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November 25, 2020

VIA EMAIL (staff@oal.ca.gov)

OAL Reference Attorney
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Re: OAL File # 2020-1120-01E
Occupational Safety and Health Standards Board, COVID-19 Prevention

Dear Sir/Madam:

On behalf of the California Employers COVID-19 Prevention Coalition (the Coalition),[1] we urge and request the Office of Administrative Law (the OAL) to reject the Proposed Emergency COVID-19 Prevention Rule (the Proposed Rule) adopted on November 19th by the California Occupational Safety and Health Standards Board (the Board), at least in its current form. Enclosed is a copy of the Coalition's written substantive comments expressing the Coalition's concerns about the Proposed Rule and the rulemaking process used to adopt it, which comments were timely submitted to the Board last week.

Fundamental to the development of executive branch regulation – even emergency regulation – is stakeholder involvement. The rushed process followed by the Board to promulgate this Rule has deprived interested parties, critical stakeholders, and the entire regulated community of any meaningful opportunity for input in the final rule. Apparently for the first time ever, the Division presented a proposed rule to the Standards Board without first convening an Advisory Committee to solicit input from stakeholders. And on top of that, the public was provided a mere five days to review, evaluate and prepare comments on a rule package that consisted of over 100 pages of background information and proposed regulatory text, and which necessitated review of hundreds if not thousands of additional pages of relevant material.

Despite this narrow timeframe, the Proposed Rule generated numerous comments, much of which were delivered on the exact same day as or the day before the public hearing during

[1] The Employers COVID-19 Prevention Coalition is composed of a broad array of California and national employers potentially impacted by the Proposed COVID-19 Rule. Included among its members are companies representing manufacturing, retail, airline operations, aerospace/defense, construction, wholesale food distribution, landscaping services, petroleum refining, logistics, veterinary services, and steelmaking industries, with a combined hundreds of workplaces with thousands of employees across California. The Coalition's membership includes segments of the regulated community significantly impacted by the Board's Proposed Rule and with a substantial interest in the outcome of this rulemaking.

which the Standards Board voted to adopt the rule; *i.e.*, the written comments could not have been read, let alone considered by the Board before it cast its vote. The public hearing itself included more than 500 participants. Well over 100 of them – many of whom were cut off or severely limited in the time provided to address the Board – provided verbal comments highly critical of the rulemaking process that was being followed, the need for the rule, and/or various provisions included in the Proposed Rule. Notwithstanding, at the end of the public hearing, and despite most of the Board members acknowledging that the Proposed Rule needs further work, the Board voted unanimously to adopt, *as is*, the Proposed Rule.

This "ready, fire, aim" approach is not permitted under the fundamentals of California administrative process, and does not meet the basic applicable legal requirements for emergency rulemakings established under Government Code Section 11346.1. Even with an extremely abbreviated emergency rulemaking schedule, the public must be provided genuine opportunity to comment. *This legal requirement is not met if the Board does not even review those comments before adopting the Proposed Rule. Here, that is precisely what occurred.*

The result of this impermissible and unnecessarily rushed approach is the development of badly flawed regulation. Essential employers operating in California have been dealing with the SAR-CoV-2 pandemic for nine months. Listening to these stakeholders would not have taken long, and would have resulted in a much better rule. It is not too late to remedy this situation.

OAL's role in the rulemaking process is not perfunctory; it is a critically important backstop to ensure that the development of regulations meets certain basic elements established in California Government Code Sections 11349 *et seq*. Before OAL may approve and publish a rule, it must find that the rule meets the following mandatory prerequisites: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. As described more fully below, the Proposed Rule adopted by the Board last week to address COVID-19 does not meet numerous of these mandatory criteria.

Because the Rule does not meet those elements and was developed without true public comment, OAL must not approve this Rule.

1. The Board's Finding of An Emergency Is Impermissibly Flawed

The entire predicate of this rulemaking is legally flawed. To support its finding of an "emergency," purportedly authorizing the severely condensed administrative process and public input opportunities provided, the Board asserted that "*immediate* action must be taken to avoid *serious harm* to the public peace, health, safety or general welfare[.]" (Finding of Emergency, p. 1)[2] However, as the Code makes clear, "A finding of emergency based only

[2] Despite its phrasing, the Board did not seek to avail itself of the exception in Section 11346.1(a)(3) ("An agency is not required to provide notice…if the emergency situation poses such an *immediate, serious harm* that delaying action to allow public comment would be inconsistent with the public interest").

upon expedience, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency." (Section 113246.1(2))

Despite this, the Board points to no specific facts supported by substantial evidence to support either the alleged need for immediate action, or any overriding reason beyond a general public need, and instead largely bases its emergency finding on Executive Orders dated *as long as eight months ago.* (Finding of Emergency, p. 2-3) *Indeed, Petition 583 – to which the Proposed Rule purports to respond*[3] *– was filed in May, more than six months ago.*

Instead, the Board admits this emergency rulemaking was improperly based on expedience and convenience, stating that "[r]egular rulemaking cannot be completed in time to address these significant and ongoing risks," and later suggests this is due to the fact that regular rulemaking "requires a fiscal analysis and approval from the Department of Finance[.]" (Finding of Emergency, p. 4, 37) The Board includes no discussion at all of the timeline for regular rulemaking, or why it would prove inadequate to the current situation, or why any fiscal analysis or approval by the Department of Finance would prevent the use of regular rulemaking.

In fact, the Code states that "[i]f the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations…the finding of emergency *shall include facts explaining the failure to address the situation through nonemergency regulations*." (Section 11346.1(2)). The Board provided no facts explaining its failure to address the situation through nonemergency regulations. The "emergency" nature of the pandemic existed last March, April and May, when it first began spreading in the State and before the myriad of regulatory and state orders and guidance were in place. If the Board wished to rely on its extraordinary emergency rulemaking authority, it should have done so last spring. The Board's failure to do so, and its failure to explain such failure, makes this emergency rulemaking fundamentally flawed.

Of course, the Coalition does not deny the horrific nature of the worldwide COVID-19 pandemic. Indeed, its employers moved quickly and proactively to develop and implement a myriad of extremely effective exposure control, mitigation and prevention protocols last spring when it first became clear that the SARS-CoV-2 virus was rapidly spreading in California. As did Governor Newsom's Office in the issuance of multiple executive orders, in conjunction with directives and guidance by the California Department of Public Health (CDPH) and county health departments, since March, the Division of Occupational Safety and Housing (DOSH or the Division) has created and issued a host of guidance (by industry), frequently asked questions, educational materials, webinars and even a "Cal/OSHA Training

[3] In this respect, it is interesting that although the Board now declares the need for "immediate" promulgation of an emergency standard, it apparently did not itself see and recognize the need until prompted by an outside entity some two months into the pandemic and following the initial Executive Orders and other actions the Board now cites to justify the existence of an emergency.

Academy" with 24- and 17-minute COVID-19 training videos for employers and employees, respectively.[4] In the context of these public health orders and agency guidance, the Board's failure to move immediately into rulemaking appears to be a matter of choice and priorities, rather than lack of opportunity. Regardless, its actions are too late, and, therefore, it must follow the legal requirements mandated by the California Code to ensure public input into the rulemaking process. The Board cannot *now*, nine months into this pandemic, declare an emergency of such urgency that it can *de facto* dispense with all meaningful rulemaking process and deny the public its right to meaningful input into the development of a rule of such import and which will have such impact on the regulated community.

In sum, there is nothing in the Finding of Emergency to justify the current emergency rulemaking, without an advisory committee or any other procedural safeguards that normally help ensure regulations are tailored to the situation and do not cause more harm than they prevent.[5] The Coalition respectfully suggests the lack of a properly and sufficiently supported emergency finding is fatal to the Proposed Rule. (Section 11349.6(b)) ("The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency[.]")

2. The Board Lacks the Authority to Issue Portions of the Proposed Rule

As set forth more fully in attached comments 4, 6, 7, 12 and 13, there is legitimate concern among the Coalition that the Board lacks any jurisdictional authority to promulgate certain aspects of its Proposed Rule. For OAL to approve the Proposed Rule, it must first examine and find that the Board's regulatory authority extends to the areas at issue and addressed in the Coalition's and other stakeholders' comments.

Our concern is based on more than simply the violation of a legal nicety. The governmental authorities with jurisdiction over the subject matter addressed by the Board in its Rule have the expertise, experience and understanding to consider the broad panoply of issues at play when addressing earnings, wages and seniority rights. The Board has no comparable experience. Accordingly, in promulgating legal requirements in these areas, it has unintentionally created a number of very serious consequences.

For example, the Proposed Rule not only excludes from the workplace employees who have tested positive for COVID-19, but any employee with "COVID-19 exposure," as defined in the regulation while also requiring that the employer "continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job."

[4] https://www.dir.ca.gov/dosh/coronavirus/

[5] The Finding of Emergency notes that the Division will convene a representative advisory committee "to review the emergency COVID-19 rulemaking(s), for the purpose of establishing if there exist any reasonable and necessary improvements to the emergency regulation required to avoid serious harm," but only *after* the Proposed Rule is already in place.

As noted in the Coalition's comment 13, under this requirement, individual employees could claim or qualify for multiple paid leaves of 14 or more days without testing positive or even showing any symptoms. But the Board only has authority to adopt *occupational safety and health standard*s (Cal. Lab. Code. 142.3(a)(1)), and it is far from clear whether this authority extends to the lengths it has now been stretched by the Board, to include, in effect, the provision by every employer in the State of California of substantial amounts of potential paid leave.[6]

As they are not directly accountable to the people through elections, there are legitimate bounds within which administrative agencies must be kept. The Coalition urges the OAL to carefully ensure that the Board is so kept here. (Section 11349.1(a)(2))

3. The Proposed Rule is Not Necessary and Is Duplicative of Other Statutes and Regulations

Taking into account the totality of the record, the Board has failed to establish that the Proposed Rule is a necessity. Indeed, as it approved the Proposed Rule without even a cursory review of the full set of written comments, and denied a full presentation of oral comments, it is impossible for the Board to have considered the "totality of the record," as required under California law. (Section 11349.1(a)(1))

In any event, the record before the Board failed to demonstrate that, absent the Proposed Rule, any employer would forego compliance with the already-existing standards directed towards legitimate public health concerns related to COVID-19 workplace prevention and containment. As discussed below, the public health standards set forth in the Proposed Rule largely overlap with and duplicate existing standards (see generally attached comments, Section I), and there is no record evidence that proves California employers will avoid compliance with such rules in the absence of the Proposed Rule.

The Board also has failed to justify the numerous duplicative portions of the Proposed Rule. Indeed, Cal/OSHA itself has declared for many months on its website that workplace safety and health regulations already in existence "require employers to take steps to protect workers exposed to infectious diseases like the Novel Coronavirus (COVID-19)[.]"[7] At a minimum, this is an admission (as further explained below) that there is no need for an emergency rulemaking to adopt these duplicative rules.

In fact, in its Finding of Emergency, the Board repeatedly downplays the estimated costs of compliance by explaining that many of the Proposed Rule's most onerous requirements are "already required" under Section 3203. That very phrase is used no less than ten times in

[6] For example, could the Board determine that employees are far healthier or safer overall when they have increased time away from the stress and confines of work, and mandate all California employers to provide paid vacation time to their employees?

