

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY
PUBLIC MEETING AND BUSINESS MEETING
August 20, 2020
Teleconference in Sacramento, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman Dave Thomas called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., August 20, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726 and via Webex at www.webex.com.

ATTENDANCE

Board Members Present at OSHSB Office

Dave Thomas

Board Members Absent

NONE

**Board Members Present via Teleconference
and/or Webex**

Barbara Burgel

Dave Harrison

Nola Kennedy

Chris Laszcz-Davis

Laura Stock

Board Staff Present at OSHSB Office

Christina Shupe, Executive Officer

Michael Nelmida, Senior Safety Engineer

Sarah Money, Executive Assistant

Division of Occupational Safety and Health

Staff Present via Teleconference and/or Webex

Eric Berg, Deputy Chief of Health

**Board Staff Present via Teleconference
and/or Webex**

Mike Manieri, Principal Safety Engineer

Lara Paskins, Staff Services Manager

David Kernazitskas, Senior Safety Engineer

Jennifer White, Staff Services Analyst

Others Present via Teleconference and/or Webex

Dan Leacox, Leacox & Associates

Michael Donlon, Construction Employers
Association

Mirella Deniz-Zaragosa, Warehouse
Worker Resource Center

Len Welsh, Western Steel Council

Kevin Goddard, CalTrans

Maggie Robbins, Worksafe

Ramón Castellblanch, CA Alliance for Retired
Americans

Dr. Robert Blink

Bruce Wick, CA Professional Association of
Specialty Contractors (CALPASC)

Megan Shaked, Conn Maciel Carey

Edith Aburto, Fight for \$15 and a Union	Bryan Little, CA Farm Bureau Federation
Margarita Tomas, Fight for \$15 and a Union	Michael Young, CA Federation of Teachers
Kevin Bland, Ogletree Deakins	Alice Berliner, Southern CA Coalition for Occupational Safety and Health (SoCalCOSH)
Lisa Prince, The Prince Firm	Eric McClaskey, International Union of Elevator Constructors
Anne Katten, CA Rural Legal Assistance Foundation	Michael Donlon, Construction Employers Association
Robert Moutrie, CA Chamber of Commerce	Johanna Bernal, Service Employees International Union, United Service Workers West (SEIU USWW)
Stephen Knight, Worksafe	Michael Müller, CA Association of Winegrape Growers
Lorena Perea Elox, Fight for \$15 and a Union	Katherine Hughes, Service Employees International Union Nurse Alliance of CA
Elizabeth Treanor, Phylmar Regulatory Roundtable	
Rosa Trevizo, Associated General Contractors of CA	
Cassie Hilaski, Nibbi Brothers General Contractors	

Mr. Thomas indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Mr. Thomas called for a break at 10:08 a.m. to resolve some technical issues with the meeting audio and reconvened the meeting at 10:09 a.m.

Dan Leacox, Leacox and Associates, stated that the emergency regulation that petition 583 is seeking to establish is not necessary because there are plenty of rules that the Division has successfully enforced to protect employees from exposure to COVID-19. He also stated that the process to create emergency regulations does not always include meaningful engagement with the regulated community, and without that meaningful engagement, the resulting regulation can be unrealistic, put unjustified burdens on the employer, and can result in a rule that is not fully vetted. **Cassie Hilaski, Nibbi Brothers General Contractors**, echoed this comment. Mr. Leacox stated that COVID-19 is a public health issue, and controlling it through the employment relationship can result in overreaching requirements, such as:

- The petition requires employers to collect and disseminate personal information about employees. **Cassie Hilaski, Nibbi Brothers General Contractors**, echoed this comment.
- The petition requires employers to establish, implement, and maintain an effective written compliance plan. This may result in employers being cited if just one employee gets sick.
- The petition requires the rule to include certain wage and hour provisions.

This regulation will also affect every employer in the state of California, so the costs will cross the \$50 million threshold and result in the regulation having to go through a standardized regulatory impact analysis (SRIA).

