

CHAPTER ELEVEN

PENALTIES AND SANCTIONS

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The subject of penalties and sanctions is often under-emphasized. A draft that simply makes a prohibited action punishable as a criminal offense and is done with the subject scarcely meets the problem. A penalty is intended to deter as well as punish. A criminal penalty for a minor offense that a harried district attorney does not have time to prosecute may not be a deterrent nor be particularly suited to the offense. A drafter can exercise great ingenuity in the area of penalties and sanctions. What discomfort inflicted by the law has the greatest potential of preventing violations? More often than not, a criminal penalty does not fit the situation. Often far greater deterrent effect can be achieved by a penalty that has a sure and certain financial impact on the violator.

1. WHEN PROHIBITION AND PENALTY ARE SEPARATED.

Except for criminal statutes of the type compiled in ORS chapters 161 to 169, the penalties for violation of provisions of an ORS chapter usually are collected in the “.990 to .999” sections of the chapter. Consequently, the penalties for violation of the Act should be collected in a single section to permit their compilation in the “.990 to .999” sections of the ORS chapter in which the remainder of the bill is compiled. This requires the separation of the penalty from the prohibition, as in this example:

SECTION 1. A person may not intentionally deface, alter or change a voter’s precinct memorandum card other than in a manner authorized by section ____ of this (year) Act.

SECTION 2. Violation of section 1 of this (year) Act is a Class C misdemeanor.

2. WHEN PROHIBITION AND PENALTY ARE NOT SEPARATED.

If drafting a criminal statute of the type compiled in ORS chapters 161 to 169, the drafter should not split the prohibition from the penalty because both will be compiled as one section. For example:

SECTION ____. (1) A person commits the crime of ____ if the person initiates or circulates a report or warning of an impending bombing or other crime or catastrophe,

knowing that the report or warning is false or baseless and that it is likely to cause evacuation of a building, place of assembly or facility of public transport, or to cause public inconvenience or alarm.

(2) _____ is a Class A misdemeanor.

3. SEPARATE SUBSECTIONS.

If a bill contains different penalties, they should be stated in separate subsections of the penalty section.

It is not necessary to amend the “.990 to .999” penalty sections in the ORS chapter in which the sections are to be compiled merely to create a new penalty. If the penalty is stated in a separate section of the bill, the ORS editors may compile the penalty provision in the appropriate ORS “.990 to .999” penalty section as a new subsection.

4. “NO PERSON SHALL”; UNNECESSARY WORDS.

A discussion of the use of the phrase “no person shall” is found in chapter 4 of this manual. Drafters should use “a person may not . . .” instead.

In stating a penalty, the words “upon conviction” are unnecessary. In the 1948 revision of Title 18, U.S. Code, relating to crimes and criminal procedure, the revisers methodically deleted these words on the grounds that punishment can be imposed only after conviction whether or not the statute so states.

Under the Criminal Code, violations, misdemeanors and felonies are classified, with the penalty for each class specified. The penalty for a prohibited action should be identified by class. ORS 161.605, 161.615, 161.625, 161.635. This is preferable to formerly used language that provided that the prohibited act was “a misdemeanor punishable by up to one year in jail and a fine not to exceed \$_____, or both.” Classification tends to standardize penalties as well as to shorten drafts.

The phrase “in the discretion of the court” is unnecessary. Words giving a name to an offense (such as “is guilty of larceny”) usually are unnecessary if the punishment is set forth, because what the crime is called should make no difference. The technique of the Criminal Code in this respect is different and if a name is to be given a crime, that name should follow the Criminal Code nomenclature.

The phrase “either directly or indirectly,” or “either directly or by artifice, scheme, subterfuge, device or trick” is unnecessary. It scarcely could be argued that a prohibition lacking one of these phrases could be violated indirectly with impunity. As a general rule, the prohibition should be stated in a straightforward manner. If no qualifications are specified, as a rule none will be inferred.

5. SPECIFICITY.

A sweeping provision such as “violation of any provision of this (year) Act is a misdemeanor” must be avoided. The draft must enumerate the sections that are subject to the criminal penalty. The drafter should not provide a penalty for violation of sections that cannot, by their nature, be violated, such as definitions, statements of intent, administrative provisions (unless punishing administrators is intended), saving clauses and the like.