[7] (*See* https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html)(accessed November 23, 2020)

discussing the estimated cost requirements of the Proposed Rule. (Finding of Emergency, pp. 45-51).

Specifically, the Board notes that under existing 8 California Code of Regulations (CCR) Section 3203, "employers in California are *already required* to have a written and effective Injury and Illness Prevention Plan" with multiple items mandated. The Board acknowledges that "All these requirements *already apply* to the hazard of COVID-19; indeed, the Division has issued COVID-19-related citations to employers based on section 3203."[8] Likewise, in discussing Section 3205(c), the Board notes that "[m]uch of that subsection makes explicit actions that are *already required* by existing section 3203[.]" (*Id*.) Numerous other statements further establish that large portions of the Proposed Rule are overlapping and/or duplicative, in violation of Section 11349.1(a)(6). (*See* Finding of Emergency, p. 47 ("This minimal evaluation is *already required* by the existing section 3203."); p. 48 ("The existing section 3203 *already requires* effective procedures to investigate workplace illnesses."); p. 50 ("Employers are *already required* to provide training and instruction regarding COVID-19 hazards and prevention under section 3203(a)(7)[.]"); p. 50 ("the Division believes that all counties *already require* face coverings and social distancing of at least six feet when it is possible to do so"); p. 50 ("Evaluating the need for such partitions is *already required* under section 3203"); p. 51 ("Counties *already require* the handwashing and cleaning/disinfection protocols required here"); p. 51 ("Such offices are *already required* to provide the specified respiratory protection under existing section 5144"); and p. 51 ("Existing section 3203 *already requires* employers to maintain illness records and records of steps taken to implement COVID-19 hazard correction.").

Perhaps even more troubling in terms of the lack of need for and duplicative nature of this Rule, the California legislature and Governor Newsom have recently finalized COVID-19 legislation affecting employers' requirements to protect workers from spread of the virus in the workplace, which will take effect in just over a month. The Board's Rule completely fails to account for this fact.

Because so much of the Emergency Rule is "already required," and because the Board has failed to justify the very significant overlap and duplication between the Rule and existing statutes, executive orders, and regulations (as well as the new legislation about to become effective), it does not meet the minimum requirements necessary for OAL to approve it.[9] OAL should, therefore, reject the Rule.[10]

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[8] Finding of Emergency, p. 45.

[9] In light of the severe time constraints, the Coalition has focused on only a few concerns with the Emergency Rule under OAL's mandate, however, the Coalition believes that its comments to the Board establish that the Emergency Rule also fails to meet the Clarity, Consistency and Reference requirements for OAL approval.

[10] The fact that the Rule is not necessary and is in large measure duplicative of existing legal requirements applicable to California employers should not indicate that approval of this Rule will not harm the regulated community or further burden California employers. To the contrary, this is not a "no harm, no foul" situation, as described more fully in the Coalition's comments. For example, even if the Rule was wholly duplicative of existing requirements, it provides an additional basis to cite and penalize an employer if a purported

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California employers have learned much in the last nine months, and through their careful and thoughtful actions have helped to change the situation dramatically for the better. Due to their own innovations and compliance with the numerous executive orders issued by Governor Newsom, the public health orders issued by every county and the California Department of Public Health, and the ubiquitous guidance issued by a wide array of state and federal agencies, including the Board, employers are in a vastly different position than they were when this pandemic began.

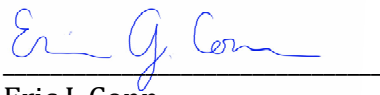
As was repeatedly made clear by the written and oral comments last week, most employers are keenly aware of and are currently meeting the risks from COVID-19 and already have systems and policies in place to deal with the ongoing issues arising from the pandemic. In fact, as early as August 10, 2020, Board staff noted that it was "unable to find evidence that the vast majority of California workplaces are not already in compliance with COVID-19 requirements and guidelines."[11]

Simply put, no further regulation is needed at this time. As demonstrated herein and in the attached comments, such a rejection would not leave California workers unprotected; nor would it prevent the Board from moving with all deliberate speed within the existing regulatory framework to promulgate – with appropriate input from all stakeholders – a permanent rule, should that ultimately prove necessary. Any rule developed from this process would undoubtedly provide better, more thoughtful and fairer protection against COVID-19 in California workplaces.

Accordingly, the Coalition urges that OAL reject the Proposed Rule.

Sincerely,

Andrew J. Sommer
Counsel to the California Employers COVID-19 Prevention Coalition



Eric J. Conn
Counsel to the California Employers COVID-19 Prevention Coalition

compliance failure is identified. That alone demonstrates the significance of promulgation of this standard.

[11] (OSHSB Petition File No. 583, Board Staff Review, August 10, 2020)

cc: Christina Shupe, Executive Officer
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Enclosures

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November 18, 2020

VIA EMAIL (oshsb@dir.ca.gov)

Chair David Thomas and Members
California Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

Re: Comments on Proposed Emergency COVID-19 Prevention Rule

Dear Mr. Thomas and Members of the Board:

On behalf of the California Employers COVID-19 Prevention Coalition (Employers COVID-19 Prevention Coalition or the Coalition), we appreciate the opportunity to provide comments on the proposed emergency COVID-19 Prevention Rule (Proposed COVID-19 Rule or Proposed Rule) being considered by the California Occupational Safety and Health Standards Board (Board).

The Employers COVID-19 Prevention Coalition is composed of a broad array of California and national employers potentially impacted by the Proposed COVID-19 Rule. Included among its members are companies representing manufacturing, retail, airline operations, aerospace/defense, construction, wholesale food distribution, landscaping services, veterinary services, and steelmaking industries, with combined hundreds of workplaces with thousands of employees across California. The Coalition's membership includes segments of the regulated community significantly impacted by the Board's Proposed Rule and with a substantial interest in the outcome of this rulemaking.

GENERAL COMMENTS

I. Adding Another Layer of Regulation Beyond Existing Law and Agency Guidance Is Not Only Unnecessary, But Creates Even More Potential for Conflicts and Confusion.

While the Proposed Rule may add another enforcement mechanism, it does not materially add to the protection of employees from COVID-19, as the proposed requirements of the Rule are already addressed in a combination of statutory mandates, executive orders, health department mandates, and existing agency requirements and guidance.

For example, in collaboration with the California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH or the Division), the State has issued Industry-Specific Guidance to Reduce Risks setting forth specific steps that employers should take including conducting risk assessments, training employees, and implementing a variety of control measures. In addition to the Division's Industry-Specific Guidance, the State has issued Executive Orders and health department mandates and guidance on a host of COVID-19 related topics, including very broadly the "COVID-19 Employer Playbook Supporting a Safer Environment for Workers and Customers," as well as specific topics such as:

- "Responding to COVID-19 in the Workplace for Employers"
- "Face Coverings, Masks & Respirators"
- "COVID-19 Infection Prevention Requirements (AB 685): Enhanced Enforcement and Employer Reporting Requirements"
- "Recording and Reporting Requirements for COVID-19 Cases" and
- "Safe Reopening FAQs for Workers and Employers"

The State also has enacted laws, specifically Assembly Bill (AB) 685 and Senate Bill (SB) 1159, requiring notice of COVID-19 outbreaks and/or potential exposures in the workplace, including to the local departments of public health, employees and their representatives, employers of subcontracted workers, and claims administrators.

Governor Newsom's Office and the California Department of Public Health (CDPH), along with many county and local health departments, have moved swiftly to establish requirements to protect employees from workplace COVID-19 transmission. These requirements comprehensively address COVID-19 transmission potential in the workplace by establishing requirements for evaluating the hazard; when and what controls to implement; the obligations an employer has if an outbreak occurs at the workplace, and how to ensure employees who contract COVID-19 do not bring it to the workplace. DOSH's Proposed Rule provides little additional direction into how to combat COVID-19 in the workplace, and no real additional protections to employees. Rather, it serves only to establish another layer to the regulatory maze employers are already dealing with related to COVID-19. The confusion caused by adding yet another patch to the impossible regulatory quilt employers are managing – especially when it seems it provides little additional employee protection – has the potential to cause the opposite effect of DOSH's objective.

Specifically, the Proposed Rule creates compliance confusion for regulated entities because, as discussed above, employers are already scrambling to understand and follow mandates and guidance by the State and public health agencies, such as the CDPH and Centers for Disease Control and Prevention (CDC). Even if this Proposed Rule is approved, employers will continue to have to follow those agency mandates and guidance, which is particularly critical as the knowledge about the science of COVID-19 evolves continuously. Indeed, our

understanding of higher risk contacts (*i.e.*, the CDC's definition of Close Contact) changed significantly just last month, and we have seen regular and frequent changes to the scientific understanding of when an infected individual remains contagious, how individuals may contract the disease, the effectiveness of testing programs, what prevention measures may be most effective, and even the basic understanding of symptoms of the illness. Because these key elements to any effective infection control and prevention program have been a moving target, the better approach to addressing them has been through more flexible guidance-setting bodies like CDC and CDPH.

II. Promulgation of the Proposed Rule Would Freeze Mitigation Plans, Preventing the Flexibility Necessary to Address the Fluid and Rapidly Evolving Science Around COVID-19 Prevention.

Because of the swift rate of change in our understanding of the virus and the most effective mechanisms and measures to prevent transmission, a static regulation likely will not be able to keep up with this critical evolution of knowledge. Prescriptive steps established by regulation may therefore not only be unnecessary and duplicative, but could also serve to inhibit or prevent employers from quickly adapting their exposure control plans to reflect the evolving landscape related to virus transmission prevention.

As discussed above, various factors in this situation change rapidly and often, and as new information and science develop, CDC and other governmental agencies revise their recommendations and mandates. For example, initially the CDC did not recommend face coverings for the general public, but now face coverings are understood to be critical in slowing the spread of COVID-19. *See* CDC "Use of Masks to Help Slow the Spread of COVID-19" (updated November 12, 2020). Additionally, on October 22, 2020, the CDC revised its guidance regarding the definition of "close contact" to include aggregate time of contacts over the course of a 24-hour period, rather than just a single, continuous 15-minute interaction. *See e.g.*, CDC "Health Departments: Appendices" (updated October 21, 2020). Also in October, the CDC revised its guidance to acknowledge the aerosolized nature of transmission in select settings. *See* CDC "Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission" (updated October 5, 2020).

Establishment of a static regulation at this point, under these unusual circumstances, is simply not prudent. Indeed, Virginia provides an insightful example of the problem we are identifying. Virginia's Occupational Safety and Health Administration (VOSH) promulgated an emergency temporary standard on July 15, 2020, incorporating then-current CDC criteria for return-to-work into its standard. However, five days after the standard was promulgated, on July 20, 2020, CDC substantially revised its return-to-work criteria. Had the CDC revised its original return-to-work guidelines because it determined that they allowed workers to return to work prematurely (*i.e.*, still contagious), Virginia's emergency temporary standard would be permitting employers to continue to follow this ill-conceived, potentially unsafe guidance. The same may turn out to be the case for safe physical distancing, the frequency for cleaning surfaces, symptoms identified in pre-work

health screenings, etc. All of those are elements of DOSH's Proposed Rule that could become obsolete the day after the rule is finalized.

