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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 **[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. Proposed Increase of Certain Minimum and Maximum Penalties for Alleged Violations.
2. **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;

(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.

1. **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

Name

Company

Date