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VIA EMAIL (rs@dir.ca.gov)

Doug Parker
Chief, Division of Occupational Safety and Health
California Department of Industrial Relations
1515 Clay Street, Suite 1901
Oakland, CA 94612
DParker@dir.ca.gov

Re: Comments for Cal/OSHA Advisory Committee
Cal/OSHA Emergency COVID-19 Prevention Rule

Dear Chief Parker:

On behalf of the *California Employers COVID-19 Prevention Coalition* (the Coalition), we respectfully offer these comments and proposed changes concerning the Cal/OSHA Emergency COVID-19 Prevention Rule (the Emergency Temporary Standard or ETS).

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, agriculture, construction, wholesale food distribution, landscaping services, petroleum refining, logistics, veterinary services, steelmaking, and other industries, with a combined hundreds of workplaces with tens of thousands of employees across California. The Coalition's membership includes segments of the regulated community significantly impacted by the Emergency Temporary Standard.

Please accept our thanks for the invitation to participate on the Advisory Committee. We appreciated the opportunity to share with the Division some of the Coalition's feedback, concerns and recommendations during the three days of meetings last month. These written comments are intended to supplement and/or clarify those discussions.

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 with Cal/OSHA's noted potential changes from the "discussion draft" are in *italics* and the revised or additional content we recommend are in red font.

§ 3205 – COVID-19 PREVENTION

(a)(1)(B) - Scope: Telework

While the ETS provides that it does not apply to employees "working from home," we recommend the ETS be revised to clarify that it does not apply to employees permitted to telework from any location that is not controlled by the employer, *i.e.*, from home or anywhere else an employee chooses to work other than at the employer's place of employment. Such clarification would be consistent with the Frequently Asked Questions (FAQs) Cal/OSHA has published regarding the ETS, specifically "Scope of Coverage" FAQ 4 (emphasis added):

> **Q: Does the reg apply for employees working from remote locations other than their home?**
>
> A: No, the regulations do not apply to **employees an employer assigns to telework but who choose to work elsewhere, such as at a hotel or rental property.** The regulation on employer-provided housing (3205.3) applies when a person is working from a hotel arranged for or provided by the employer; however, the rule would not impose additional requirements for business travel by employees not sharing a room or suite.

Our Coalition's Proposed Regulatory Text:

(a)(1) This section applies to all employees and places of employment, with the following exceptions:

(B) Employees working from home or anywhere else an employee chooses to work other than at the employer's place of employment.

(b) – Definitions: EXCEPTION to COVID-19 Exposure

We support the Division's proposal in the discussion draft to add an Exception to the Definition of "COVID-19 exposure" regarding reliance on respiratory protection, but we recommend striking the word "required." As the scientific consensus is evolving to focus more on airborne transmission (as opposed to droplet transmission), Cal/OSHA should take every opportunity to incentivize greater use of N95s. Requiring a written respiratory protection program, fit testing (with scarce resources), and medical evaluations before allowing an employer to take credit for an N95 to avoid close contacts, will have the opposite effect.

During the Advisory Committee meetings, Mr. Berg indicated reluctance to make this change because of testing that showed a difference in the level of protection between a fit tested N95 respirator and one that had not been fit tested. But that analysis compares the wrong articles. What the Division should be comparing is the level of protection of an N95 that has not been fit tested vs. the level of protection of the simple face coverings that everyone outside of healthcare is wearing now. There can be no reasonable dispute that the N95, even without a fit test, is far more protective than simple face coverings. But we can report here

that employers are choosing to forego N95s because if we require them, Cal/OSHA could look to enforce any technical deficiencies under the respiratory protection standard. And if we do not require them, but permit them, we get no benefit under the ETS; *i.e.*, we will still lose employees to quarantine and potentially push them into testing programs. The end result is huge orders of magnitude fewer N95s being used in general (non-healthcare) industry.

Our proposed change is not without precedent in California. Look no further than the Agency's "Protection from Wildfire Smoke" Rule. Rather than requiring adherence to all elements of the respiratory protection standard (Sec. 5144) for use of N95s in that context, the Wildfire Smoke rule provides that when the Air Quality Index (AQI) is between 150 and 500, employers must provide N95 respirators to employees for voluntary use. The Wildfire Smoke rule requires adherence to all elements of Sec. 5144 only if the AQI is extraordinarily high, akin in the COVID-19 context to work around known or suspected COVID-19 patients, where respiratory PPE is mandatory.

Despite the Agency's hesitancy about this change, we strongly urge you to consider this. If you are looking for ways to make a bigger impact on the spread of COVID-19 in workplaces, this is a surefire way to get there.

