it is a serious for cause. It is a baseline serious piece. Shaded areas show where the penalty amount is the same as either the minimum or the maximum. Appeals specialists will continue to have discretion during settlements to make modifications as long as it falls within the minimum and maximum.
 - Option A is similar to Fed citation framework. They look at different things than Oregon OSHA does.
 - Option B: is the base is the minimum.
 - Option C: Base 3X Minimum with Fed OSHA
 - Option D: Base 2X Minimum
 - Option E: Base 3X Minimum
- RAC comments and feedback
 - Good Faith Effort; Size; History; Immediate Correction are currently used to consider penalties.

- We would look at employer’s good faith efforts (consultation, other mitigation of hazards, engaged with other safety/health professionals), could be a 10 or 20% reduction. If an employer is not showing these efforts (showing poor faith), could be a 10 or 20% increase.
 - Q. Room for negotiations and appeals: how will these categories be used in appeals?
 - If the base is the minimum, there would be no opportunity to negotiate the dollar amount. Oregon OSHA does not generally change the level of severity as negotiation. Fed OSHA does not have any numbers in their statute. Fed OSHA has the ability during settlement discussions and also takes into account history and good faith.
 - Q. What is meant by “average” and “good faith”? What is the primary purpose of these matrices?
 - There are some restrictions/limitations in our rules on applying good faith. Matrix is meant to be useable by Oregon OSHA field staff. It is not always our goal to have negotiations in settlements, but it is discussed.
 - Comment. We want amounts to be true deterrents. We are not in favor of low base amounts.
 - Clarification: If percentages (reductions) are applied, they are applied before the citation is issued (Fed OSHA and Oregon OSHA). When the employer gets the citation, size is already taken into account.
 - Members in favor of Option B.
 - Members in favor of Options A, C, E for a higher base amount.
 - Workers are really discouraged by low penalties. Low penalties result in discouragement of the workers speaking up and complaining.
- Willful, repeat and for cause requirements
 - RAC comments and feedback
 - Summary of Annual Penalty Bulletin
 - Part of the legislation is that penalties are adjusted annually. Table in bulletin would change using the Consumer Price Index for October data and effective the following January.
 - RAC comments and feedback

1:45-2:50 Division 1 Changes

- Review Division 1 changes SB592
 - SB592 Color coded categories
 - Green – Comprehensive inspections
 - Purple – Penalties
 - Teal – Annual penalty increases
 - Orange and Blue - Penalties, work related fatalities and willful violations
 - RAC comments and feedback
- New inspection type: Programmed Inspection for Cause
 - There are three triggers that would invoke the new type of inspection from the bill. These include three or more willful or repeat when the violation caused or contributed to a fatality, and when deemed necessary.
 - Comment. Use of the word “systemic” is problematic and challenging. Suggest defining, swapping out that word, or removing it. Consider “based on a significant history” or “history within the previous six months of the opening conference.”

- Annual Adjustment of Civil Penalties
 - OSHA: Possibly remove penalty amounts from the rule as things change. Have the base amounts in the bulletin. Rule section would clarify what could be found in the bulletin and would link to the bulletin. Is it helpful to have an exception to what would be included in the bulletin in there? Those without a probability or severity do not get captured in the bill.
 - Members: The rule should be really clear that these amounts will be adjusted annually for inflation. [In regards to exception] Yes, would be confusing and misleading without clearer language. Suggest removing specific numbers out of the rule so it doesn't need updated every year. Instead, link to the bulletin. Numbers in the rule would be misleading as they become outdated.
 - Suggest separately defining the words "caused" or "contributed to" in draft language table and rule.

 - Base civil penalty table shown

OSHA: Having the starting point in the rule would be helpful to the user.

 - Updated text regarding "caused or contributed"
 - Suggest separately defining the words "caused" or "contributed to" in draft language table and rule.
 - Q. Is the analysis that the penalty is the same whether it was "caused" or if it "contributed"?
 - A. Yes. There is not a distinction based on how the bill is written.
 - Q. Is there a low end to what "contributed to" means? Consider defining "substantial" to clarify.
 - Comment. Instead say a "substantial factor that may or may not be the predominant or sole factor."

 - Updated text regarding exemption with emphasis program defined in OAR 437-001-0057

 - Programmed Inspection for Cause section has been added throughout rule

 - Exempt from any scheduled inspection
 - Text is the same, changed from note to part of the rule.

 - Addition of programmed inspections
 - Comment. [Although not part of the legislation,] suggest with Subsections A and B you have a time period to start the one year period, have same start point trigger in the repeat rule (3 years).
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- Review Division 1 changes SB907
 - SB907 Color coded categories
 - Red – Refusal of work
 - Two options: Federal OSHA Language and BOLI Language
 - RAC comments and feedback
 - Q. Suggest using BOLI rule language instead of possibly updating it to align with Fed OSHA. BOLI is already trained on their own rules.

- Fed OSHA's verbiage provided per request, and Option B, BOLI language was discovered. SB907 specifically tells us to be in line with Fed OSHA.
- Comment. First sentence is unnecessary and can be removed. Remove "imminent." Add environmental/climate factors to "other factors." We would like to know the history to "dangerous."
- A. We have tried to keep rule simplistic and then provide supplemental education materials.
- Comment. There is confusion on the word "inherent."
- A. Concern with inherent risk seems to be that workers do not have the right to if the task is part of their normal job. No employee should be asked to do something where there isn't a protection method that we recognize. Needs to be mitigated so that the risks are less.
- Comment. Possible addition: "due to hazardous conditions beyond those that are inherent to the job."
- Comment. Consider, what if it is necessary in worker's opinion to leave the work site/area to remain safe (unsafe emissions from industrial process)?
- Comment. Communication with supervisor, agency, or law enforcement may be difficult or impossible because workers do not have cell phones or signal coverage, especially in the fields. These may include the most vulnerable workers.

2:50-3:00 Next Steps

- Additional review and comments. Send comments by end of day 7/26.
- Next meeting: Week of August 7th – will send out poll.