To address this problem, VOSH issued guidance in the form of a Frequently Asked Question ("FAQ") relying on the standard's catchall provision. The FAQ stated: *"On July 22, 2020, the CDC changed its guidance…Employers who comply with the above-referenced change in CDC guidance issued July 22, 2020, will be considered to be providing protection equivalent to protection provided by complying with the requirements in the ETS. However, nothing in the FAQ shall be construed to prohibit an employer from complying with the symptom-based or time-based strategies for return to work determinations in the ETS." See* 16VAC25-220-10(G)(1); and VOSH "Coronavirus (COVID-19) FAQs, § 40 Question 18.

At best, the enactment of the Proposed Rule will likely require continual updates via guidance that contradicts or supplements the requirements included in the standard itself. Recognizing that "haste makes waste," perhaps a pause and deep breath are in order – recent news brings word that vaccines with 95% effectiveness against the virus will be ready for distribution imminently.[1] At any rate, as Virginia's experience shows, a static regulation adopted in response to a fast-moving pandemic may prove obsolete shortly after its passage. In this regard, nearly nine months into the outbreak, the science behind COVID-19 continues to evolve.

In its "Basis for Finding of Emergency," the Board suggests that "[a]doption of the proposed emergency regulation is necessary to strengthen the Division's enforcement efforts related to the hazard of COVID-19 in workplaces, through regulatory mandates specific to preventing the spread of the virus." However, this has not been the experience in Virginia relative to Fed OSHA and State OSH Plans that have declined to issue emergency rules. Despite the fact that the emergency standard took effect in July, based on the best information available, to date VOSH has not issued a single citation under its emergency rule. In sharp contrast, without an emergency rule, Federal OSHA has issued dozens of COVID-19 enforcement actions with penalties totaling more than $3 million. In a similar fashion, Cal/OSHA has issued at least 41 COVID-19 citations, with penalties totaling more than $600,000.

For the foregoing reasons, the Coalition does not believe this is a situation conducive to rulemaking, much less emergency rulemaking. That does not mean this vital area is unregulated – to the contrary, as noted above in Section I, the supposed gap that DOSH seems to be trying to fill has already been addressed by Governor Newsom through executive orders, by the CDPH, as well as CDC on the federal level, and by the Division's existing portfolio of standards.

[1] If enacted, the Proposed Rule should recognize the potentially huge effect of the announced vaccines. For example, to incentivize employers to mandate, pay for and provide vaccinations for their employees, the Proposed Rule should include a provision that exempts employers who ensure a certain percentage of their workforce gets vaccinated.

To the extent DOSH's Proposed Rule is approved, the Coalition urges that it include a catchall provision similar (but not identical) to that of Virginia OSHA's emergency temporary standard. Importantly, given the fluid nature of the pandemic, the Coalition believes it is important to retain the ability to comply with updated guidance as those updates are issued, because they are based on the best available science. However, the Coalition recommends modification to Virginia OSHA's provision in at least two respects: (1) the condition that the updated guidance provide "equivalent or greater protection" should be deleted, because it should be presumed that any updated guidance provides such protection or that a higher level of protection is unnecessary; and (2) employers must also be given a reasonable amount of time to revise their exposure plans to deal with evolving guidance. When scientific understanding evolves and guidance changes, employers cannot revise and retrain their workforces at the snap of their fingers. The Proposed Rule must make clear that compliance with CDC or other health officials' recommendations and guidance insulates employers from any violation, and that employers have a reasonable amount of time to come into compliance with those recommendations and/or guidance.

III. Issuance of a California-Specific Rule Will Result in a Patchwork of State Rules in Conflict with an Imminent Federal OSHA Emergency Temporary Standard, Adding Substantial Regulatory/Compliance Burdens for Multi-State Businesses.

President-Elect Joe Biden has vowed to issue mandatory workplace safety rules that employers must follow to protect workers from COVID-19 exposure. As part of this effort, President-Elect Biden has stated that he will direct his Administration, in connection with his plan to combat COVID-19, to issue an emergency temporary standard within his first 100 days in office. This standard will establish specific precautions that employers will be required to take to protect their workers from exposure to the coronavirus. Although the standard's terms will not be fully known until later this winter, it is expected they will at least mandate compliance with CDC guidelines, which includes requirements for social distancing measures, disinfection and hygiene workplace protocols, and the provision of protective equipment like gloves, goggles, and face coverings.

Indeed, part of the motivation for a Federal OSHA standard on COVID-19 is the new Administration's view that a national set of rules for employers could help workers return more quickly to workplaces since everyone would be following the same emergency standard, rather than a patchwork of differing state and local requirements. Although California operates an approved State OSH Program, and therefore, would not be bound by a Federal OSHA COVID-19 standard, that does not mean that the establishment of a DOSH standard at this point – nine months into the pandemic and just a few months before the next Administration will promulgate a federal standard – is prudent. At minimum, the issuance of a California-specific emergency COVID-19 rule would add considerably to the patchwork of regulations and guidance around COVID-19, and the enormous regulatory/compliance burdens for multi-state companies. And it will impede the

incoming Administration's plans to create a uniform national framework to combat COVID-19.

IV. The State Already Has Ample Authority to Ensure Employers Are Protecting Their Employees from Potential Hazards Caused by COVID-19 Under the Injury and Illness Prevention Program (IIPP) Standard.

The Coalition believes that the most effective way for DOSH to ensure that employers are adequately protecting their employees from COVID-19 transmission in their workplaces is for DOSH to enforce its existing regulations. This position is consistent with the position recommended by the Board's Staff.[2]

The IIPP standard requires employers whose employees are at risk of exposure to COVID-19 in their workplaces to have assessed and addressed this hazard by developing adequate mitigation and prevention measures. The IIPP adapts itself well to this type of hazard prevention because of the requirement for site-specificity. Indeed, by design, many of the Proposed Rule's provisions related to the requirement for employers to establish, implement, and maintain a written COVID-19 Prevention Plan are nearly identical to those already established by the IIPP. Namely, among other similarities, both the COVID-19 Prevention Plan and IIPP require:

- Systems for communicating (3203(a)(3); 3205(c)(1))
- Hazard identification and evaluation (3203(a)(4); 3205(c)(2))
- Investigation of illnesses (3203(a)(5); 3205(c)(3))
- Hazard correction (3203(a)(6); 3205(c)(4))
- Training and instruction (3203(a)(7); 3205(c)(5))

Clearly, the IIPP provides ample enforcement authority to require employers to develop sufficient COVID-19 plans. If DOSH finds certain employers are not protecting their employees, we believe the agency has all the enforcement authority necessary to effectively address this situation by enforcing existing regulations and has been doing so throughout the pandemic.

[2] In the "Cost Estimates of Proposed Action" section of its Finding of Emergency, the Division admits it "has issued COVID-19-related citations to employers based on Section 3203." It further asserts that existing Section 3203 "requirements already apply to the hazard of COVID-19," and that many of Section 3205's most onerous requirements "make[] explicit actions that are already required by existing section 3203, such as COVID-19 prevention policies, and/or includes requirements which are already mandated by local government entities." This further demonstrates that the Proposed Rule is not necessary at all.

SPECIFIC COMMENTS

To facilitate review of these comments, the specific comments and recommendations are organized by and listed under the proposed regulatory provisions they address. Existing rule language is in italics and any revised or additional content we recommend appears in bold.

COMMENT 1 –The Rule Should Adopt Staggered Deadlines/Effective Dates to Allow Reasonable Time Periods for Employers to Come Into Compliance.

To the extent an emergency rule is promulgated, it should adopt staggered deadlines/effective dates to allow reasonable time periods for employers to come into compliance with its various requirements. Allowing for staggered implementation deadlines is necessary, in part, because of the short window over the holidays when it appears employers will have to come into compliance, and because certain elements of the rule depend on other elements having first been addressed.

Specifically, based on the timing it appears the Standards Board is targeting, this Rule would become effective just after we all finish our Thanksgiving meals. Expecting employers to come into compliance with a brand new, onerous regulation over Thanksgiving week is obviously infeasible and callous. Furthermore, expecting employers to come into compliance with the entire regulation all at one time ignores that implementation of several key provisions builds on actions taken to come into compliance with other provisions of the Rule. For example, employers cannot conduct training for their entire workforces on their compliant infection control plans until after the plans are finalized.

Accordingly, the Coalition urges that, at the very least, a thoughtful, reasonable deadline be imposed on the rule's requirement to finalize a written infection control plan, and that the deadlines for training be set for a reasonable amount of time after that deadline for updating the control plans. The Coalition urges the Board to set a deadline for finalizing compliant written infection control plans at least 30 days after the effective date of the rule. And because specific training topics must be covered under the Proposed Rule, that training depends in part on the contents of employers' final infection control plans, and that training must be documented (whether explicitly for compliance with the rule or to ward off an enforcement action), there should be additional, reasonable time for employers to complete training. Because of the time it takes for employers to develop training materials and push those out to all their employees, the Coalition urges at least 60 days after the effective date of the rule to meet the training requirements, or at least 30 days after the deadline to finalize the written infection control plan.

Providing staggered deadlines with reasonable periods for compliance will not pose a risk to California employees. Even though DOSH is promulgating this as an emergency rule, numerous government agencies have already established requirements and guidelines that

California employers have been in compliance with for months. This new rule is not filling a void that otherwise would present risk to our State's workforce. Thus, sufficient time to come into compliance is warranted.

Providing time and staggered deadlines for compliance is consistent with how other state emergency temporary standards in this area have been implemented. For example, Virginia OSHA's emergency temporary standard provided staggered deadlines for its hazard assessment, plan development and training requirements. It states:

> *This emergency temporary standard shall take immediate effect July 27, 2020, upon publication in a newspaper of general circulation, published in the City of Richmond, Virginia. With the exception of 16VAC25-220-80 B 10 regarding training required on infectious disease preparedness and response plans, the training requirements in 16VAC25-220-80 shall take effect on August 26, 2020. The training requirements under 16VAC25-220-80 B 10 shall take effect on September 25, 2020. The requirements for 16VAC25-220-70 [related to infectious disease preparedness and response plan] shall take effect on September 25, 2020. . . ." See* 16VAC25-220-20.

Likewise, Oregon OSHA's emergency temporary standard provides specific deadlines after the effective dates for various requirements. For example, the standard states that the deadline for ventilation requirements is "[n]o later than January 6, 2021," and the deadline for exposure risk assessments is "[n]o later than December 7, 2020." *See* OAR 437-001-0744(f) and (g).

The specific proposal we advance here is consistent with the time allotted by Virginia OSHA's emergency temporary standard, and is similar to Oregon OSHA's emergency temporary standard, as well.[3] *See* 16VAC25-220-20; OAR 437-001-0744(i).

COMMENT 2 – Subsection §3205(a): Scope - The Exceptions Are Not Sufficiently Inclusive and Are Vague and Uncertain.