Our Coalition's Proposed Regulatory Text:

EXCEPTION: Employees have not had a COVID-19 exposure if they wore ~~required~~ respiratory protection, such as a required or voluntary-use N95 respirator, ~~in accordance with section 5144,~~ whenever they were within 6 feet of the COVID-19 case during the high risk exposure period.

(b) Definitions: "Exposed Workplace" / "Exposed group"

We support the Division's proposal in the discussion draft to add an Exception to the definition of "exposed group" such that areas where masked workers pass through without interacting or congregating are not considered as part of an outbreak analysis.

The ETS should be revised to state that each shift may be considered a separate "exposed group." Cal/OSHA already has adopted this approach in guidance. *See* "Outbreaks and the 'Exposed Workplace'" FAQ 9.

The ETS should also be revised to expressly state that the presence of COVID-19 positive employees in separate but slightly (*e.g.*, two hours or less) overlapping shifts does not mean that all employees within each of the overlapping shifts need to be counted together for purposes of outbreak determinations.

Our Coalition's Proposed Regulatory Text:

"Exposed group" means all workers at a work location, working area, or a common area at work, ~~where~~ who were present with the COVID-19 case ~~was present~~ during the COVID-19 case's high-risk exposure period, including in the same location during materially overlapping times

of the same work shift. A common area at work includes bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas.

EXCEPTION: Places where persons wearing face coverings pass through without interacting, or congregating are not a work location, working area, or a common area at work.

(b) – Definitions: "Face Covering"

We support the additional flexibility Cal/OSHA is considering adding to the definition of "face covering," but we do not agree with introducing the new requirement for "two or three layers" of material, which would eliminate the acceptability of a huge volume of face coverings already acquired by employers throughout the state to comply with the ETS. Consider instead expressing a preference, but not a requirement.

Our Coalition's Proposed Regulatory Text:

"Face covering" means a surgical mask, a medical procedure mask, a respirator worn voluntarily, or a tightly woven fabric or non-woven material ~~of two to three layers~~. The face covering must have no visible holes or openings and must cover the nose and mouth. Employees should be encouraged to wear face coverings with two or three layers.

(c)(3)(B) - Investigation and responding to COVID-19 Cases in the workplace: notice of COVID-19 case

With respect to forms of notice acceptable under (c)(3)(B)(3), we recommend more flexibility than the list of methods included in the proposed amended regulatory text; *i.e.*, personal service, email, or text message. We recommend including "posting," either physically at the workplace, or at least via an intranet or other electronic communication system, as an acceptable form of notice.

Not all employees have work email or share personal email contact with their employers. Many employers do not, or are not able to, maintain any more reliable non-work contact information for employees than can be achieved through an electronic work communication system; *e.g.*, an electronic time clock/payroll system. The rule uses language that requires a form of communication that can reasonably be anticipated to be received by the employee within one business day. A form of posting that meets that condition should be acceptable under the rule.

Further, the rule presently requires notice to "All employees who may have had COVID-19 exposure…." We had intended to propose changes to that language because it caused confusion about whether this subset of employees was different than the universe of identifiable close contacts, and to suggest that it should be clarified to be limited to individuals who experienced a "COVID-19 exposure," as the term is used in the ETS, or the more commonly recognized term "close contact."

Cal/OSHA's proposed change to the regulatory text – that notice of a positive case should now be conveyed to "All employees at the worksite during the high risk exposure period" – moves in exactly the wrong direction. By changing the notice to "All employees at the worksite during the high risk exposure period," regardless of any actual interaction with the infected individual, or even presence during any shared time and space within the worksite with the infected worker, people who have literally zero risk of personal exposure would be notified of a positive case, implying that they may have been exposed. The proposed text would expand the audience who would receive these notices in a way that would turn the notices into something of a nuisance alarm, ultimately to be ignored, or worse, to cause unnecessary confusion and panic.

We understand the intent here is to align the notification requirements of the ETS with the corollary provisions of AB 685, but we believe the agency is on the wrong track. We should try to remedy the broken, overbroad notification requirements of AB 685, not to conform the ETS to them.

