



Locally Grown
and
GROWING STRONG

Senate Committee On Judiciary and Ballot Measure 110 Implementation

OFB Testimony on SB 528

March 16, 2021

Chair Prozanski, members of the Committee,

Thank you for the opportunity to provide comments in support of SB 528. By way of background, the Oregon Farm Bureau is the state's largest agricultural trade association representing nearly 7,000 farm and ranch families across the state. OFB's members are proud to employ thousands of individuals in rural Oregon, and take the health, safety, and wellbeing of workers across Oregon very seriously.

Through the course of the pandemic, Oregon's agricultural operations have been resolute in keeping our food supply secure and worksites safe. Farmers and agribusinesses have invested millions of dollars to upgrade in-field sanitation, transportation, and employer-provided housing to mitigate the spread of COVID-19. Our industry has partnered with community-based organizations to assist our employees and provide them COVID-19 testing and vaccinations. Agricultural businesses are regulated and being inspected under OR-OSHA's COVID-19 rules, a new Local Emphasis Program, industry-specific policies and playbooks from the Oregon Health Authority, and the requirements of the Governor's Executive Orders. Simply put, Oregon agriculture has stepped up to the plate during COVID-19.

Unfortunately, employers can only mitigate the spread of COVID-19 while employees are at work and it is outside of an employer's control if an employee does not follow public health guidance in their off-hours or refuses to do so while on the clock, but out of sight of management. There is nothing an employer can do to prevent an outbreak from occurring if employees are contracting the virus in their off-hours, refusing to be tested or wear masks, coming to work knowing they have been exposed to COVID-19, or not following precautions set by employers to reduce exposure in the workplace.

Outside of the pandemic, employers are still on the hook for violations assessed by OR-OSHA, even if the violation is a direct result of an employee's misconduct. As an example, if an agricultural housing provider did everything they could to comply with OR-OSHA rules, but during a surprise inspection it is found that an employee removes their mask or rearranged beds in violation of OR-OSHA's COVID-19 rules, the employer would be assessed a penalty for the non-

compliance. This style of regulation forces employers to be omnipresent and creates an untenable enforcement regime that is unfair to employers who are doing their best to comply with the law.

Moreover, OR-OSHA is currently proposing to eliminate the common law "rogue employee" defense through administrative rules. Right now, in a contested case, an employer may offer relevant evidence of employee misconduct to prove that the employer should not be held responsible for the employee's safety violations. For example, if an employee intentionally disregards safety trainings or does not use safety equipment they were provided, an employer can assert these facts to negate the knowledge element of a serious violation. This is not an affirmative defense under the law, but is used by employers to show that they did not or could not have known about a violation.

Under proposed rules, OR-OSHA seeks to define "unpreventable employee misconduct" in a way that essentially renders the defense out of existence.¹ As mentioned above, the defense is used to prove that an employer did not know about a violation or could not have known. Under the proposed rules, an employer cannot utilize this defense unless they can prove that they also developed and implemented measures that identify any instance of an employee not following the employer's procedures, and that they have taken "effective corrective action" whenever an employee was caught disregarding the training.

However, this would inherently require an employer to have knowledge of the violation and then correct the violation in order to use the defense. For example, if an employer had measures in place to not only prevent any violation, but also to identify and then correct any misconduct, there is no way for an employer to argue that they did not know or could not have known about the violation. They would have had to have known about the violation because they would have had to identify and then correct it.

SB 528 would preserve the employee fault defense and prevent OR-OSHA from assessing civil penalties against employers for violations that result in an employee's failure to follow health and safety rules, public health guidelines, or an employer's safety policies. OR-OSHA's current rules require all employers to adopt health and safety policies and train employees on these protective measures. If an employee is aware of these policies and refuses to comply with safety measures or does not follow Oregon Health Authority's rules for mitigating the spread of COVID-19 during off-hours, employers should not be fined for an employee's failure to follow the rules.

For these reasons, OFB supports SB 528. Thank you for the opportunity to provide testimony. Please do not hesitate to reach out with any questions.

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¹ [*Re-Proposed* Amendments in General Administrative Rules to Clarify Employer's Responsibilities \(oregon.gov\)](#)