Lorena Perea Elox, Fight for \$15 and a Union, stated that her employer, McDonald's, has failed to protect workers from exposure to COVID-19. She said that McDonald's is not being honest with its employees about who has COVID-19 and who has been exposed to an employee with COVID-19. She is also not sure if her store is being properly sanitized between shifts to prevent exposure. Workers are forced to come in when they are sick because if they don't, their shifts get cut or changed. This was an issue prior to the COVID-19 pandemic. The Los Angeles County Health Department has failed to act on any complaints filed by the store employees. The current regulations are not working, so they need to be rewritten.

Maggie Robbins, Worksafe, stated that the lack of evidence of employer non-compliance with the COVID-19 guidance documents and standards does not mean that employers are complying. There is no data, such as inspections done by the Division, to support this contention. However, there are plenty of reports from the media and from workers of worksite outbreaks, workers remaining at work when they are sick, no social distancing, no handwashing access, and no worksite cleaning that indicate employers are not complying. There may be a lack of data as to how many of the COVID-19 illnesses and fatalities are due to exposure in the workplace, but no matter how big or small the percentage is of them that can be attributed to COVID-19, the illnesses and deaths from COVID-19 outnumber those caused by other means. **Anne Katten, CA Rural Legal Assistance Foundation**, echoed Ms. Robbins's comments.

Elizabeth Treanor, Phylmar Regulatory Roundtable, stated that developing an emergency regulation to address COVID-19 is not the best course of action for the Board to take, and the existing regulations sufficiently address COVID-19 exposure in the workplace. **Rosa Trevizo, Associated General Contractors of CA**, echoed this comment. Ms. Treanor stated the injury and illness prevention program (IIPP) standard encompasses all hazards, including COVID-19, and is comprehensive enough, and the other existing regulations and guidance do work. The Division's time would be better spent targeting employers who are not complying with the existing regulations through inspections and enforcement rather than on emergency rulemaking. She asked the Board to step back and assess the consequences that will come with adopting an emergency regulation, and to review the prescriptive and overreaching requirements in petition 583. **Kevin Bland, Ogletree Deakins, representing the CA Framing Contractors Association, the Residential Contractors Association, and the Western Steel Council**, echoed Ms. Treanor's comments.

Edith Aburto, Fight for \$15 and a Union, stated that her employer, McDonald's in Berkeley, has not closed for proper cleaning and sanitizing even though many of the workers have tested positive for COVID-19. McDonald's has asked the employees to do surface cleaning in the bathrooms and kitchen, but they are not the professional cleaners that are needed to properly clean the store following a COVID-19 outbreak. The employees have reported this to the city officials, but no action has been taken, and the management has retaliated against them by cutting their hours.

Michael Donlon, Construction Employers Association, stated that it is impossible for employers to comply with the wildfire smoke regulation because there are no N95 masks available and the Division has not found an adequate alternative. The Governor issued an order asking employers to give their N95 masks to healthcare workers, and now employers are being cited and fined for not having them. This is what happens when an emergency regulation is passed too quickly.

Mr. Donlon also stated that petition 583 is very duplicative of the public health orders that have been issued and will not make the workplace any safer than following the existing guidelines. A regulation to address COVID-19 exposure would also not be able to remain consistent with public health orders because public health orders are constantly changing. It will also lack consistency with the Health Insurance Portability and Accountability Act (HIPAA) laws because employers are not allowed to disclose that kind of information to other employees. The petition also requires that employers hire a competent person to implement this plan, and most employers do not have someone on staff who is qualified to do this.

Margarita Tomas, Fight for \$15 and a Union, stated that her employer, McDonald's in Oakland, told their employees to wear their disposable masks for several days and gave them gloves to wear that broke easily. There is no social distancing being implemented by her employer, and as a result, several workers have tested positive for COVID-19 and they have had to go to court to get their employer to comply.