Our Coalition's Proposed Regulatory Text:

"Give ~~written~~ notice of a ~~potential~~ COVID-19 case at the workplace ~~worksite exposure~~ in a form readily understandable by employees, within one business day, in a way that does not reveal any personal identifying information of the COVID-19 case. ~~Written~~ Notice may include, but is not limited to, personal service, email, ~~or~~, text message, or by electronic or physical posting, if it can reasonably be anticipated to be received by the employee within one business day ~~of sending~~. The notice shall include the disinfection plan required by Labor Code section 6409.6(a)(4). The notice must be made ~~sent,~~ to the following:

a. All employees who have experienced an identifiable COVID-19 exposure in the workplace ~~at the worksite during the high risk exposure period~~ and their authorized representatives.

b. Employers of subcontracted workers who have experienced an identifiable COVID-19 exposure in the workplace. ~~Independent contractors and other employers present at the worksite during the high risk exposure periodplace during the high-risk exposure period.~~

(c)(3)(B)(5) - Investigation and responding to COVID-19 Cases in the Workplace: Testing

The ETS should be revised to state that "during their working hours" or "during employees' working hours" means that the employees must be paid regular wages and travel expenses if testing is conducted offsite outside of regular working hours (*i.e.*, while the employee must be compensated for their time and travel expenses, the employer is not obligated to provide the test during the employee's normal working hours). *See also* § 3205.1(b)(Outbreak) and 3205.2(b) (Major Outbreak). Cal/OSHA already has adopted this position in guidance. *See* "Testing" FAQ 6.

The ETS should be revised to expressly clarify that employers may provide testing to employees at a testing site separate from their work location and/or may meet its testing obligations by providing home test kits to covered employees (for use at home or work),

allowing covered employees to elect testing through health insurance, and other means/methods. Cal/OSHA already has adopted this position in guidance. *See* "Testing" FAQ 3.

We support Cal/OSHA's recognition in the Outbreak section of the discussion draft of CDC's guidance for limiting testing for individuals who previously tested positive (for 90 or 45 days, depending on whether symptoms are experienced). *See* CDC When to Quarantine ("People who have tested positive for COVID-19 within the past 3 months and recovered do not have to quarantine or get tested again as long as they do not develop new symptoms. Thus, for persons recovered from SARS-CoV-2 infection, a positive PCR without new symptoms during the 90 days after illness onset more likely represents persistent shedding of viral RNA than reinfection").

Additionally, we also recommend excluding individuals who were fully vaccinated prior to a COVID-19 exposure, and thus are at a very low risk for symptomatic COVID-19 infection or moderate or severe COVID-19 illness as a result. Our proposed language provides for the California Department of Public Health to determine the efficacy of FDA-approved vaccines, such that an exception from any testing (or quarantine) requirements would be warranted, allowing flexibility in the face of evolving research and studies about vaccine efficacy.

Our Coalition's Proposed Regulatory Text:

Make COVID-19 testing available at no cost ~~during paid time~~ to all employees of the employer who had a COVID-19 exposure in the workplace and provide them with the information on benefits described in subsections (c)(5)(B) and (c)(10)(C). Employers may provide testing to employees at a testing site separate from their work location and/or may meet its testing obligations by providing home test kits to covered employees (for use at home or work), allowing covered employees to elect testing through health insurance, and other means/methods. Employees must be paid regular wages and travel expenses if testing is conducted offsite outside of regular working hours.

EXCEPTION 1: For COVID-19 cases who returned to work pursuant to 3205(c)(11)(A) or (B), no testing is required for 90 days after the first positive test or, if the employee has experienced any COVID-19 symptoms since returning to work, then 45 days after the first positive test.

EXCEPTION 2: For individuals who have completed a vaccine that is approved or licensed by the US Food and Drug Administration (FDA) or authorized for emergency use by FDA under an Emergency Use Authorization, and, in the determination of the California Department of Public Health, has an efficacy of at least 70% in preventing symptomatic COVID-19 infection or moderate or severe COVID-19 illness for a duration that includes the high-risk exposure period, no testing is required.

(We offer the same recommendation for exceptions everywhere in the ETS for testing and exclusion from work of close contacts, i.e., a "COVID-19 exposure")

(c)(3)(B)(5) - Investigation and responding to COVID-19 Cases in the Workplace: Refusal to Test

The ETS should also expressly clarify that an employer cannot and is not required to mandate that an employee take a COVID-19 test, and that employers are in compliance with the ETS when they offer COVID-19 testing (where obligated to do so under the standard) to an employee at no cost to that employee, even if an employee declines or refuses to take the test. Cal/OSHA already has adopted this position in guidance. *See* "Testing" FAQ 5.

Our Coalition's Proposed Regulatory Text:

Add to end of (c)(3)(B)(5): *Employers are in compliance with this subsection if they offer COVID-19 testing at no cost to covered employees, even if an employee declines or refuses to take the test.*

(c)(6) - Training

We support almost all of the proposed changes in the discussion draft that constitute clarifications/explanations, but we do not support the addition of a new training topic to the list; *i.e.*, *"(J) How to participate in the identification and evaluation of COVID-19 hazards under (c)(1)(A)."*

The ETS was put into immediate effect with no rollout period over Thanksgiving weekend. Every employer in the state moved heaven and earth to come into compliance with the new rule as quickly as possible. That included conducting the identification and evaluation of COVID-19 hazards referenced in this proposed new training requirements (*i.e.*, the assessments have already been done), as well as updating their existing written COVID-19 plans to meet the nuances of the written plan requirements of the rule and providing additional COVID-19 training to employees on the updated written plans and other training topics specified in the rule to ensure there were no gaps from the numerous COVID-related training that has already been delivered to employees throughout the pandemic. Adding a new mandatory training subject months later, even a simple one, will mean an additional round of training for every employer in the state.