6. DIFFERENT KINDS OF CRIMINAL PENALTIES.

The choice of a penalty depends on the purpose to be accomplished by the prohibition and the seriousness of the offense; it is a choice that must be made by the requester of the bill. The three options are violations (punishable only by a fine, ORS 153.018), misdemeanors (punishable by fines and up to one year in jail, ORS 161.615 and 161.635) and felonies (punishable by fines and 5 to 20 years in jail, ORS 161.605 and 161.625).

A drafter may wish to suggest to the requester that penalties in statutes already existing can be made applicable to a new prohibition by adding the material to and making it a part of an existing ORS chapter or series of ORS sections. The new penalty will then be similar to existing penalties prescribed for offenses of similar nature. The following examples give some idea of the various types of penalties that can be used:

a. Misdemeanor.

One of the most common penalties is a misdemeanor:

SECTION _____. Violation of section _____ of this (year) Act is a Class A misdemeanor.

If conduct is declared to be an offense but no specific penalty or classification is stated, ORS 161.555 provides that the offense is considered a Class A misdemeanor. It is desirable to avoid specifying a different penalty for every crime if the schedule in ORS 161.505 to 161.685 can be made to fit.

b. Violation.

If a fine is to be the only penalty, the penalty section should use the classifications provided by ORS 153.018 for violations. An offense that is declared to be a “violation” without using a classification is a Class B violation. ORS 153.015. Drafters should indicate that the offense is a Class B violation and not rely on ORS 153.015 if the intent is to create a Class B violation.

c. Minimum Penalties.

Minimum periods of imprisonment for felonies provided by law prior to 1989 were abolished by ORS 137.120, which provides for an indeterminate sentence not to exceed the maximum term prescribed by law. In 1989, indeterminate sentencing for felonies was replaced by a system of sentencing guidelines that prescribes minimum periods of imprisonment based on the severity of the crime and the defendant’s criminal history. Sentencing guidelines are amended through the administrative rulemaking process. The

legislature can direct the Oregon Criminal Justice Commission to amend the guidelines. See, for example, section 20, chapter 423, Oregon Laws 1995. In recent years, minimum periods of imprisonment have been established through the initiative process. ORS 137.700 et seq. Although some statutes still prescribe minimum fines and periods of imprisonment for misdemeanors, in recent years the Oregon Legislative Assembly has been inclined to prescribe only maximum fines and periods of imprisonment.

d. Cumulative Penalties for Continuing Violation.

If the failure to comply with statute can result in an ongoing violation, the drafter may want provide that each day of violation is a separate offense. For instance:

SECTION _____. Failure to comply with section _____ of this (year) Act is a Class A violation for each day a person fails to comply.

e. Enhanced Penalty for Subsequent Offenses.

Creating an enhanced penalty for repeated violations is a complicated task, involving determinations as to when previous violations are considered to have occurred and whether the subsequent violation must take place within a specific period of time. For examples of statutes that have provided enhanced penalties for subsequent offenses, see ORS 137.712 and 161.610.

f. Criminal Forfeiture and Oregon Racketeer Influenced and Corrupt Organizations Act (ORICO).

When creating a new crime, drafters should consider whether to allow criminal forfeiture of instrumentalities and proceeds of the crime. ORS 131.550 to 131.600. This can be accomplished by adding the section creating the new crime to the list in ORS 131.602. The drafter should not simply indicate in the draft that instrumentalities and proceeds are subject to forfeiture.

A drafter may also want to consider whether violation of a new crime should give rise to remedies under ORICO. ORS 166.715 to 166.735. This can be accomplished by adding the section creating the new crime to the list in ORS 166.715.

7. JURISDICTION OVER PARTICULAR OFFENSES.

The circuit courts in Oregon are courts of general criminal jurisdiction. Although authorized to do so by section 12, Article VII (Original), Oregon Constitution, the Legislative Assembly has not given criminal jurisdiction to county courts. ORS 3.132 provides that circuit courts have concurrent jurisdiction with municipal courts over violations of the charter and ordinances of any city within the circuit court's judicial district.

Justice courts and municipal courts have jurisdiction over violations and misdemeanors. ORS 51.050 and 221.339.

8. STATUTES OF GENERAL APPLICATION TO CRIMES AND CRIMINAL PROCEDURE.

A drafter should become familiar with the content of ORS chapter 161 when drafting a statute relating to crimes and criminal procedure.