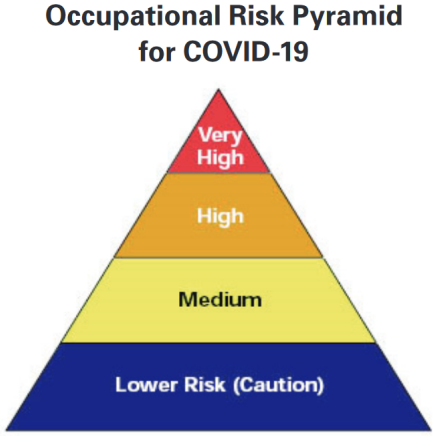
Section 3025 of the Proposed Rule states that it applies to "all employees and places of employment" with limited exception. One of the few exceptions is "*Employees working from home."* That language is insufficiently inclusive of circumstances where employees who are working remotely outside of the workplace may actually be working. For example, an employee may be working at another employer's facility or a customer's home, or may have arranged for other types of working arrangements on his or her own outside of the workplace. As a further example, the employee may be traveling and working out of a hotel room or have access to an office in someone else's home, or elsewhere. All of these arrangements, however, include an employee working in a location where the employer has no or limited ability to control work conditions and practices.

[3] Oregon's emergency temporary standard was released on Monday, November 9, 2020, but took effect Monday, November 16, 2020. Employers must provide workers with information and training regarding COVID-19 by no later than December 21, 2020. *See* OAR 437-001-0744(i).

We therefore recommend modifying subsection (1)(B) to describe the exception as **"Employees working remotely outside of the employer's workplace."**

Similarly, subsection (a)(1)(C), which exempts "*Employees when covered by section 5199 [Aerosol Transmittable Disease]*" is vague. The use of "when" suggests that an employee in a single workplace might be subject to both the Proposed Rule and Section 5199 at different times, which would be onerous for compliance particularly where the respective rules' requirements conflict. Instead, we suggest revising this exception to state, **"Employees who are covered by section 5199 are not covered by the requirements of this rule."**

Finally, **we recommend adding one more important exception to coverage under the rule – workplaces deemed to present only "Lower Risk" exposures to work-related transmission of COVID-19**. Consistent with CDC and Federal OSHA's cornerstone guidance document for the prevention of workplace spread of COVID-19 – *Guidance on Preparing Workplaces for COVID-19* **–** "Worker risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, during an outbreak may vary from very high to high, medium, or lower (caution) risk. The level of risk depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2." This foundational guidance divided job tasks into four risk exposure levels: very high, high, medium, and lower risk consistent with this now-very recognizable risk matrix:



According to CDC and Federal OSHA, "[m]ost American workers will likely fall in the lower exposure risk," which includes those jobs "that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers."

Based on that understanding that most jobs are in the Lower Risk category, and employees working in the Lower Risk category have "minimal occupational" exposure, it would seem

appropriate to exempt from coverage under this emergency rule at least those workplaces that involve only Lower Risk work tasks. Indeed, it would seem to be necessary under any consideration of the proper legal scope of an emergency rule that such a rule not cover workplaces that involve minimal occupational exposure to the hazard that is the subject of the emergency rule.

Adding an exception like this to coverage under the rule would also be consistent with the approach taken by other State OSH Plans. For example, Virginia OSHA's COVID-19 emergency rule excludes "lower risk" work tasks from the more onerous requirements of the standard, *e.g.*, they are not required to prepare a written exposure control plan or provide certain training.

Finally, carving out such workplaces from coverage under this emergency rule would not mean that these workplaces are not regulated. Rather, the agency's existing regulatory tools, such as the IIPP Standard, would still apply, but it would result in applying this onerous new rule only to those workplaces where there is meaningful exposure to the hazard.

COMMENT 3 –Section 3205(b): The Definition of "Exposed Workplace" is Uncertain and Overly Broad as It Relates to "Outbreaks."

As used in Section 3205.1, the term "exposed workplace" is uncertain and overly broad, as it is defined to include various types of work areas and, as of January 1, 2021, will incorporate the broader definition of "worksite" from AB 685. This inconsistency will likely prove particularly problematic for larger employers, as they are more likely to have multiple COVID-19 cases, even if they are implementing sophisticated and effective exposure control strategies.

For this reason, the Coalition suggests that the Proposed Rule should better account for the circumstances of large employers, particularly those with sizeable campuses or multiple buildings, facilities, or discrete work areas at a single address. For instance, many large employers in California have miles-long campuses with many buildings and no connection or interface between the employees in the various parts of the campuses. Treating such work environments as a single place of employment based simply on a street address creates an unworkable burden for employers, and is completely unnecessary from the perspective of protecting against COVID-19 transmission.

One way to address this issue is to modify the definition of "exposed workplace" to more closely follow or incorporate the definition of outbreak used in the recently enacted SB 1159. Under that bill, employers of less than one hundred employees are considered to have an "outbreak" if they have four COVID-19 cases. However, taking into account the practical and real differences between large and small employers, while applying the same proportional standard to employers of greater than 100 employees, the bill defines an

"outbreak" for employers with more than 100 employees as positive tests for four percent of the total number of employees at the specific place of employment.

Such a revision to the Proposed Rule would be fair, as the same approximate standard would apply to employers whether large or small, which would prevent larger employers from being subject to the additional regulatory requirements and stigma of having one or more "outbreaks" when, statistically speaking, they may have experienced no such event. Such a revision also would allow the local departments of health to focus their efforts based on actual numbers rather than misapplied "outbreak" labels.

COMMENT 4 – Subsection §3205(c)(1)(B): Accommodations – The Provisions Regarding Accommodations for Employees with "Medical and Other Conditions" Are Vague and Ambiguous and Intrude on Employee Privacy Rights.

Section 3205(c)(1)(B) of the Proposed Rule would require all employers, as part of the newly-mandated written COVID-19 prevention program, to "*Describe procedures or policies for accommodating employees with medical or other conditions that put them at increased risk of severe COVID-19 illness."*

This requirement is problematic for several reasons, not the least of which is that it is vague and ambiguous. For example, what is encompassed within the phrase "medical or other conditions"? Which other conditions? And how does the employer become aware of such conditions? If they include protected private medical information, or information about a disability or pregnancy, drug abuse, membership in a particular race, developmental disorder, etc., there are a myriad of valid bases for precluding or limiting an employer from seeking out, or worse, assuming any such information. Employers should not be placed in such an untenable position.

Other similar language of the Proposed Rule is equally problematic and raises equally troubling questions. For example, without asking (and possibly violating other statutes or employee privacy) how does an employer – especially one with no medical training or knowledge – know whether any particular employee is at "increased risk" of "severe" COVID-19 (as opposed to "normal" COVID-19)? And how much of an "increased risk" is enough to qualify for special accommodation "procedures or policies," and how is such increased risk to be quantified by an employer – again, without specialized knowledge or medical training?

We suggest that the Proposed Rule would be improved by eliminating this language, or by replacing it with simple language noting that an employer should include in its written plan language indicating that it will **"Describe procedures or policies for employees who are at increased risk of severe COVID-19 illness to request accommodations."** Imposing any requirements regarding the specifics of the accommodation process would exceed Cal/OSHA's authority, as the disability accommodation process is squarely addressed by

the California Fair Employment and Housing Act and falls under the jurisdiction of the California Department of Fair Employment and Housing.

COMMENT 5 – Section 3205(c)(2)(E): Ventilation and Partitions Requirements – The Requirements are Unduly Stringent and the Language is Vague and Uncertain.

The Coalition is concerned by the Proposed Rule's provisions regarding engineering controls, specifically as they relate to ventilation systems and physical barriers. The Proposed Rule requires that "[f]or indoor locations, the employer shall evaluate how to maximize the quantity of outdoor air and whether it is ***possible*** to increase filtration efficiency to the highest level compatible with the existing ventilation system." *See* 8 CCR § 3205(c)(2)(E) (emphasis added). Additionally, the Proposed Rule states that "[a]t fixed work locations where it is not ***possible*** to maintain the physical distancing requirement at all times, the employer shall install cleanable solid partitions that effectively reduce aerosol transmission between the employee and other persons." *See* 8 CCR § 3205(c)(8)(A) (emphasis added).

The Coalition recommends that, consistent with CDC, federal OSHA, and state/local health department guidance, the Proposed Rule replace the word "possible" with the concept of "feasibility," as the limits of possibility are theoretically endless. The use of "feasibility" in CDC, OSHA, and other guidance has been consistent, and incorporates the traditional, reasonable elements of technical and economic feasibility under which businesses operate. The Virginia emergency temporary standard uses the feasibility concept throughout and even provides a definition for "feasible," which includes both technical and economic feasibility, and further provides definitions for both "technical feasibility" and "economic feasibility." *See* 16VAC25-220-30. The Coalition urges the Board to similarly modify the Proposed Rule's ventilation and partitions requirements to incorporate the element of feasibility into both.

COMMENT 6 – Section 3205(c)(3): Recordkeeping/Reporting Provisions Are Unnecessary and Unduly Burdensome.

Under a reasonable interpretation of the Proposed Rule's recordkeeping/reporting provisions, the provisions are unnecessary and duplicative. Employers are already required to comply with local health department orders and directives related to COVID-19 reporting and recordkeeping obligations, and as of January 1, 2021, will be required to comply with AB 685's additional COVID-19 reporting requirements. Instead of adding yet another reporting/recordkeeping requirement, the Coalition encourages the Board to coordinate with local health departments and other governing bodies regarding such requirements to create a single, consistent reporting/recordkeeping mechanism whereby employers can make a single report and send records if necessary to fulfill their reporting/recordkeeping obligations.

Further, the Coalition urges the Board to specify in the Proposed Rule exactly what means employers should use to fulfill their reporting/recordkeeping obligations, and strongly encourages DOSH to adopt a centralized reporting/recording system.[4] If such a centralized system cannot be established, the Proposed Rule should expressly preempt all other state reporting requirements.

Additionally, the Coalition asserts that certain provisions of the Proposed Rule appear to circumvent Cal/OSHA's Access to Employee Exposure and Medical Records standard by demanding that employers make confidential medical information about their employees available to Cal/OSHA immediately upon request. *See* 8 CCR § 3204. Although set forth in the context of posting requirements, the standard clearly contemplates that DOSH may be required to present a written access order when requesting access to personally identifiable information. *See* 8 CCR § 3204(e)(3)(B). Specifically, the standard states that "[w]henever DOSH seeks access to personally identifiable employee medical information by presenting to the employer a written access order, the employer shall prominently post a copy of the written access order and its accompanying cover letter for at least fifteen (15) working days." *See id.* Yet, the Proposed Rule states:

- *3205(c)(3)(C) Personal identifying information of COVID-19 cases or persons with COVID-19 symptoms shall be kept confidential. All COVID-19 testing or related medical services provided by the employer under this section and sections 3205.1 through 3205.4 shall be provided in a manner that ensures the confidentiality of employees.*

  ***EXCEPTION to subsection (c)(3)(C): Unredacted information on COVID-19 cases shall be provided to** the local health department, CDPH, **the Division**, the National Institute for Occupational Safety and Health (NIOSH), or as otherwise required by law **immediately upon request**.*

- *3205(c)(3)(D) The employer shall ensure that all employee medical records required by this section and sections 3205.1 through 3205.4 are kept confidential and are not disclosed or reported without the employee's express written consent to any person within or outside the workplace.*

  EXCEPTION 1 to subsection (c)(3)(D): Unredacted medical records shall be provided to** the local health department, CDPH, **the Division**, NIOSH, or as otherwise required by law **immediately upon request.