Accordingly, Cal/OSHA should not include this proposed insert in a final amended rule, or, at most, it should be identified as a subject to be "communicated to employees," as opposed to a subject required in training. That would enable employers to convey to employees the ways in which they can participate in the identification and evaluation of COVID-19 hazards by written communications, postings, or other methods that do not involve convening all employees for another training session.

(c)(6) - Physical Distancing

The ETS should be revised to state that physical distancing is not required when it is "not reasonably practicable" or "not feasible," as opposed to the current regulatory text: when it is "not possible." We think Cal/OSHA intends the requirement for physical distancing to be based on feasibility, as that is the traditional marker for regulatory requirements, and this is

the basis that Cal/OSHA is using to interpret the standard; however, the language indicates that physical distancing is required whenever achieving that is within the extreme realm of what is humanly possible, even when that may not be feasible.

Cal/OSHA should also consider including examples of when distancing may not be reasonably practicable, *e.g.*, cashiers, greeters, receptionists, workers at desks or in cubicles, cooks, and workers involved in team lifts.

We also recommend changing the word "momentary" in the provision – "except for momentary exposure while persons are in movement" – to comport with the concept included in Cal/OSHA's proposed Exception to the "Exposed Group" definition – "pass through without interacting, or congregating."

Our Coalition's Proposed Regulatory Text:

All employees shall be separated from other persons by at least 6 feet, except where an employer can demonstrate that 6 feet of separation is not ~~possible~~ reasonably practicable, and except ~~for momentary exposure while persons are in movement~~ where exposure is brief, such as while persons are near each other only briefly without interacting or congregating.

NOTE - We propose the same recommended change (i.e., "possible" becomes "reasonably practicable") everywhere in the ETS where the term "possible" is used; *e.g.*, in the Face Coverings paragraphs, the rule provides: "outside air supply to the area, if indoors, has been maximized to the extent possible."

(c)(8) - Other engineering controls, administrative controls and PPE: Barriers

Under the language proposed in the discussion draft, the ETS would require employers to rely exclusively on partitions at fixed work stations where it is not possible to maintain the physical distancing requirement. *See* 8 CCR 3205(c)(8)(A). The ETS should be revised to include permissive language in this provision, allowing for employers to draw upon the wide array of effective engineering and administrative controls that have been identified by throughout the pandemic.

As is well established, Cal/OSHA recommends following the hierarchy of controls for mitigating safety and health risks, and typically advises that a combination of controls is the best approach. Indeed, in one of its first guidance documents related to the COVID-19 pandemic, Federal OSHA stated: "Occupational safety and health professionals use a framework called the 'hierarchy of controls' to select ways of controlling workplace hazards. In other words, the best way to control a hazard is to systematically remove it from the workplace, rather than relying on workers to reduce their exposure. During a COVID-19 outbreak, when it may not be feasible to eliminate the hazard, the most effective protection measures are (listed from most effective to least effective): Engineering controls, administrative controls, safe work practices (a type of administrative control), and PPE. There are advantages and disadvantages to each type of control measure, when considering effectiveness, the ease of implementation, and cost. In most cases, a combination of control

measures will be necessary to protect workers from exposure to SARS-CoV-2." *See* OSHA "Guidance on Preparing Workplaces for COVID-19."

This hierarchy of controls should be reflected in the ETS to allow employers greater flexibility in choosing the types of engineering and/or administrative controls that work best with their operations to mitigate the risk of potential transmission.

To the extent that Cal/OSHA retains any reference to installing partitions under certain circumstances, the ETS should incorporate the specific definition for "fixed work location (station)" in the standard itself. *See* Sec. (c)(8)(A). Under Cal/OSHA guidance (*see* "Physical Distancing, Face Coverings and Other Controls" FAQ 4), a "fixed work location" is "a workstation where a worker is assigned to work with minimal movement from that location for extended periods of time. Examples include cashiers, greeters, receptionists, workers at desks or in cubicles, and food production line workers. It does not include construction or maintenance work."

Additionally, the standard should make clear that physical barriers are not required if their presence would create other hazards for employees (requiring workers to be exposed to hazards in moving around the barrier), materially obstruct operations at a workplace, or cause non-compliance with other regulatory obligations (*e.g.*, fire, building, and electrical code violations).