Dr. Robert Blink stated that he supports petition 583 because Section 3203 does not apply to many industries, but it is important to address the concerns that have been raised so that employers are not unnecessarily burdened by the regulation. The new regulation will need to have a lot of built-in flexibility to accommodate the new incoming information and the rapidly changing circumstances surrounding the COVID-19 pandemic. He also recommended including a provision for getting input from local health officers in each jurisdiction.

Bryan Little, CA Farm Bureau Federation, stated that it will be difficult for most employers to find a person with the expertise needed to fulfill the "competent person" requirement that is listed in petition 583. He also said that N95 respirators are difficult to obtain because they are being given to healthcare workers to protect them against COVID-19 exposure, so employers need to have other alternatives. As a result, outdoor employers can only comply with the emergency wildfire smoke standard by implementing feasible engineering controls and practicable administrative controls, but these do not exist for many of those employers. As a result, outdoor employers are forced to either cease operations or to continue operating out of compliance. He asked the Board to consider the unintended consequences that have resulted from the emergency wildfire smoke standard because there may be unintended consequences if petition 583 is adopted.

Lisa Prince, The Prince Firm, stated that the Division is conducting many inspections related to COVID-19 exposure in the workplace, and there are regulations under which the Division can cite employers. **Rosa Trevizo, Associated General Contractors of CA**, echoed this comment. Ms. Prince said that adding an additional regulation like that mentioned in petition 583 will not help. She is concerned that some of the requirements in the petition, such as having a competent person on staff and updating an employer's written program, will take the focus away from safety and compliance. Also, the reporting requirements in the petition require employers to report positive COVID-19 cases to both the Division and the local public health department, regardless of whether or not the exposure occurred in the workplace. This is duplicative of the system that is already in place to report positive cases to the public health and contact tracing departments. The petition also creates problems when it comes to employee privacy. It will result in more fear and less communication in the employer/employee relationship.

Len Welsh, Western Steel Council, stated that it is important for the Division to focus its limited resources on where it will do the most good. The Division has been in compliance assistance mode since the beginning of this pandemic, and that has been the most helpful to employers. It has allowed the Division to reach more employers, explain what needs to be done to comply and why, and helped gain more trust from employers. It is best to allow the Division to continue to work in compliance assistance mode with employers to address COVID-19 exposure in the workplace because it gives the Division and employers the flexibility to change things quickly when new information becomes available instead of having to go through the process outlined in the Administrative Procedures Act (APA) to change a regulation. It also allows the Division to better target non-compliant employers and industries.

Bruce Wick, CA Professional Association of Specialty Contractors, stated that it would be good to find out from the Division the following:

- How have employers assessed the industry-specific guidance and used it to protect their employees from exposure to COVID-19?
- Are most of the citations being issued because employers are not following the industry guidance?

Mr. Wick also stated that employers who are not complying with the existing regulations will not comply with the new regulation, so it is better for the Division to focus its resources on enforcement and targeting non-compliant employers. **Rosa Trevizo, Associated General Contractors of CA, Cassie Hilaski, Nibbi Brothers General Contractors, and Michael Miiller, CA Association of Winegrape Growers**, echoed this comment.

Mr. Thomas called for a break at 12:00 p.m. and reconvened the meeting at 12:15 p.m.

Anne Katten, CA Rural Legal Assistance Foundation, stated that it is important to find alternatives to N95 masks for workers working outdoors when wildfire smoke is present. KN95's could be used, as well as valved N95's for socially distanced work outdoors and slightly expired N95's that could provide adequate protection. Employers also have the option to limit exposure to wildfire smoke by relocating or rescheduling the outdoor work if possible. It is very important to limit exposure to wildfire smoke because it can increase the risk of a worker getting COVID-19.

Stephen Knight, Worksafe, stated that an emergency regulation is needed right away to address COVID-19 exposure in the workplace because the ATD standard is limited in scope to only apply to healthcare workplaces. The Division has also indicated in its evaluation of petition 583 that an emergency temporary standard is needed so that the Division has all of the tools that it needs to ensure that workers are protected.