9. CRIMINAL SENTENCE REDUCTIONS REQUIRING A SUPERMAJORITY.

Section 33, Article IV of the Oregon Constitution, provides that a two-thirds vote of all the members elected to each house is required to pass a bill that reduces a criminal sentence approved by the people through the initiative or referendum process.

Because section 33 was enacted at the same time that the mandatory minimum sentences found in ORS 137.700 and 137.707 were enacted (Ballot Measure 11 (1994)), it is clear that the supermajority requirement was intended to apply to those sentences. What is less clear is to what other sentences it might apply. Muddying the water further is the fact that both ORS 137.700 and 137.707 have been legislatively amended to add new crimes to the lists that require mandatory minimum sentences. The legislatively added crimes found in ORS 137.700 and 137.707 do not require the supermajority for sentence reduction, because they were not approved by the people through the initiative or referendum process.

The following statutes were enacted through the initiative and referendum process. They contain criminal provisions that, if amended, may have the effect of reducing a criminal sentence. If a drafter is asked to amend one of the following statutes, the drafter must carefully analyze the effect of the amendments to determine if a reduction of a criminal sentence might result. If it would, the constitutional supermajority requirement is triggered and the title of the bill must reflect the requirement (“providing for criminal sentence reduction that requires approval by a two-thirds majority”).

ORS 137.700 and 137.707 – Ballot Measure 11 in 1994. These sections establish mandatory minimum sentences for specified crimes. They require that defendants convicted of one of the crimes listed serve the full statutory minimum sentence with no reduction for good time, etc. Reducing the minimum sentences (except as noted later) or allowing a reduction in a sentence for good time, etc., would require a supermajority. ORS 137.700 (2)(a)(B) and (C), (b) and (c) and ORS 137.707 (4)(a)(B) and (C), (b) and (c) (citing 2009 Edition in both instances) were legislatively added; therefore, reductions in sentences prescribed by those provisions would not require a supermajority.

ORS 137.123 – Part of Ballot Measure 10 in 1986. This section deals with the imposition of concurrent and consecutive sentences. If a drafter is asked to amend subsection (2) or (5), the drafter must analyze the effect of the amendment. Subsection (3) was added by the legislature.

ORS 137.635 – Ballot Measure 4 in 1989. This section requires imposition of determinate sentences for specified felonies. It also requires the defendant to serve the entire determinate sentence without reduction for good time, etc. The statute does not set out specific lengths of sentences. It is possible that some amendments to this section would require a supermajority. Any amendment would need to be analyzed for its effect.

ORS 161.067 – Also part of Ballot Measure 10 in 1986. The section deals with determining the number of separately punishable offenses. Amendments to this section would probably not require a supermajority.

ORS 163.105 – Amended by Ballot Measure 7 in 1984. The ballot measure amendment to this section created a mandatory death or life imprisonment sentence for aggravated murder. A reduction of the sentence would require a supermajority.

ORS 164.061, 475.907, 475.925 and 475.930 – Ballot Measure 57 in 2008. These sections establish mandatory minimum sentences for certain controlled substance and property offenses.

ORS 166.416, 166.418 and 166.438 – Ballot Measure 5 in 2000. This ballot measure created and amended criminal provisions related to the transfer of firearms. Analysis is required.

ORS 498.164 – Ballot Measure 18 in 1994. This section regulates the use of dogs or bait to hunt black bears or cougars.

ORS 680.990 (2) – The result of a 1978 initiative. This section raises the same issues as ORS 774.990. Analysis is required.

ORS 774.990 – Ballot Measure 3 in 1984. This section provides that violations relating to the Citizens' Utility Board are Class A misdemeanors. See ORS 774.120 (1) and (5) and 774.140. If a drafter is asked to amend the section to provide that violation is something less than a Class A misdemeanor or is asked to repeal the section, it may have the effect of reducing a sentence. Analysis is required.

10. OTHER SANCTIONS.

In addition to criminal penalties, other sanctions are:

a. Civil Action.

ORS 496.705 is an example of a statute giving the state a cause of action against an offender. A civil sanction giving a damaged person a cause for treble damages appears in ORS 105.810. Freund v. DeBuse, 264 Or. 447 (1973), discusses the civil consequences of violation of a statute.

b. Civil Penalty.

A civil penalty is one that may be imposed and collected by the enforcing agency without filing an action in court. ORS 441.705 to 441.745 provide sample language for authorizing imposition of civil penalties. If the drafter intends to create a civil penalty, the draft should refer to “civil penalties” **not** to “fines,” “monetary penalties” and other variations. “Fine” should be used only when a sanction is to be imposed for the commission of a crime or violation.