Our Coalition's Proposed Regulatory Text:

At fixed work stations where it is not ~~possible~~ reasonably practicable to maintain the physical distancing requirement at all times, the employer ~~shall install~~ should consider, among other engineering, administrative, and safe work practice controls, installation of cleanable solid partitions that effectively reduce aerosol transmission between the employee and other persons. Physical barriers should not be installed where their use could create other hazards, materially obstruct operations, or cause non-compliance with other regulatory obligations (e.g., fire, building, and electrical code violations).

A "fixed work location" is a location where a worker is assigned to work with minimal movement from that location for extended periods of time. Examples include cashiers, greeters, receptionists, workers at desks or in cubicles, and food production line workers. It does not include construction or maintenance work."

(c)(8) - Other engineering controls, admin. controls and PPE: Respiratory Protection

As we noted earlier, Cal/OSHA should do everything it can to incentivize employers to implement respiratory PPE. Requiring fit testing, medical evaluations, and full written respiratory protection programs for employers that have no hazardous chemicals in the workplace and no work tasks that involve known or suspected COVID-19 positive individuals, creates a huge disincentive for employers to supply and encourage the use of N95 respirator masks.

A better approach than requiring adherence to all elements of Sec. 5144 for N95s in this context, would be to follow the same approach Cal/OSHA has very recently adopted in the context of the "Protection from Wildfire Smoke" Rule, *i.e.*, when the AQI is between 150 and 500, employers must provide N95 respirators for employees for voluntary use. The Wildfire Smoke Rule only requires adherence to all elements of Sec. 5144 if the AQI is extraordinarily high, akin in this context to work around known or suspected COVID-19 patients.

Additionally, to account for the continued shortage of N95s, and the continued need to prioritize N95s for healthcare personnel, the ETS should explicitly state that provision of NIOSH-assessed KN95s and other similar makes/models that measure more than 95% filter efficiency is an acceptable alternative to N95s. *See* NIOSH "NPPTL Respirator Assessments to Support the COVID-19 Response."

Our Coalition's Proposed Regulatory Text:

Employers shall evaluate the need for respiratory protection ~~in accordance with section 5144~~ when the physical distancing requirements in subsection (c)(6) are not ~~possible~~ feasible or are not maintained, and in those circumstances, except when work tasks involve work around known or suspected COVID-19 cases, employers should provide N95 respirators or NIOSH-assessed masks that measure more than 95% filter efficiency for voluntary use.

(c)(9)(A) & (E) - Reporting, recordkeeping, and access: Notification and Employee Access

Cal/OSHA and local health departments should align employer notification obligations to report outbreaks to local health departments. Currently AB 685 and Cal/OSHA's ETS create differing notification/reporting requirements and different triggers for notification/reporting, causing great confusion for the regulated community and lessoning the likelihood of compliance with both requirements.

The ETS should include a provision stating that if an employer provides notice to the local health department of each COVID-19 case, that shall also be sufficient to satisfy compliance with the ETS and AB 685 outbreak notification requirements.

We support Cal/OSHA's proposed removal of the Sec. (c)(9)(E) requirement that information regarding COVID-19 cases be made available. Such requirement is duplicative, unnecessary, and potentially violates the privacy of those employees who have tested positive. Employees already have the ability to request Cal/OSHA 300 logs and are already receiving notifications required under the ETS and AB 685. Providing an additional right of access to sensitive medical information serves no legitimate purpose.

(c)(9) - Reporting, recordkeeping, and access: Test Results

The ETS should be revised to state that COVID-19 lab test results and documentation of proof of vaccination are not covered by the employee medical record retention regulation. The

30+ year retention requirement may be shortened by explicit retention periods in specific standards. We recommend setting such a specific period in the ETS; specifically, a one-year retention requirement. Retaining these types of records for decades serves no legitimate workplace health purpose. The reason other exposure and medical records are required to be kept for years is because of the potential long-term latency periods for onset of certain work-related illnesses. That purpose is not relevant to these types of records in this context. One year would be sufficient for evaluating compliance with the ETS.

Our Coalition's Proposed Regulatory Text:

(c)(9)(E) COVID-19 lab test results and documentation of proof of vaccination are not covered by 8 CCR 3204(c)(6)(A), and such test results and documents shall be subject to a one-year retention period.

(c)(10)(C) - Exclusion of COVID-19 cases: Exclusion Pay and Benefits

The ETS should be more explicit that if an employee is unable to work because of COVID-19 symptoms, then the employee is not eligible for exclusion pay and benefits under section 3205(c)(10)(C). Cal/OSHA already has adopted this position in guidance. *See* "Exclusion Pay and Benefits" FAQ 5.

