September 15, 2021

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 **[fill in employer, trade association, etc.]** we are writing to comment and express our opposition to rule changes proposed on February 26, 2020 and re-proposed on April 24, 2020 and July 30, 2020, by the Oregon Occupational Safety & Health Division (“OR-OSHA”). This letter includes our comments regarding:

1. Re-Proposed Amendments in General Administrative Rules to Clarify Employers’ Responsibilities

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

**OR-OSHA’s Proposed Amendments to “Clarify Employers’ Responsibilities”**

1. Proposed Text.

OR-OSHA proposes adding definitions of “reasonable diligence” and “unpreventable employee misconduct” to OAR 437-001-0015. The proposed language provides[[1]](#footnote-1):

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

\* \* \* \* \*

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

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

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

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

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

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

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

(1) Employers’ Responsibilities.

\* \* \* \* \*

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

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

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

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

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

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

1. 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.

* 1. 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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-6)

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

* 1. 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]](#footnote-7) and not for the purpose of penalizing employers even though they are making reasonable and appropriate efforts to provide a safe workplace.

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

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

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

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

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

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

* 1. 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.

* 1. The proposed definition of “unpreventable employee misconduct.”

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

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

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

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

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

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

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

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

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

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

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

(a) The employer did not have reasonable devices, safeguards, rules, procedures, or other methods in place to abate or safely control the hazard or prevent the violation.

(b) The employer had not effectively communicated to employees the methods established under (a).

(c) The employer had not provided employees with the necessary training, equipment, and materials to use in complying with the methods established under (a).

(d) The employer had not developed and implemented measures to audit the effectiveness of its safety program,

(e) The employer had not taken effective corrective action when a hazard or a violation was identified.

(f) The employer was not in compliance with OAR 437-001-0760(1)(a) or (b).

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

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

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

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

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

(1) Employers’ Responsibilities.

\* \* \* \* \*

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

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

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

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

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

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

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

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

The proposed language holds Oregon employers to an unreasonable standard.

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

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

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

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

Sincerely,

Signature

Name

Company

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. [↑](#footnote-ref-1)
2. *OSHA v. CBI Servs.*, 294 Or. App. 831, 837 (2018). [↑](#footnote-ref-2)
3. *Id.* at 836. [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. *Id*. at 838. [↑](#footnote-ref-5)
6. *Id.* [↑](#footnote-ref-6)
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*). [↑](#footnote-ref-7)