ORS 183.745 establishes a standardized procedure for imposition of civil penalties. The procedure will automatically apply to any penalty that the drafter denominates a “civil penalty,” unless the draft specifically indicates a contrary intent. Specific aspects of the procedure found in ORS 183.745 may be modified by an exception. See, e.g., ORS 441.712 (“Notwithstanding ORS 183.745 . . .”). ORS 205.125 and 205.126 provide standardized enforcement procedures for civil penalties.

To clarify that the procedure for imposition of civil penalties is to apply (and to alert the requester and agency of the provisions of ORS 183.745), the following standard phrase should be used: <spm civil-penalty>

SECTION ____. Civil penalties under section __ of this (year) Act shall be imposed in the manner provided by ORS 183.745.

The language of the draft must not authorize imposition of civil penalties “for violation of any of the provisions of this (year) Act.” The drafter should search the provisions of the bill to determine which sections or subsections should be subject to the civil penalty and specify those provisions in the section authorizing the civil penalty.

Significant policy issues that should be raised with the requester and, if appropriate, addressed in the draft, include:

1. The amount of the penalty to be imposed.
2. Whether the amount of the penalty is to be determined by the agency rather than by the legislation (i.e., should the draft authorize a range of penalties?).
3. What particular violations subject a person to the penalty (e.g., violations of the statutory provisions? violation of any rules adopted pursuant to rulemaking authorization?).
4. Whether the legislation should contain a provision allowing for remission or mitigation (see, e.g., ORS 441.720).
5. Disposition of amounts collected.
6. Whether the civil penalty is to be the exclusive remedy.

The following language addresses some of these issues and may be helpful:

SECTION ____. (1) In addition to any other liability or penalty provided by law, the Director of ____ may impose a civil penalty on a person for any of the following:

- (a) Violation of any of the terms or conditions of a license issued under ORS ____.
- (b) Violation of any rule or general order of the ____ Department that pertains to a facility.
- (c) Violation of any final order of the director that pertains specifically to the facility owned or operated by the person incurring the penalty.
- (d) Violation of ORS ____ or of rules required to be adopted under ORS ____.

(2) A civil penalty may not be imposed under this section for violations other than those involving ____ or a violation of ORS ____ or of the rules required to be adopted by ORS ____ unless a violation is found on two consecutive surveys of the facility. The director in every case shall prescribe a reasonable time for elimination of a violation:

- (a) Not to exceed 30 days after first notice of a violation; or
- (b) In cases where the violation requires more than 30 days to correct, such time as is specified in a plan of correction found acceptable by the director.

SECTION _____. (1)(a) After public hearing, the Director of _____ by rule shall adopt a schedule establishing the civil penalty that may be imposed under section _____ of this (year) Act. However, the civil penalty may not exceed \$500 for each violation.

(b) Notwithstanding the limitations on the civil penalty in paragraph (a) of this subsection, for any violation involving _____ or a violation of _____ or rules required to be adopted under _____, a penalty may be imposed for each day the violation occurs in an amount not to exceed \$500 per day.

(2) The penalties assessed under subsection (1) of this section shall not exceed \$6,000 in the aggregate with respect to a single facility within any 90-day period.

SECTION _____. A civil penalty imposed under section _____ of this (year) Act may be remitted or reduced upon such terms and conditions as the Director of _____ considers proper and consistent with the public health and safety.

SECTION _____. In imposing a penalty pursuant to the schedule adopted pursuant to section _____ of this (year) Act, the Director of _____ shall consider the following factors:

(1) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(2) Any prior violations of statutes, rules or orders pertaining to facilities.

(3) The economic and financial conditions of the person incurring the penalty.

(4) The immediacy and extent to which the violation threatens the public health or safety.

SECTION _____. All penalties recovered under sections _____ to _____ of this (year) Act shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses.

c. Suspension or Revocation of License.

ORS chapters 670 to 704 contain examples of provisions for suspension or revocation of a license or permit to do business. ORS 497.415 contains provisions regarding revocation or denial of licenses.

d. Unlawful Practice Under ORS Chapter 659A.

If a bill draft addresses the relationship between an employer and an employee, the drafter should consider making the prohibited activity an unlawful employment practice under ORS chapter 659A. See, e.g., ORS 659A.303 (employer prohibited from using genetic information in hiring, etc.). Existing unlawful employment practices are codified at ORS 659A.029 to 659A.321.