The ETS should also be revised to allow employers to require employees to use vacation or other paid time benefits to offset wages during a quarantine.

Although it is already set forth in the ETS that the exclusion pay and benefits provisions only apply to employees "excluded from work under subsection (c)(10) (*i.e.*, because they are a "COVID-19 case" or had a "COVID-19 exposure"), the ETS should explicitly state that if an employer chooses to exclude an employee from the workplace who refuses to test (after a "COVID-19 exposure" or in an outbreak context), the employee is not entitled to exclusion pay and benefits. To require otherwise would create a perverse incentive for employees to decline testing, which surely Cal/OSHA did not intend.

Lastly, we also believe individuals who were fully vaccinated prior to the COVID-19 exposure, and thus are at very low risk for symptomatic COVID-19 infection or moderate or severe COVID-19 illness, should be excluded from the quarantine requirements, and therefore, also excluded from the exclusion pay and benefits provisions. We have proposed language providing that the California Department of Public Health will determine the efficacy of the FDA-approved vaccines such that an exception from any testing requirement would be warranted, allowing flexibility in the face of any evolving research or studies over efficacy rates.

Our Coalition's Proposed Regulatory Text

(c)(10)(C) 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 status,

as if the employee had not been removed from their job. Employees receiving disability or temporary disability payments for the period of exclusion mandated by this section shall not be considered able and available to work. Employers may use ~~employer-provided~~ employee sick leave and vacation benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law.

EXCEPTION 1: Subsection (c)(10)(C) does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission such as a business closure, caring for a family member, disability or vacation.

EXCEPTION 2: Subsection (c)(10)(C) does not apply where the employer demonstrates that the COVID-19 case or COVID-19 exposure is not work related.

EXCEPTION 3: Subsection (c)(10)(C) does not apply to an employee with COVID-19 exposure who has completed a vaccine that is approved or licensed by the US Food and Drug Administration (FDA) or authorized for emergency use by FDA under an Emergency Use Authorization, and, in the determination of the California Department of Public Health, has an efficacy of at least 70% in preventing symptomatic COVID-19 infection or moderate or severe COVID-19 illness for a duration that includes the high-risk exposure period.

EXCEPTION 4: Subsection (c)(10)(C) does not apply to an employee with COVID-19 exposure who declines a COVID-19 test.

(c)(11) - Return to work criteria - Generally

The ETS should include in its return-to-work provision the fact that, if a licensed health care professional determines the person is not/is no longer a COVID-19 case, in accordance with California Department of Public Health or local health department guidance, that person can return to work. Cal/OSHA already has adopted this position in guidance. *See* "Outbreaks and the 'Exposed Workplace'" FAQ 13, as well as in the original definition of "COVID-19 case."

Our Coalition's Proposed Regulatory Text:

(c)(11)(C) A COVID-19 case may return to work if a licensed health care professional determines the individual is not or is no longer a COVID-19 case.

(c)(11) - Return to work criteria – Critical Infrastructure

Our recommendation to improve the ETS in this regard is a simple one. Instead of the current provision at Sec. 3205(c)(11)(E), which requires employers to seek express approval from the Division to relax quarantine requirements for most critical infrastructure workers, the Division should simply expressly adopt the CDC's existing guidance: *See* "COVID-19 Critical Infrastructure Sector Response Planning." Under that guidance: "To ensure the continuity of essential functions, CDC advises that critical infrastructure workers may be permitted to continue working following potential exposure to a person with confirmed COVID-19," so

long as they are asymptomatic, follow universal masking, and monitor for symptoms, among other conditions. California has already defined what industries are considered Critical Infrastructure.

To the extent Cal/OSHA does not adopt CDC's existing critical infrastructure guidance, the ETS should, at the very least, be revised to allow for a 7-day quarantine (with a test after Day 5) option for all industries. For a rule that so heavily endorses and relies on testing, it feels particularly inappropriate for the rule to largely reject CDC's guidance permitting an earlier return to work based on a negative test. That approach has worked nationwide and should be part of California's ETS.

Regardless, the reference to a test that will allow a return to work in 7 days should be expanded to accept both a PCR and antigen test.