[4] Use of DOSH's resources to centralize and make uniform the COVID-19 reporting requirements would be particularly useful since employers in the state have had to deal with a myriad of issues in attempting to comply with their reporting/recording obligations, For example, although some local health departments have passed orders requiring employers to make reports, the departments themselves have not established a mechanism by which employers are able to make reports. In numerous cases, it has taken multiple calls and significant effort to ensure the reports were received. The burden to prove a report was successfully made should not be on the employer when there is no established mechanism for reporting.

See 8 CCR § 3205(c)(3)(C)-(D) (emphasis added).

Coalition members question the legal validity as to whether DOSH can regulate away its obligation to obtain a written access order / medical access order to have an immediate right to such information, and recommend that these exceptions be deleted.

Also, relevant to DOSH's position on reporting and recording COVID-19 employee cases, the Coalition believes there is a serious question regarding the authority the agency has to establish injury and illness recording criteria that differs materially from Federal OSHA's injury and illness recordkeeping requirements. Although not directly affected by this Proposed Rule, we incorporate into these comments, the concerns expressed to the Division in a July 10, 2020 letter from the *Coalition for Uniformity in COVID-19 Recordkeeping* (*See* **Appendix A**).

COMMENT 7 – Section 3205(c)(3)(B)(4): COVID-19 Testing Requirements Appear to Mandate Testing in the Workplace and Do Not Take Into Account Important Considerations Including Supply Chain Limitations

The Coalition does not believe mandated employer testing requirements should be included in the Proposed Rule. Specifically, the requirement that employer offer employees COVID-19 testing *"during their working hours"* seems to indicate that this testing must be administered in the workplace. Workplace COVID-19 testing is not feasible for most employers, let alone advisable given the risk of workplace exposure should an employee with COVID-19 symptoms come into the place of employment for testing. Even if this language is interpreted to mean that employers are required to make off-site arrangements for employee testing during working hours or pay regular wages while employees are traveling to and from the testing site and being tested, this exceeds the legitimate authority of Cal/OSHA, for the reasons discussed in Comment 13.

Mandated testing otherwise raises a number of challenging and sensitive employment relations and privacy issues that the Proposed Rule does not sufficiently address. Additionally, the availability of adequate testing supplies and facilities is uncertain. Although California is not currently experiencing testing capacity shortages, the Coalition reminds the Board that, at the height of the pandemic, the overwhelming guidance was that testing should be saved for symptomatic persons due to the short supply of testing kits. Given the near inevitability of a second or third "wave" of COVID-19 positive cases this winter – with the very real possibility of more positive cases than last spring – the mandated testing included in the Proposed Rule is likely infeasible. Employers should not be required to provide testing when testing capacity may not be available.

DOSH may believe it can adequately address this issue if testing capacity becomes strained by relieving employers from enforcement threat if they can demonstrate good faith efforts to comply. The Coalition takes little solace in this view as it is well aware of the citations Federal OSHA has issued for failure to conduct fit-testing under its respiratory protection

standard even though fit test kits were virtually impossible to obtain during the height of the pandemic earlier this spring.

Rather than mandating testing, the Coalition urges DOSH to follow Virginia OSHA's emergency temporary standard with regard to testing. There, VOSH does not require employers to provide testing, but to the extent that an employer wishes to require its employees to undergo testing and incorporates such testing into its exposure control requirements, the standard specifies that employers are not permitted to require employees to pay for such tests. *See* 16VAC25-220-40(C)(1)(b)(i)-(ii); 16VAC25-220-40(C)(2)(b)(i)-(ii). This provides a balanced approach respecting employee privacy issues but ensures that any employee who is required to be tested by his or her employer would not bear the cost of such testing.

COMMENT 8 – Section 3205(c)(6) and (c)(7): Physical Distancing and Face Coverings – These Provisions are Inconsistent with Current Guidance, Unnecessary and Pose Greater Hazards.

The physical distancing and face covering provisions of Section 3205 are inconsistent with current California and CDC guidance, unnecessary, and pose a potentially greater hazard than the one they are designed to address. With regard to the physical distancing requirement, the Coalition recommends a clarification to Section 3205(c)(6)(a) that all employees "shall be separated from other persons by at least six feet, except where the employers can demonstrate that six feet of separation is **not feasible.**"

As mentioned above, impossibility is not typically used as a regulatory threshold. Query what is not possible given unlimited time, money and resources? In the COVID-19 area, the Board can consider existing mandates and guidance that have now been in place for more than six months to determine their effectiveness. Virtually all six-foot physical distancing requirements establish a *feasibility* threshold (rather than a "possible" threshold) and overall they have proven to be highly effective at preventing virus transmission.

While it may be *possible* for employees to remain six feet apart for certain tasks, it may not be feasible to complete those tasks in an efficient and safe manner (patient care, hazardous chemical handling, etc.). Also, this language could result in significant disruption of short-term critical tasks necessary as part of a larger operation (furnace opening that takes a few seconds but requires two people, for example). The modification to this language is therefore essential to account for those tasks that involve significant risks where strictly enforcing a six-foot distance, while theoretically possible, could functionally either create a greater hazard or render the work/work product deficient.

This language revision focusing on "feasibility" (rather than "possibility") would align with both the Virginia and Oregon standards. *See* 16 VAC 25-220-60(C)(1)(e)-(f); OAR 437-001-0744(3)(a).

As to the face covering requirement of Section 3205(c)(7)(A), it too is inconsistent with current CDPH guidance. CDPH's current face mask guidance states that Californians must wear face coverings when they are in the following "high-risk situations" at work:

- Engaged in work, whether at the workplace or performing work off-site, when:
  - Interacting in-person with any member of the public;
  - Working in any space visited by members of the public, regardless of whether anyone from the public is present at the time;
  - Working in any space where food is prepared or packaged for sale or distribution to others;
  - Working in or walking through common areas, such as hallways, stairways, elevators, and parking facilities;
  - In any room or enclosed area where other people (except for members of the person's own household or residence) are present when unable to physically distance.

See CDPH, *Guidance for the Use of Face Coverings* (June 18, 2020), available at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf

Where employees are able to be physically distant from one another, however, the State's leading authority on public health, the California Department of Health, specifically states that such employees do not need to wear a mask. Similarly, Governor Newsom's face covering Directive (Executive Order N-33-20) also allows employees to conduct their work without the use of a face covering as long as they remain physically distant from other employees (or customers). The Coalition requests that Section 3205(c)(7)(A) be revised to align with CDPH guidance and Governor Newsom's face mask order.

Many employers' operations and facility layouts allow employees to work and remain physically distant from one another. Requiring employees to wear masks throughout an entire shift poses notable safety concerns. Specifically, many manufacturing facilities require employees to wear safety glasses as part of their job. Anecdotal evidence suggests that use of face coverings cause persistent fogging of glasses. Safety glasses fogging presents a surroundings awareness limitation that could pose a significant threat or hazard to an employee. It is critical that the Board's emergency rule be fashioned in a manner that does not inhibit or restrict adequate vision during tasks that require precision and attention to detail, especially tasks involving large machinery and operating forklifts or other large equipment.

Likewise, employees may be subject to increased temperatures around large machinery and equipment, and mask use only exacerbates the employee's exposure to indoor heat hazards. In fact, Federal OSHA explicitly recognizes that employees should be allowed to remove face coverings if they can maintain at least six feet of physical distance from each other where there are alternative risks present, such as heat illness:

Allow workers to remove cloth face coverings when they can safely maintain at least 6 feet of physical distance from others.

See COVID-19 Guidance on the Use of Cloth Face Coverings while Working Indoors in Hot and Humid Conditions.

Accordingly, the Coalition requests that Cal/OSHA provide explicit language that allows workers in workplaces not accessible to the general public to remove face coverings in those areas of the workplace where they can adequately maintain six feet or more of distance from co-workers. Where workers cannot maintain this distance, a mask of course should be required to be worn.

COMMENT 9– Section 3205(c)(4): Hazard Correction – Provisions Related to Correcting Hazards are Duplicative and Ambiguous.

The provisions relating to correcting hazards are duplicative and ambiguous. Hazard correction is part of the IIPP standard, is something all employers must address currently, and is the basis for existing Cal/OSHA citations related to COVID-19. *See* DOSH Citations for COVID-19 Related Violations. Under existing section 3203(a)(6) every employer's Injury and Illness Prevention Program must include "methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard." Accordingly, as stated at the outset, this provision is fully addressed by IIPP and is, therefore, unnecessary. Other than providing DOSH with an additional basis to issue duplicative citation items in an action, the Coalition can see no reason to retain this provision.

COMMENT 10 – Section 3205(c)(8)(D): "Time for Employee Handwashing - The Proposed Rule Is Not Necessary, and Should be Clarified to Ensure It Does Not Exceed the Legitimate Authority of Cal/OSHA.

The language of Section 3205(c)(8)(D) requiring employers to "encourage and allow time for employee handwashing" is unclear as written, and can leave employers uncertain as to how to comply. For example, is this provision intended to create a new type of rest break specific to handwashing? Would this rule force employers to adjust operating procedures?

The Coalition submits that such a rule would more appropriately fall within the jurisdiction of existing employment laws and fall under the oversight of the Office of the Labor Commissioner or, in the case of the continued payment of earnings and benefits, the legislature.[5] However, to avoid any confusion, the language of the Proposed Rule should be

[5] It should be noted that AB 1867 recently amended the Health and Safety Code to mandate that food handling employees shall be permitted to wash their hands every 30 minutes and additionally as needed. (Section 113963)

revised to at least clarify that it should not be construed to compel any employer to create a separate break period specifically for handwashing.

COMMENT 11 - §3205(c)(2)(A), (c)(8)(C)(1), 3205 (c)(9)(D) and 3205(c)(9)(E): The Provisions Referring to "Authorized Employee Representative" Are Vague, and Requiring the Participation of Employees and their Authorized Employee Representatives in Identifying/Evaluating Hazards Is Infeasible.

Several provisions of the Proposed Rule reference "authorized employee representatives." For example, Section 3205(c)(8)(C)(1) would require employers to inform any such representative of the employer's cleaning and disinfection protocols, while Section 3205(c)(9)(D) and (c)(9)(E) respectively would require employers to make available their written COVID-19 prevention program and certain redacted records of all COVID-19 cases.

In each of these instances, the Proposed Rule would benefit from clarification that an "authorized employee representative" is the same as defined in the California Labor Code and other regulations specifically defining "authorized employee representative" as "an authorized collective bargaining agent of employees." See California Labor Code 90.2(d) ("For purposes of this section, an 'employee's authorized representative' means an exclusive collective bargaining representative."); *see also* Title 7, Subch. 1, Art. 2, 14300.35(b)(2)(A)("An authorized representative is an authorized collective bargaining agent of employees."), and Title 8, Sec. 347(e) ("'Authorized Employee Representative' means a labor organization which has a collective bargaining relationship with the cited employer[.]").

