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Via Electronic Mail

Chair David Thomas and Board Members
Occupational Safety and Health Standards Board
Department of Industrial Relations
State of California
2520 Venture Oaks Way, Suite 350
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Re: Comments and Recommendations About Modifications to Cal/OSHA's Proposed Non-Emergency/Permanent COVID-19 Prevention Rule

Dear Chair Thomas and Members of The Board:

On behalf of the **California Employers COVID-19 Prevention Coalition** ("the Coalition" or "Coalition Members"), we have served on the Advisory Committee for the Cal/OSHA COVID-19 Prevention Emergency Temporary Standard (the "Emergency Temporary Standard" or "ETS") and the Proposed Non-Emergency/Permanent COVID-19 Prevention Standard (the "Proposed Non-Emergency Rule" or "Rule"). We respectfully offer these comments and recommendations concerning the revisions to the Proposed Non-Emergency Rule under consideration.

As a reminder, the California Employers COVID-19 Prevention Coalition is composed of a broad array of California and national employers and trade groups substantially impacted by Cal/OSHA's ETS and which would be substantially impacted by the Proposed Non-Emergency Rule. The common thread among our Coalition Members is that they are responsible employers who care deeply about their employees' health and safety.

Specific Comments Regarding Modifications to the Proposed Rule

§ 3205(b)(1) – Close Contact Definition

Our Coalition appreciates the revision to the "close contact" definition to return to the Centers for Disease Control and Prevention's ("CDC") measurable "close contact" standard, incorporating the 6-feet benchmark consistently relied upon by OSHA and public health agencies and employers across the country for over two years. However, we believe that

the CDC's definition should apply to all indoor workspaces, not just large spaces greater than 400,000 cubic feet per floor.

As we discussed in our initial comments, this new CDPH definition under subsection (b)(1)(A)("sharing the same indoor airspace as a COVID-19 case....") injects a novel ambiguous term with no reference to proximity that has unnecessarily complicated Coalition Members' efforts to determine whether their employees have experienced a close contact. Therefore, we urge the use of the CDC definition including a component of physical proximity for all workspaces, regardless of the size.

Nonetheless, should the Board be inclined to retain the expansive close contact definition under subsection (b)(1)(A), the Coalition encourages adding clarifying language recognizing the importance of proximity to the COVID-19 case, as well as the direction of airflow, the facility's configuration and engineering controls, as considerations in determining close contacts. Otherwise, employers will lack the guidance to meaningfully determine whether there has been a close contact without unnecessarily implicating the entire workplace.

Discussion at the October 20, 2022 Board Meeting

At the last Standards Board meeting, several members inquired into the benefits and legal protections applicable to COVID-19 that exist outside of the Board's present rulemaking.[1] To support the Board in evaluating these questions, we have provided a summary of some of the applicable benefits and legal protections otherwise available under California law.

Multiple Sources of Leave Entitlements for COVID-19 Purposes

California law currently provides benefits under a variety of statutes that have been applied to COVID-19 related absences from work:

- Workers' Compensation Paid Benefits
    - As Deputy Chief Eric Berg explained at the last Standards Board meeting, workers' compensation benefits are available for employees who contract COVID-19 in the workplace.[2] Generally a COVID-19 illness is deemed work related for workers' compensation purposes where there is a workplace outbreak. Specifically, Senate Bill 1159 (as extended through January 1, 2024

[1] Cal/OSHA's COVID-19 emergency rule mandates exclusion pay for employees who are COVID-19 cases or experience a close contact. Although the rule provides an exception where an employer "demonstrates" the employee's COVID-19 exposure was not work related, that is a hefty burden as the employer must rely on what information is shared by employees regarding their non-occupational sources of exposure. See COVID-19 Emergency Temporary Standards Frequently Asked Questions, Exclusion Pay and Benefits.
[2] DIR's "A Worker May Be Sick or Exposed to COVID-19."

by Assembly Bill 1751) creates a rebuttable presumption, for employers with 5 or more employees, that a COVID-19 illness is work-related and therefore eligible for workers' compensation benefits where an employee tests positive for COVID-19 during an outbreak at the employee's specific place of employment.[3]

- <u>State Disability and Paid Family Leave Benefits</u>

  - Employees who are unable to work because of an infection or suspected infection with COVID-19 can file a Disability Insurance (DI) claim. DI provides benefit payments to eligible workers with full or partial loss of wages due to a non-work-related illness or injury. In addition to paid DI benefits, employees are eligible for state Paid Family Leave benefits where they are unable to work because they are caring for a family member diagnosed with COVID-19 or related symptoms.[4]

- <u>Paid Sick Leave (Healthy Workplace, Healthy Families Act of 2014)</u>

  - Under California's regular paid sick leave law (Healthy Workplace, Healthy Families Act of 2014, Labor Code §§ 245-249), employees are covered, whether they are a full-time, part-time, or temporary employee. Employees can earn one hour of paid leave for every 30 hours worked and use at least 24 hours of paid leave per year, though many employers do not impose a cap on the use of accrued sick pay. In addition, a number of municipalities throughout the state have sick pay ordinances that confer more generous benefits to employees.