Our Coalition's Proposed Regulatory Text:

Add to end of (c)(11)(G): *Critical infrastructure employees with a COVID-19 exposure may be permitted to continue working following potential exposure to a COVID-19 case, so long as such employees are asymptomatic, wear a face covering at all times, and monitor for COVID-19 symptoms.*

§ 3205.1 (OUTBREAK) and § 3205.2 (MAJOR OUTBREAK)

§ 3205.1(a) and § 3205.2(a) - *Outbreak Determination*

The ETS improperly places the burden on the employer to manage non-work community spread. The ETS should be amended to tie outbreak determinations and continuation of outbreak status to transmission in the workplace. The ETS should be amended in several ways:

First, the cases that trigger a determination of an outbreak should be found to be epidemiologically-linked to work and the workplace (*i.e.*, transmission occurred within/at the workplace). Of course, the first case will always come from outside the workplace, but for any environment to be considered to be experiencing an Outbreak, every scientific assessment looks for growth in cases in that environment because of that environment. If all three cases happen to be in the same exposed workplace, but have had no connection with each other, and where there is clear evidence that at least one of the employees was exposed outside the workplace (*e.g.*, at a family gathering with a family member diagnosed with COVID-19, etc.), this situation should not constitute a workplace "outbreak," as there is no epidemiological link between the cases.

In its definition of "outbreak" for workplaces, the California Department of Public Health informs local health departments that an outbreak consists of "[a]t least three probable or confirmed COVID-19 cases[] within a 14-day period in people who are epidemiologically-linked[] in the setting, are from different households, and are not identified as close

contacts[] of each other in any other case investigation." *See* California Department of Public Health "Non-Healthcare Congregate Facilities COVID-19 Outbreak Definitions and Reporting Guidance for Local Health Departments" (Oct. 13, 2020). The California Department of Public Health includes in a footnote that "[e]pidemiologically-linked cases include persons with close contact[] with a confirmed or probable case of COVID-19 disease; OR a member of a risk cohort as defined by public health authorities during an outbreak. This includes persons with identifiable connections to each other such as sharing a defined physical space; *e.g.*, in an office, facility section or gathering, indicating a higher likelihood of linked spread of disease than sporadic community incidence." *See id*.

The whole concept of an outbreak at work is that the virus is being spread among co-workers. Obvious coincidental cases should not implicate an employer. To require anything less essentially substitutes the employer for the local public health authority in managing community spread.

In addition to requiring an epidemiological link (*i.e.*, work-relatedness), the outbreak trigger should not be a set number of cases (*i.e.*, 3 cases), regardless of the size of the workforce. Otherwise, a very large workplace could have 3 cases, which could reflect a much better infection rate than the surrounding community, but still be considered in outbreak status. The recommended threshold percentage for Major Outbreaks is 20%.

Likewise, extending the duration of an outbreak surely should be limited to only epidemiologically-linked cases. If an employer has completely eliminated workplace spread of the virus, but an employee, who happens to be in the same exposed group contracts COVID-19 at a personal holiday gathering, it cannot reasonably follow that the workplace is still experiencing an outbreak, and the employer is obligated to continue weekly testing for numerous employees.

Second, the outbreak period should be reduced from 14 days to 10 days. The original 14-day period was obviously intended to align with the ETS's original 14-day quarantine requirement. As that quarantine period has now been shortened to 10 days for asymptomatic close contacts, in accordance with Governor Newson's Executive Order, and employees who test positive can also be cleared to return to work in as few as 10 days regardless of whether they experienced symptoms, the outbreak period should realign with that period.

Third, the ETS should explicitly state that rather than use the testing date for purposes of measuring the 14- or 30-day period for assessing outbreaks and major outbreaks, employers should use the beginning date of each case's high-risk exposure period. The regulatory text and/or the associated FAQ ("Outbreaks and the 'Exposed Workplace'" FAQ 10) should be changed accordingly.

Finally, the ETS should state that the date from which to determine the end of an outbreak is the last date that the last case in the outbreak group was at the facility during his/her high-risk exposure period.

Our Coalition's Proposed Regulatory Text:

§ 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks.

(a)(1) This section applies to a place of employment covered by section 3205 if ~~it has been identified by a local health department as the location of a COVID-19 outbreak or when~~ the employer determines that there are the greater of three or more epidemiologically-linked COVID-19 cases in or at least 4% of an exposed group ~~workplace~~ within a 10-~~14-~~day period. *For purposes of measuring the 10-day period for assessing outbreaks, employers should use the beginning date of each COVID-19 Case's high-risk exposure period.*

(a)(2) This section shall apply until there are no new epidemiologically-linked COVID-19 cases detected in an exposed group ~~workplace~~ for a 10-~~14-~~day period.

§ 3205.2. Major COVID-19 Outbreaks.

(a)(1) This section applies to a place of employment covered by section 3205 when the employer determines that there are the greater of 20 or more epidemiologically-linked COVID-19 cases in an exposed workplace or 20% of an exposed group within a 30-day period. *For purposes of measuring the 30-day period for assessing outbreaks, employers should use the beginning date of each COVID-19 Case's high-risk exposure period.*

(a)(2) This section shall apply until there are no new epidemiologically-linked COVID-19 cases detected in an exposed workplace for a 10- ~~14-~~day period.