In addition, Section 3205(c)(2)(A) states: *"The employer shall allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards."* The Proposed Rule should clarify the scope of such participation and make clear that soliciting and accepting input – that is, offering employees and authorized employee representatives the opportunity to identify and evaluate hazards – meets the standard. Requiring that employers include employees and their union representatives in each and every step of the process for identifying and evaluating hazards, upon initially implementing its COVID-19 Prevention Plan and upon regular reviews and in addressing COVID-19 cases, is simply not feasible or appropriate for a variety of reasons, including that might divulge confidential information concerning COVID-19 cases.

COMMENT 12 – Section 3205(c)(8)(E)(2): N95 Masks and RPP Applicability -- These Requirements Are Infeasible.

As set forth in the Proposed Rule, employers would be required to "evaluate the need for respiratory protection in accordance with section 5144 when the physical distancing requirements in subsection (c)(6) are not feasible or are not maintained." *See* 8 CCR § 3205(c)(8)(E)(2). As worded, the Proposed Rule seems to suggest that, if physical

distancing is not feasible or cannot be maintained, the only option for employers is to evaluate the need for Section 5144 respirators (e.g., N95s or more substantial respiratory PPE). This must not be the intention of this provision, for a number of reasons, and if it is, it should be reconsidered. First, as we learned during the surge of cases this past spring, N95s and higher-level protection must be conserved for healthcare workers and emergency medical personnel. As set forth in the CDC's guidance, "The cloth face coverings recommended are not surgical masks or N-95 respirators. Those are critical supplies that must continue to be reserved for healthcare workers and other medical first responders, as recommended by current CDC guidance." *See* CDC, Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission (May 16, 2020). Even as the nation tried to conserve such supplies, many hospitals' and other health care facilities' needs exceeded critical capacities. As we approach the second or third "wave" of COVID-19 positive cases this winter, employers should not be required to provide such PPE when doing so depletes these critical resources to those in industries who need them most.

Additionally, this should not be the intention of California's standard because the CDC has recently recognized that cloth face coverings do indeed, contrary to earlier belief, protect the wearer. *See* CDC, Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2 (November 10, 2020). CDC states, "Masks are primarily intended to reduce the emission of virus-laden droplets [source control]… " but "*also help reduce inhalation of these droplets by the wearer [filtration for personal protection].*" The CDC further explains that, "the community benefit of masking for SARS-CoV-2 control is due to the combination of these effects; individual prevention benefit increases with increasing numbers of people using masks consistently and correctly." *See id.*

Accordingly, to the extent that wearing a cloth face covering provides a similar intended benefit as that achieved by wearing a Section 5144 respirator, under these circumstances, especially given the preservation concerns, employers should not be mandated to require respirators for all employees who are unable to maintain physically distanced from their co-workers. The Coalition urges DOSH to revise the Proposed Rule to clarify that the Rule does not mandate the broad use of N-95 (or other) respirators, but provides flexibility for employers to mandate simple masks or cloth face coverings in the workplace.

COMMENT 13 – Section 3205(c)(10)C): The Provisions Mandating Employers to Pay the Earnings and Benefits for Excluded Employees Will Impose Massive Additional Costs on Employers and Exceed Cal/OSHA's Legitimate Authority.

One of the most troubling provisions of the Proposed Rule is Section 3205(c)(10)(C), which states, in part: *"For employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers shall continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job."*

This provision raises potentially significant concerns for Coalition members. To begin with, this provision is far beyond the scope of Cal/OSHA's legitimate mandate and seems more appropriately suited to enactment by the legislature. In fact, the Proposed Rule directly conflicts with AB 1867, enacted by the California legislature just two months ago. That statute requires *private employers with 500 or more employees nationwide* to provide their California employees "supplemental paid sick leave" specific to COVID-19 causes. *See* Labor Code 248.1(3)(A). In sharp contrast, the Proposed Rule would apply to "all employees and places of employment" in California with limited exception. *See* Sec. 3205(a)(1).

Another significant difference between the recently enacted law and the Proposed Rule is illustrative of the agency's overreach. Whereas AB 1867 provides up to 80 hours of supplemental sick leave for workers only when they are subject to a quarantine or isolation order, advised by a health care provider or prohibited from working by the employer itself, Section 3205(c)(10)(C) *requires* employers to exclude from the workplace not just employees with a positive COVID-19 test, or a quarantine or isolation order, but any "COVID-19 cases" and employees with "COVID-19 exposure."

Critically, as defined by the Proposed Rule, "COVID-19 exposure" means being within six feet of a COVID-19 case for a cumulative total of 15 minutes in a 24-hour period. Section 3205(b). Accordingly, under the Proposed Rule, employers are required to exclude from the workplace – and continue paying – any employee who has (or believes he or she has) met the 15-minute cumulative threshold. This greatly expands the scope and magnitude of paid leave required under California law. If included at all, an expansion of such far-reaching economic costs and burdens on California employers should be undertaken legislatively.

While the intention behind excluding employees with "COVID-19 exposure," as defined, is desirable and supported by the Coalition, it seems likely that in most instances such exposure will be self-reported by an individual employee and not subject to refutation by the employer. This provision thus creates an incentive for employees to claim "exposure" and receive 14 days of pay for no work. Moreover, a single individual could claim or qualify for multiple 14-day paid leaves, all with no symptoms, no isolation or quarantine order, or even a doctor's visit.

The provision is not improved by the additional language that "Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation." First, we are now eight months into this pandemic, and many employees have exhausted any available sick leave. Presumably, this is the reason underlying the legislature's passage of AB 1867 providing "supplemental" paid sick leave.

In addition, however, the statement "and when not covered by workers compensation" is vague and unclear. Does this mean employers cannot consider payments made by workers compensation? Or does it mean that employers can only require the use of sick leave, or consider payments from public sources where the underlying claim is not covered by workers compensation?[6]

Because Section 3205(c)(10)(C) exceeds the legitimate authority of Cal/OSHA, contradicts recently enacted legislation on the same subject, and introduces potentially very significant unknown and unknowable costs as well as additional complex issues into this area, it should be deleted from the Proposed Rule.

COMMENT 14 – Section 3205.4: Employer-Provided Transportation – This Provision Is Unduly Burdensome.

The Coalition is concerned about Cal/OSHA's approach to regulating employer-provided transportation to and from work in a number of regards.

First, the Proposed Rule's requirement that employers develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation is far too burdensome to manage.

Tasking employees with screening other employees at the door of a shuttle bus, van, or charter bus unnecessarily creates additional close contact with riders and increases the risk of potential transmission of COVID-19. Additionally, the length of time it would take to complete such screening could severely interrupt normal business operations and cause delays in productivity and work schedules. Such delays could impact other key laws that employers are tasked with managing, including wage and hour and mandatory break time laws and Department of Transportation regulations. For example, it would be nearly impossible for employers in the airline, freight, and transportation industries to satisfy a pre-board screening requirement – all of which are industries that commonly use shuttle vans and busses to transport employees to and from employee parking lots or other shuttle stops to the employer's facility. Countless number of employees could miss delivery or flight times due to delays at the door of the shuttle bus, which would not only impact the employer's operations but also the general public.

Moreover, given that the Rule will include a requirement that employers implement a pre-work screening protocol, and that this can be accomplished by allowing employees to

[6] As the Proposed Rule requires payment only for employees "otherwise able and available to work," this leads to the further question of whether such employees are covered by unemployment insurance, and whether the employer may take this into account? At this point, it does not appear the Board has considered the impact of any "benefit payments from public sources," either on the question of what private employers have to pay, or on the costs to the State. (Finding of Emergency, pp. 51-52).

evaluate their own symptoms prior to reporting to work, a second pre-screening activity prior to onboarding on shared transportation is duplicative and completely unnecessary.

Accordingly, the Coalition requests the Board to eliminate this provision from the Proposed Rule or to clarify that an employer's self-screening procedure performed by employees prior to leaving their homes to go to work satisfies the screening requirement in Section 3205.4(d).

Second, the Coalition requests clarification regarding application of the cleaning, disinfecting and ventilation protocols in the context of shared transportation, as those requirements are potentially extremely burdensome. The cleaning protocols require employers to ensure that all high-contract surfaces used by passengers are cleaned and disinfected before each trip. The term "before each trip," however, is subject to differing interpretations. In workplaces where employees are transported to and from an employee parking lot and the worksite on a continuous basis throughout the day, it would be impossible to clean the bus or van between each trip. If drivers had to clean high touch points between each 10-minute trip to and from the parking lot, for instance in employee shuttle buses at airports, it would significantly impact business operations.

A more reasonable requirement would be to clean the shuttle busses and vans on a performance-based standard – *i.e.*, on a regular basis – which is consistent with the CDC guidance for bus transit operations. *See* COVID-19 Employer Information for Bus Transit Operators, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/bus-transit-operator.html

Third, while the Coalition does not dispute that opening windows on shuttle busses and vans is a positive safety control, the rule does not account for those vans or busses that may not have windows. In such cases, it would be reasonable to require that those buses or vans are well-ventilated by other means, such as via adequate filtration units. However, it must be clarified that this Rule does not prevent the use of shuttle vehicles that do not have windows that open.

Additionally, the temperature thresholds for closing the windows are arbitrarily set and would be extremely difficult to monitor. This requirement potentially conflicts with requirements under the Heat Illness Prevention Program standard, as those requirements are implicated well below 90 degrees Fahrenheit. Requiring a driver to keep the windows open on a day in which it is 89 degrees and extremely high humidity would pose a potential hazard to the driver and other employees and might run afoul of the requirements of the heat illness prevention standard.

Further, it would be near impossible for a driver to monitor the temperature throughout the day – evaluating minute by minute when temperatures change from 59 degrees to 60 degrees Fahrenheit or 90 degrees to 89 degrees Fahrenheit. A performance-based standard that imposes an obligation to provide well-ventilated buses and open windows

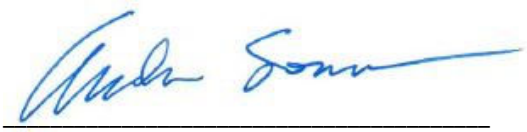
when it is appropriate and feasible would suffice. While the clarity of the specification elements of the Proposed Rule provide simplicity, they would be difficult to comply with in practice and promulgation of such restrictive standards would likely subject employers to other potential DOSH regulatory compliance issues.

Finally, the Coalition is concerned about the application of the transportation requirements to shared transportation services not under the control of the employer but relied on by the employer's workforce. For instance, many third-party entities operate shuttle services to and from employee parking lots and multi-employer worksites, such as airports and large shipping and warehouse facilities. The scope of the transportation section of the Rule should be clarified to explicitly exclude these services from the obligations of that provision. The employer has no control or authority over those vehicles and must, therefore, not be held responsible for ensuring compliance.

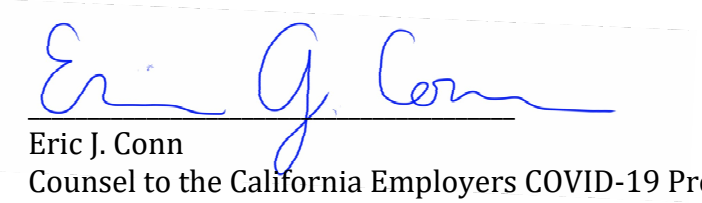
***

The California Employers COVID-19 Prevention Coalition is pleased to have the opportunity to provide comment on the Proposed COVID-19 Rule and respectfully asks the Board to carefully consider its comments before issuing a rule.