If a bill draft prohibits discrimination in providing services based on classifications declared to be invalid by the draft, the drafter should consider making the prohibited activity an unlawful practice under ORS chapter 659A. See, e.g., ORS 659A.403 (unlawful discrimination in public accommodations).

A draft can make the prohibited activity an unlawful practice or unlawful employment practice by adding the section containing the prohibition to ORS chapter 659A and declaring the practice to be either an unlawful practice or unlawful employment practice. See ORS 659A.001 (11) and (12) (defining unlawful practice and unlawful employment practice).

If a drafter adds a new section to ORS chapter 659A, declares the prohibited practice to be either an unlawful practice or an unlawful employment practice, and does nothing else,

the sole remedy for an aggrieved person will be the administrative procedures provided in ORS 659A.800 to 659A.865. Almost all unlawful practices and unlawful employment practices are also subject to enforcement by a civil action under ORS 659A.885. If ORS 659A.885 is amended to provide a civil action, the drafter must determine whether the requester would prefer to have a civil action under ORS 659A.885 (2) (no punitive damages or jury trial; de novo review on appeal) or 659A.885 (3) (punitive damages, jury trial available; no de novo review on appeal).

e. Unlawful Trade Practice.

If a draft prohibits certain activities by persons engaged in commercial activities, the drafter should consider making violation of the prohibition an unlawful trade practice under ORS 646.605 to 646.652. The prohibited activity can be made an unlawful trade practice by amending ORS 646.608 to include a reference to the new section. Unlawful trade practices are subject to enforcement by the Attorney General and district attorneys (ORS 646.632) and by private civil action (ORS 646.638).

f. Bond Provision.

A surety bond in favor of the state may be used to provide protection of the public if the person putting up the security defaults. The bonds are appropriate for construction projects or other types of activity when default is based on a clear finding of fact. For example:

SECTION _____. (1) Every person proposing to construct a domestic sewerage system shall file with the agency a surety bond in an amount required by the agency, but not to exceed \$25,000. The bond must be executed in favor of the State of Oregon and its form is subject to approval by the Attorney General.

(2) The agency may permit the substitution of other security for the bond, in such form and amount as it considers satisfactory. The form of the other security is subject to approval by the Attorney General.

(3) The bond or other security shall be forfeited in whole or in part to the State of Oregon by a failure to follow the plans and specifications approved by the agency in the construction of the domestic sewerage system or by a failure to have the system maintained and operated in accordance with the rules of the agency. The bond or other security shall be forfeited only to the extent necessary to obtain compliance with the approved plans and specifications or the rules of the agency. The agency may expend the amount forfeited to obtain compliance with the approved plans and specifications of its rules.

(4) If a failure as described in subsection (3) of this section occurs and part of the bond or other security remains unforfeited, any person, including a public body, who has suffered loss or damage by reason of the failure has a right of action upon the bond or other security and may bring a suit or action in the name of the State of Oregon for the use and benefit of the person. This remedy is in addition to any other remedy that the person who suffered loss or damage may have against the person who failed to follow the approved plans and specifications of the rules of the agency.

(5) If the ownership of the domestic sewerage system is acquired or its operation and maintenance assumed by a public body, the bond or other security is terminated as security for the purposes of this section. The agency shall return the bond or other security to the person who filed it.

ORS 825.162 contains another example. An example of state agency enforcement of the bond is provided in ORS 585.047. Provisions that accomplish the same purpose as a statement under oath are contained in ORS 305.810, 305.815, 305.820 and 305.990.

g. Adverse Presumption.

It usually is not clear whether an adverse presumption merely shifts the burden of going forward with the presentation of evidence. The following example illustrates this type of provision:

SECTION _____. The finding of fish, taken out of season, is prima facie evidence that the fish were taken by the person who has control over the place where the fish were found.

Other examples are contained in ORS 273.241, 496.690 and 506.610.

h. Denial of Standing to Sue.

The requester may find it advantageous, in enforcing a regulatory law, to deny standing to sue to any person who does not comply with the requirements of the law. The following example is based on ORS 345.210:

SECTION _____. A career school may not bring or maintain an action in any court in this state for a cause arising out of its doing business as a career school in this state unless the career school alleges and proves that it held a valid license to operate as a career school in this state at the time the cause of action arose.