§ 3205.1(b) - Testing Requirements

We support Cal/OSHA's recognition in the Outbreak section of the discussion draft of CDC's guidance about limiting testing for individuals who have previously tested positive (for 90 or 45 days, depending on whether symptoms are experienced). *See* CDC When to Quarantine ("People who have tested positive for COVID-19 within the past 3 months and recovered do not have to quarantine or get tested again as long as they do not develop new symptoms"); *see also* CDC Duration of Isolation and Precautions for Adults with COVID-19 ("However, for SARS-CoV-2, reinfection appears to be uncommon during the initial 90 days after symptom onset of the preceding infection []. Thus, for persons recovered from SARS-CoV-2 infection, a positive PCR without new symptoms during the 90 days after illness onset more likely represents persistent shedding of viral RNA than reinfection") (internal link omitted).

The ETS should also be revised to eliminate the automatic second round of testing in the case of an outbreak. Rather, employers should be required to provide a single round of testing for the relevant subset of employees, and should not be required to provide subsequent round(s) of testing, unless three or more work-related cases are identified. Further, as with Section 3205(c)(3), the outbreak provisions should clarify that employers may provide testing to employees at a testing site separate from their work location and/or may meet its testing obligations by providing home test kits to covered employees (for use at home or work), allowing covered employees to elect testing through health insurance, and other means/methods.

Lastly, as discussed above, individuals who were fully vaccinated prior to a COVID-19 exposure, and thus are at very low risk for symptomatic COVID-19 infection or moderate or severe COVID-19 illness, should not be subject to testing requirements for an appropriate duration.

Our Coalition's Proposed Regulatory Text:

3205.1(b)(2)(B) After the first two COVID-tests required by subsection (b)(2)(A), employers shall make testing available once a week at no cost~~, during paid time,~~ to all employees in the exposed group, who remain at the workplace, or more frequently if recommended by the local health department, until this section no longer applies pursuant to subsection (a)(2). Employers may provide testing to employees at a testing site separate from their work location and/or may meet its testing obligations by providing home test kits to covered employees (for use at home or work), allowing covered employees to elect testing through health insurance, and other means/methods. Employees must be paid regular wages and travel expenses if testing is conducted offsite outside of regular working hours.

Exception to (b): No testing is required for individuals who have completed a vaccine that is approved or licensed by the US Food and Drug Administration (FDA) or authorized for emergency use by FDA under an Emergency Use Authorization, and, in the determination of the California Department of Public Health, has an efficacy of at least 70% in preventing symptomatic COVID-19 infection or moderate or severe COVID-19 illness for a duration that includes the high-risk exposure period.

Exception to (b): Employers are in compliance with this subsection if they offer COVID-19 testing at no cost to employees, even if an employee declines or refuses to take the test.

§ 3205.4 –EMPLOYER-PROVIDED TRANSPORTATION TO/FROM WORK

(a) - Scope

Cal/OSHA's proposed change broadening the "Scope" provision to include "transportation to and from different workplaces, jobsites, delivery sites, buildings, stores, facilities, and agricultural fields" may lead to troubling unintended consequences. For example, this language could very well be cited in enforcement proceedings under Sec. 3205.4 based on a vehicle being used for a purpose other than transportation such as the training of drivers or general operation of powered industrial trucks by employees performing their regular duties. In those cases, the requirements for prioritization of assignments and screening, among others, would be impractical and unnecessary. Accordingly, if this proposed change is accepted, we recommend clarifying that this rule does not apply to the use of a vehicle for any non-transportation purpose.

Our Coalition's Proposed Regulatory Text

Add this Exception: (a)(4) This section does not apply to the use of a vehicle for any purpose other than transportation.

(b) - Assignment of Transportation

The requirement that employers prioritize transportation assignments by, for example, transporting employees working on the same crew or workplace, is impractical in situations where the employer is offering employees a shuttle bus for commute purposes from the general community to various job sites. The ETS should be revised to state that such prioritization is not required when it is "not reasonably practicable" or "not feasible," as opposed to the current regulatory text, "when no other transportation alternatives are *possible*." It is critical that we not disincentive employers from providing commute transportation through a rigid prioritization order, as that would be a disservice for workers who might not have other safe modes of transportation to get to work.

Our Coalition's Proposed Regulatory Text

(b)(3) Employees who do not share the same household, work crew or workplace shall be transported in the same vehicle only when no other transportation alternatives are reasonably practicable ~~possible~~.

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On behalf of *the California Employers COVID-19 Prevention Coalition*, thank you for the opportunity to serve on the Advisory Committee and for considering our comments and recommended revisions.

Sincerely,

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