Sincerely yours,



Andrew J. Sommer
Counsel to the California Employers COVID-19 Prevention Coalition



Eric J. Conn
Counsel to the California Employers COVID-19 Prevention Coalition

APPENDIX A

July 10, 2020

Doug Parker
Chief, Division of Occupational Safety and Health
California Department of Industrial Relations
1515 Clay Street, Suite 1901
Oakland, CA 94612

RE: *Recording Requirements for COVID-19 - Frequently Asked Questions*

Dear Mr. Parker:

On behalf of the **Coalition for Uniformity in COVID-19 Recordkeeping**, we are writing to call your attention to an important matter regarding recent interpretive guidance issued by California's Department of Industrial Relations, Division of Occupational Safety and Health ("Cal/OSHA") related to COVID-19 recordkeeping. The guidance is in direct contravention of federal OSHA's recordkeeping requirements and is therefore not permitted under the law. We therefore respectfully request Cal/OSHA rescind and/or revise the guidance to comport fully with the requirements of federal OSHA recordkeeping regulations.

The Coalition for Uniformity in COVID-19 Recordkeeping is composed of a broad array of California employers that are significantly impacted by Cal/OSHA's COVID-19 recordkeeping requirements. Directly or through trade associations, the Coalition represents more than 20,000 employers with more than half a million workplaces and more than five million employees in California. Included among its members are individual employers representing segments of the retail industry; supermarkets and grocery stores; and the automotive, aerospace defense, chemical manufacturing, petroleum refining, construction, pharmaceutical, agricultural, and airline industries. The Coalition also is supported by various trade associations representing several of these industries and more, including the California Chamber of Commerce, the California Retail Association, the Retail Industry Leaders Association, the National Retail Federation, the Crane Owners Association, and the Food Industry Association (FMI). Given the number of Coalition members impacted by Cal/OSHA's COVID-19 recordkeeping requirements, the Coalition has a substantial interest in ensuring clear, consistent recordkeeping requirements, and hopes to work with you to resolve the Coalition's concerns.

On May 27, 2020, Cal/OSHA issued *Recording and Reporting Requirements for COVID-19 Cases, Frequently Asked Questions* ("FAQs") setting new requirements for logging COVID-19

cases on California employers' 300 Logs.[1] In several respects, these requirements differ materially from the corollary federal OSHA requirements for logging COVID-19 cases. Cal/OSHA's differing and inconsistent requirements will necessarily result in California employers recording COVID-19 cases on 300 Logs that would not be required to be and will not be recorded anywhere else in the country. This will undermine the purpose and benefit of recordkeeping for COVID-19 cases by contaminating the OSHA 300 Log data, rendering the data of little utility for multi-state employers, OSHA, the Bureau of Labor Statistics, labor unions, or researchers that will conduct COVID-19 related comparative analyses, risk assessments, and/or resource targeting. It is to avoid these very problems that OSHA promulgated a regulatory mandate preventing state recordkeeping regulations from differing from federal OSHA's.[2] Beyond this, as explained below, Cal/OSHA's different recordkeeping criteria will result in myriad negative consequences and unjustifiable burdens borne uniquely by California employers.

I. Cal/OSHA May Not Depart from Federal OSHA's Recordkeeping Requirements

Section 18 of the federal OSH Act mandates that State OSH Plans establish standards that are "as effective as" federal OSHA standards, but generally provides State Plans with authority to establish more stringent and/or supplemental requirements. *See* 29 U.S.C. Sec. 667(c)(2). State Plans, however, have no discretion to deviate from federal OSHA *recordkeeping* requirements for which cases must be logged and how to log them.

29 C.F.R. 1904.37(a) provides:

> *Basic requirement*. Some States operate their own OSHA programs, under the authority of a State plan as approved by OSHA. States operating OSHA-approved ***State plans must have occupational injury and illness recording and reporting requirements that are substantially identical to the requirements in this part.***

In explaining 1904.37(a), subsection (b) of that regulation states that state OSH Plans "***must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.***" 29 C.F.R. 1904.37(b). Accordingly, uniformity in recordkeeping is mandated by Section 1904.37(b)(1), and State Plans are not allowed to establish more or less stringent or restrictive requirements, or any difference in requirements at all. The language of the regulation is clear – in this regard, State Plan regulations "must have the same requirements" as federal OSHA.

The absolute mandate in 1904.37(b)(1) is made clearer when contrasted with subparagraph (b)(2), which states: "[f]or other Part 1904 provisions (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement), State-Plan State requirements may be more stringent than or supplemental to the Federal requirements." 29 C.F.R. Section 1904.37(b)(2).

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[1] *See* https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html

[2] Federal OSHA has been unambiguous in its mandate that State Plans' requirements be identical to federal requirements with regard to which cases are recordable and how to record them. *See* 29 CFR 1904.37.

OSHA's inclusion of Section 1904.37 in its recordkeeping regulations (along with other significant revisions) was the third and final piece of a major overhaul of the federal recordkeeping requirements two decades ago. In explaining the objective of these revisions, OSHA stated in the preamble to the 2001 Final Recordkeeping Rule, that the "revisions to the final rule will also create more consistent statistics from employer to employer," and that more consistent records "will improve the quality of analyses comparing the injury and illness experience of establishments and companies with industry and national averages and of analyses looking for trends over several years." 66 Fed.Reg. 5916-6135, 5918 (Jan. 19, 2001). Pointedly, OSHA explained:

> "State Plans ***must have recording and reporting regulations that impose identical requirements*** for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction . . . **to *ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States* are created**.

Id. at 6060.

It is hard to imagine a clearer statement regarding the importance of ensuring the exact same set of injuries and illnesses are recorded in every state, yet Cal/OSHA has now deviated from this clear regulatory mandate. As far as we are aware, historically, Cal/OSHA and all the other State Plans have always adhered to the mandates of Section 1904.37.

II. COVID-19 Recordability Criteria

As described below, Cal/OSHA's May 27th FAQs improperly deviate from federal OSHA's recordkeeping requirements in two important respects: (a) the requirement for a confirmed positive COVID-19 test result; and (b) the standard for work-relatedness.

A. Confirmed Case Recordability Criterion

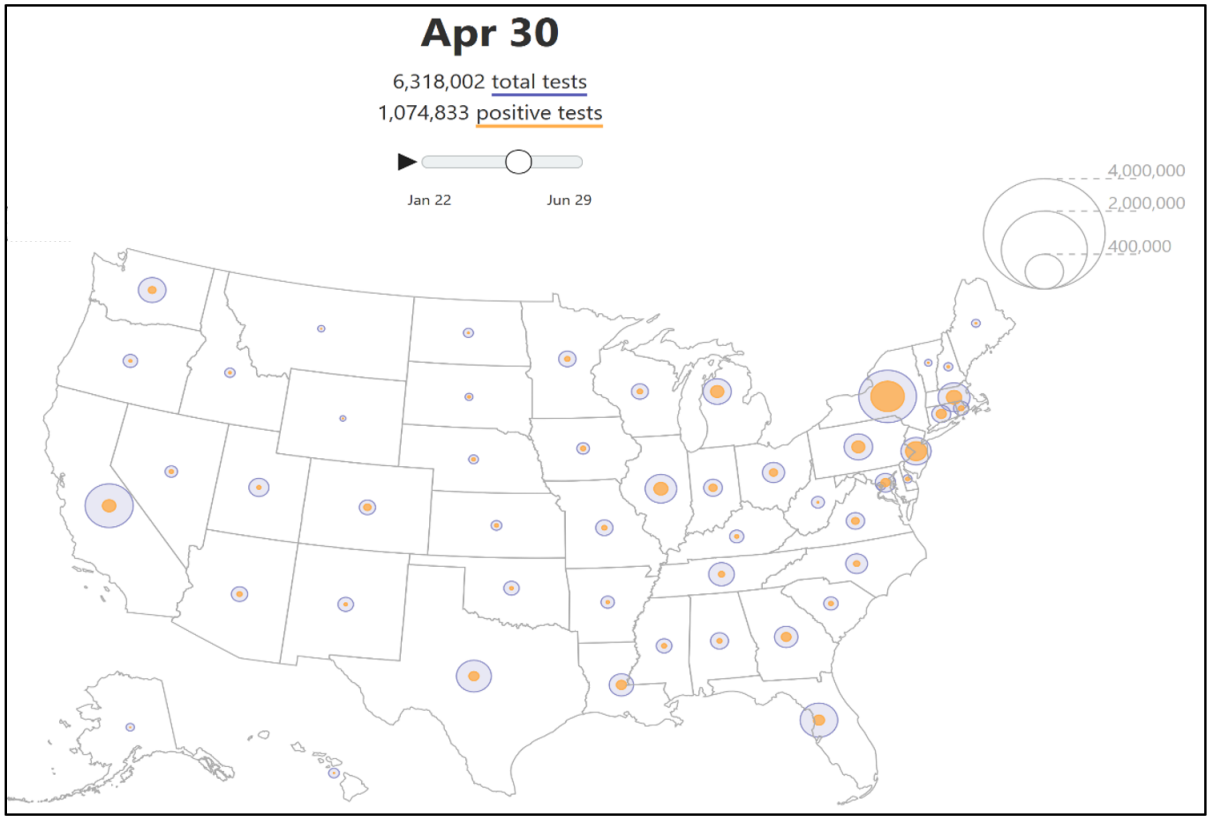
Federal OSHA established three threshold criteria for COVID-19 cases to be recordable:

- **The employee's COVID-19 infection is confirmed by a positive laboratory test of a respiratory specimen**;
- The case involves one or more of the general recording criteria, including days-away-from-work, restricted job duties or transfers; etc. and
- The case is work-related as defined by 29 C.F.R. Section 1904.5.

To distinguish COVID-19 cases from the cold, the flu, or other ailments for recordkeeping purposes, federal OSHA set a precondition for recordability that the COVID-19 infection must be a "confirmed case." It is not enough to self-diagnose or even to have a medical professional opine that an illness likely is coronavirus. Referencing CDC guidance, federal OSHA explains that a "confirmed case of COVID-19 means an individual with at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19."

Cal/OSHA expressly rejects OSHA's requirement that there be a confirmed positive test result and eliminates that as a criterion for California recordkeeping. Cal/OSHA's FAQs state: "while Cal/OSHA considers a positive test of COVID-19 determinative of recordability, a positive test result is ***not necessary*** to trigger recording requirements." Elimination of this precondition in California recordkeeping guarantees discrepancies between California employers' logs and the logs of employers everywhere else in the country. This inconsistency alone will likely dramatically increase the number of COVID-19 cases recorded on California logs, and will very likely result in the mistaken recording of cases of the cold and flu, which are exempt from recordkeeping.

Cal/OSHA's stated reason for requiring inclusion of suspected cases on California logs is its concern regarding a shortage of COVID-19 testing in California. However, that rationale is flawed for several reasons. First, the entire nation, not just California, faced COVID-19 testing challenges in the early stages of the pandemic. Indeed, based on objective data, it appears California has been and remains far ahead of the curve in testing among its peer states. As of the end of June, California had performed more than 4,000,000 COVID-19 tests, the most of any state in the country, representing 13% of the total tests performed nationwide, and in the top third of states in terms of number of tests per 100,000 population.[3] Even if we focus just on the early days of the pandemic, by the end of April, California had already performed 625,337 COVID-19 tests, second only to New York.