  - State law allows employees to use paid sick leave to:
    - Recover from illness or injury including due to COVID-19 illness;
    - Seek medical diagnosis, treatment or preventative care including for COVID-19;
    - Self-isolate as a result of potential exposure to COVID-19; and
    - Care for a family member who is ill or needs medical diagnosis, treatment, or preventative care. [5]

- <u>12 weeks of Leave under the California Family Rights Act</u>

  - Employers with 5 or more employees must provide up to 12 weeks of leave under the California Family Rights Act ("CFRA")(as well as the federal Family and Medical Leave Act). Eligible employees may take leave for a variety of

[3] Cal. Labor Code section 3212.88
[4] COVID-19 FAQs: Disability and Paid Family Leave Benefits.
[5] See FAQs on Laws Enforced by the California Labor Commissioner's Office.

circumstances including to attend to their own serious health condition or care for a family member's serious health condition.

- Leave as a Reasonable Accommodation under California's Fair Employment and Housing Act

  - California's Fair Employment and Housing Act is the primary source of protection for employees from discrimination, retaliation and harassment in employment. Specifically, the FEHA requires employers to provide leave as a reasonable accommodation due to an employee's disability or medical condition (as construed broadly). Leave is required if it appears likely that the employee will be able to return to work in the foreseeable future. See 2 Cal. Code of Reg. § 11068, subd. (c).

Job Protections Already Afforded to Employees Under Multiple Sources

At the last Board meeting, Ms. Stock requested that the Proposed Non-Emergency Rule include "job protections" of some sort. It should be noted, however, that such protections already exist under numerous state statutes including for circumstances where employees test positive for COVID-19, are absent from work or denied a request for time off related to COVID-19 illness, and otherwise assert their rights under the law. We have highlighted some examples of California employment laws that confer legal protections to employees under these circumstances, which may be enforced through civil actions and/or Labor Commissioner administrative proceedings:

- Labor Code section 6310 (broadly prohibits employers from discharging or in any manner discriminating against an employee because the employee has exercised any rights under the California Occupational Safety and Health Act).

- Labor Code section 6409.6 (prohibits employers from retaliating against an employee for disclosing a positive COVID-19 test or diagnosis or order to quarantine or isolate).

- Paid Sick Leave (Healthy Workplace, Healthy Families Act of 2014)(prohibits employers from denying an employee the right to use accrued sick days, or discharging, threating to discharge, demoting, suspending, or in any manner discriminating against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with [the enforcement agency] or alleging a violation of [the paid sick leave law], cooperating in an investigation or prosecution of an alleged violation of [the paid sick leave law], or opposing any policy or practice or act that is prohibited by [the paid sick leave law]"). Labor Code § 246.5(c)(1).

- Labor Code section 232.5 (prohibits employers from discharging, formally disciplining, or otherwise discriminating against an employee who discloses information about the employer's working conditions).

- California Family Rights Act (during family medical leave, employee shall retain employee status with the employer, and the leave shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan). Gov. Code § 12945.2(f).

- California Fair Employment and Housing Act (prohibits retaliation against an employee for requesting a reasonable accommodation based on mental or physical disability, regardless of whether the employer granted the request). 2 Cal. Code of Reg. § 11068(k).

Exclusion Pay Provision Under the ATD Standard Is Unique to That Rule

At the Board meeting, Ms. Burgel referenced the pay provision from the Aerosol Transmissible Diseases ("ATD") Standard seemingly requesting that it be incorporated into the Proposed Non-Emergency Rule. That pay provision is unique to the ATD Standard, as it applies to "precautionary removal" at the recommendation of a physician/licensed health care professional or local health officer under limited circumstances. See 8 Cal. Code of Reg. § 5199(h)(8)(B):

> ***Where the PLHCP[physician or other licensed health care provider] recommends precautionary removal, or where the local health officer recommends precautionary removal***, the employer shall maintain until the employee is determined to be noninfectious, the employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to his or her former job status, as if the employee had not been removed from his or her job or otherwise medically limited.[6]

The ATD Standard is generally limited to certain enumerated health care industries such as hospitals and skilled nursing facilities where employees are at an *elevated risk* of contracting an infectious disease than employees working in public contact businesses like retail that are not covered under this standard. For example, where an employee performs a procedure in the course of treating a patient with an aerosol transmissible disease, there is an increased risk for transmission than in a typical direct contact outside of this setting.

Here, however, the Proposed Non-Emergency Rule is far reaching, applying to all employers across all industries (except those covered by the ATD standard), yet specifically tailored to COVID-19, an illness for which there is pervasive community spread creating a

[6] Emphasis added.

reliable source of non-work related exposure. There is thus no clear nexus to the workplace as there often is under the ATD Standard, nor any gate keeping as there is with ATD's requirement that a licensed health care provider or local health officer recommend precautionary removal as a condition for pay continuation.

The community-spread characteristic of COVID-19 infection, and evolving COVID-19 conditions, including the availability of vaccinations, milder symptoms and significantly lower rates of COVID-19 related hospitalizations and fatalities, support omitting exclusion pay from the Proposed Non-Emergency Rule. In announcing that California's COVID-19 State of Emergency will end on February 28, 2023, Governor Newsom cited these very circumstances to support that decision.

Sunset Clause in the Proposed Non-Emergency Rule

In our initial written comments concerning the Proposed Non-Emergency Rule, we recommended including alternative bases for terminating the Rule – for example, where the COVID-19 State of Emergency is rescinded, or the Rule is repealed by Executive Order. In light of Governor Newsom's announced end of the State of Emergency, it is more critical than ever that an earlier sunset clause be recognized so the Rule can be aligned with the governor's action. These alternative triggering events are preferable to the Standards Board later having to undertake a time-consuming rulemaking process to consider and execute the repeal of the Rule.

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On behalf of the *California Employers COVID-19 Prevention Coalition*, thank you for the opportunity to comment and share this information.

Sincerely,

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