[3] The data referenced here comes from the highly regarded *COVID Tracking Project*, a volunteer organization dedicated to collecting data on a state-by-state level to understand the COVID-19 outbreak in the U.S. *See* https://covidtracking.com/data.

Regardless, even if testing shortages resume or remain in some pockets of California, as with other areas around the country, that does not provide a legitimate basis to deviate from the federally-mandated requirement to establish consistent recordability criteria. Indeed, it would make it all the more important for California to align its recording requirements with federal OSHA's. Otherwise, trend analyses will be artificially skewed, distorting the picture of virus transmission nationally, and showing a disproportionate COVID-19 impact on California employers. Significant concern exists among this Coalition that this artificial picture will create the false impression that California employers are not acting as responsibly to protect their employees as employers in other states. This would be an unfair and unjustified conclusion, but nonetheless would be difficult to combat.

Furthermore, the portion of Cal/OSHA's COVID-19 recordkeeping FAQs related to confirmed cases is unworkably vague and will result in over-recording non-COVID cases due to confusion about whether an illness is actually a COVID-19 case. That is especially true now that CDC has expanded the list of potential COVID-19 symptoms to include very common ailments like headache and diarrhea. It is not clear whether Cal/OSHA requires a presumption that an illness is COVID-19 any time an employee presents with such symptoms, or the other common cold and flu symptoms that overlap with COVID-19. It is also not clear whether Cal/OSHA even requires a diagnosis by a medical professional, or if an employee's self-diagnosis would be sufficient. This will surely be applied differently by different employers, driving the kind of variance in recordability outcomes that federal OSHA was trying to avoid when it promulgated 29 C.F.R. 1904.37(a).

Finally, to the extent Cal/OSHA's expansive criteria is designed to catch suspected cases to ensure adequate contact tracing, again the rationale is flawed. Employers do not rely on OSHA 300 Logs to identify employees for whom contact tracing should be conducted. Cases do not even need to be recorded on a 300 Log for seven days, so reliance on logs for contact tracing would be woefully inadequate. Likewise, the 300 Log captures only work-related cases, and a contact tracing protocol that is limited only to work-related cases would similarly be woefully inadequate, because employers must isolate and remove potentially infected employees regardless of the origin of the illness. Finally, 300 Logs are not a source relied on by state and county health departments as a tool to track COVID-19 cases. Accordingly, revising Cal/OSHA's FAQs to reflect federal OSHA's criteria would have no impact on contact tracing efforts by employers or any agency.

B. <u>The Standard for Work-Relatedness</u>

Federal OSHA directs employers to find work-relatedness for COVID-19 cases only where it is "more likely than not" that the illness was caused by an exposure in the workplace, based on reasonably available evidence, and in the absence of an equally or more likely alternative (non-work) explanation for the illness. Illnesses of uncertain origin are not presumed to be work-related, and indeed, where there may be both work-related as well as non-work-related possible explanations for an employee's illness, federal OSHA makes clear the case is not work-related. This "more likely than not" standard, without a presumption, is the standard that OSHA has always applied to any work-relatedness analysis involving an injury or illness of uncertain origin.

Cal/OSHA, however, has flipped this longstanding standard for work-relatedness on its head, instead establishing a presumption of work-relatedness, which would require logging a COVID-19 case even where there is an equally likely, non-work cause of an individual's illness. Also, it seems that the only situation in which Cal/OSHA even allows consideration of a non-work COVID-19 exposure is when there is no identifiable work-related exposure at all. In all other circumstances, especially in the very common and murky area where there are multiple identifiable sources of exposure within and outside the workplace, Cal/OSHA FAQs demand a conclusion of work-relatedness. For instance, examples of "work-related" exposures that would need to be logged under the FAQs include:

- Working in the same area where people known to have been infected had been; or
- Sharing tools, materials or vehicles with persons known to have been infected.

While these factors certainly should be considered in a work-related analysis, as they are under federal OSHA's guidance, these factors alone would not render a case "work-related" under federal OSHA's criteria, especially where there is a discernable basis to believe a non-work-related exposure was as likely the source of transmission (e.g., the employee's spouse contracted the illness a few days earlier).

The Cal/OSHA guidance leaves no room even to consider the employee's own belief as to where he/she contracted the illness. The members of this Coalition have identified numerous instances where there has been more than one COVID-19 case at a workplace, but where one or more of those employees notified the employer that the employee himself believed he contracted the virus outside the workplace – such as, while attending an event or party, traveling out of state for personal reasons, or having a family member who works in a hospital and was exposed, etc. Under federal OSHA guidance, those cases were properly determined to be not work-related, but because of the new presumption established by Cal/OSHA's guidance, those cases presumably are work-related in California.

In addition, Cal/OSHA's guidance includes no suggestion that the work-related presumption is rebuttable, nor does it provide any guidance on what would be needed to rebut this presumption if it is even rebuttable under any circumstances. Rather, the guidance makes clear that employers must "err[] on the side of recordability." Thus, in situations where an employer identifies any "work-related" factor (e.g., an employee used a tool that also had been used by another employee who had COVID-19), but also a non-work-related factor (e.g., the employee attended a July 4th barbeque with a cousin who had contracted COVID-19), Cal/OSHA's directive is to find work-relatedness and log the case, without consideration of the non-work exposures or even the infection control measures implemented at the workplaces (e.g., requiring the wearing of masks, social distancing measures, or enhanced sanitation, etc.).

As illustrated above, Cal/OSHA's May 27th FAQs directly contradict federal OSHA's "more likely than not" criteria that weighs non-work exposures equally and will result in overreporting and data contamination. The FAQs are inconsistent with the regulation

requiring State Plans to have the same requirements as federal OSHA for determining which injuries and illnesses are recordable.

III. Consequences and Burdens of Cal/OSHA's Diverging Recordability Criteria

The Coalition's concern regarding Cal/OSHA's deviation from federal OSHA recordkeeping criteria is not simply an esoteric one. Compliance with the criteria laid out in Cal/OSHA's FAQs will have real and significant negative consequences for the regulated community. Importantly, it also will hamper the ability of OSHA and State Plan states from accurately tracking COVID-19 transmission and identifying trends.

A. Distortion of an Accurate Record of COVID-19 Cases

Cal/OSHA has cast a broader net for capturing COVID-19 cases on California employers' 300 Logs than will be captured on employers' logs everywhere else in the country, rendering accurate comparative analysis of OSHA 300 Log data essentially impossible. This raises several serious concerns. First, for employers with facilities in both California and other parts of the country, their facility logs will almost inevitably skew to higher caseloads at their California facilities. This will make it appear that risk mitigation measures and safety protocols in place in their California facilities are less effective than measures implemented in other states, even if California facilities' exposure control plans and mitigation measures are equal or even superior to their sister facilities.

Because the federal OSHA and Cal/OSHA recordkeeping standards are different, the data will have lost its meaning. Company safety professionals will have no way of knowing which COVID-19 safety measures are working and which are not working. The data distortion could and likely will hamper critical job hazard analyses and evaluation of risk mitigation protocols and controls, and may improperly drive resource decisions.

Additionally, the same data distortion will occur for OSHA and the State Plans. OSHA relies on 300 Logs to identify injury and illness trends, and to assess existing hazards, but because California Log data will not reflect an "apples to apples" comparison, any trend analysis will be distorted and inaccurate.

B. Undue and Unfair Risks and Burdens on California Employers

Following Cal/OSHA recordkeeping guidance, California employers will inevitably log higher recordable numbers than employers in every other state, *even under scenarios that present precisely the same circumstances,* which will in turn have myriad consequences.

First, although employers have not yet fully realized these consequences, it is eminently reasonable to assume that the high COVID-19 caseload on OSHA logs will negatively impact California companies' contract bidding opportunities, especially in the construction and aerospace/defense industries, where the safety record of potential contractors is carefully

scrutinized. Likewise, and more generally, the risk of reputational harm associated with increased injury and illness recordables and/or DART rates is real and significant.[4]

Second, because DART rates are an element in most workers' compensation insurance rate modifiers, a disproportionate number of recordable illnesses for California employers will result in disproportionately higher workers' compensation insurance rates, not because California employers are experiencing higher instances of work-related illnesses, but just because Cal/OSHA has set a unique standard for recording such cases.

Finally, because Cal/OSHA expressly endorsed federal OSHA's COVID-19 recordkeeping guidance until its May 27th reversal, California employers face significant confusion over which is the proper standard for COVID-19 recordkeeping. It also is unclear which standard applies to COVID-19 cases recorded during the first few months of the pandemic. Retroactive application of Cal/OSHA's contradictory recordability standard would require California employers to revisit the recordability determinations of every potential COVID-19 related illness made between January and May 27th, creating an extraordinary burden that only California employers would have to bear.

An important point to clarify is that Cal/OSHA's realignment of its recordkeeping criteria with federal OSHA's will not interfere with or affect in any way an employee's ability to receive benefits for COVID-19 illnesses under California's workers' compensation program. The work-relatedness standard for federal OSHA 300 Log recording purposes is different than the standard for benefits under California's workers' compensation laws. In fact, by executive order, Governor Newsom ordered that any COVID-19-related illness must be presumed to "arise out of and in the course of employment" for purposes of awarding workers' compensation benefits. That mandate is unaffected by employers' 300 logs.

IV. Conclusion

For all the reasons discussed above, Cal/OSHA's unique COVID-19 recordkeeping standard places California employers between the proverbial rock and a hard place. They can follow federal guidance and risk harsh enforcement[5] for violating Cal/OSHA's unique recordkeeping criteria, or they can follow Cal/OSHA's recordkeeping criteria to avoid enforcement, but be exposed to myriad other negative consequences associated with artificially elevated COVID-19 recordable cases on their 300 Logs. Accordingly, we respectfully request Cal/OSHA rescind the COVID-19 FAQs referenced herein and promptly

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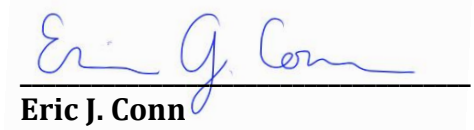
[4] The requirement to annually upload electronic recordkeeping data subjects this data to public availability. While federal OSHA's current policy has been to temporarily withhold this data from public disclosure, federal courts have rejected that policy.

[5] Recordkeeping violations are among the most common citations that Cal/OSHA characterizes as "repeat" violations, which results in steep penalties, upwards of potentially $132,765 per violation. Recordkeeping violations also are among the small set of citations that may be assessed on a "violation-by-violation" basis, with separate fines for each instance of a recordkeeping violation that constitutes "an egregious or flagrant violation."

reissue revised guidance that is fully consistent with federal OSHA's COVID-19 recordkeeping criteria.

We appreciate your interest in this matter and look forward to an opportunity to meet with you at your earliest convenience regarding this matter.

Sincerely,



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Rob Moutrie
Policy Advocate

California Chamber of Commerce

In conjunction with:

California Retailers Association
Crane Owners Association
FMI (The Food Industry Association)
National Retail Federation
Retail Industry Leaders Association