Robert Moutrie, CA Chamber of Commerce, stated that employers need to know what to do to comply with the wildfire smoke regulation in light of the fact that there is a lack of N95's available and there are no alternatives allowed. It appears that the only option for outdoor employers is to shut down when they are unable to get N95's. This is not a feasible option, especially for the indoor workplaces that have had to move their operations outdoors due to COVID-19 requirements.

Mr. Moutrie also stated that moving too quickly to develop an emergency regulation to address COVID-19 is not a good idea and could result in a regulation being developed that is not feasible. The regulation could also become outdated very quickly when science changes. **Cassie Hilaski, Nibbi Brothers General Contractors, and Michael Miller, CA Association of Winegrape Growers**, echoed this comment. Mr. Moutrie also said that a rise in the number of COVID-19 cases does not indicate that the current regulations aren't working, and anecdotal stories from workers do not demonstrate that there is a need for additional regulation.

Michael Müller, CA Association of Winegrape Growers, stated that many employers gave their N95 masks to healthcare workers at the beginning of this pandemic, and as a result, they don't have any to give to their workers because there is a shortage. Many winegrape growers are afraid that they will miss the harvest because they don't have N95 masks and there is no other alternative except to shut down. He asked the Division to coordinate with other agencies as soon as possible to come up with a solution. He also asked the Board to ensure that a complete fiscal analysis is done on each regulation that comes before it so that the true costs of each regulation are known before the regulation is adopted.

Katherine Hughes, Service Employees International Union Nurse Alliance of CA, stated that when it comes to talking with employees about work-related exposure incidents to COVID-19, employers cannot claim HIPAA protections or violations as a reason not to communicate this information with them. She said that further regulation is needed to address COVID-19, and though it may take a while, all employers will eventually comply with the new regulation. She stated that some employers continue to lock up and ration out personal protective equipment (PPE) to their workers or require their workers to reuse PPE that is not designed to be reused.

The following individuals also commented in support of petition 583:

- **Johanna Bernal, Service Employees International Union, United Service Workers West**
- **Ramón Castellblanch, CA Alliance for Retired Americans**
- **Mirella Deniz-Zaragosa, Warehouse Worker Resource Center**
- **Alice Berliner, Southern CA Coalition for Occupational Safety and Health (SoCalCOSH)**
- **Alexis Perez-Nava, Koreatown Immigrant Workers Alliance** [Mr. Perez-Nava provided a written statement to Alice Berliner of SoCalCOSH, and she read his statement into the record]
- **Michael Young, CA Federation of Teachers**

B. ADJOURNMENT

Mr. Thomas adjourned the Public Meeting at 12:49 p.m.

II. BUSINESS MEETING

Mr. Thomas called the Business Meeting of the Board to order at 12:49 p.m., August 20, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726, and via Webex at www.webex.com.

A. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Ms. Shupe stated that she is aware of no unresolved procedural issues regarding the items A-P on the consent calendar, and she believes that those items are ready for the Board's consideration and vote.

MOTION

A motion was made by Ms. Laszcz-Davis and seconded by Mr. Harrison to adopt the consent calendar as proposed.

A roll call was taken, and all members present voted "aye." The motion passed.

B. OTHER

1. Legislative Update

Ms. Shupe provided updates on the following bills:

- AB 685
- AB 2092
- AB 2537
- SB 275
- SB 1257

2. Executive Officer's Report

Ms. Shupe stated that the Board staff is preparing the proposed decision for petition 583. The proposed decision for petition 583 will be voted on at the September 17th Board Meeting. It will be posted on the Board's website no later than September 10th.

Ms. Stock stated that several standards have been developed out of need for additional regulation, such as the ATD and heat illness standards. Although the Division has conducted many inspections pertaining to COVID-19 exposure in the workplace, no citations have been issued yet. She asked Mr. Berg about the value that the ATD standard has provided since it was promulgated. **Mr. Berg** stated that the ATD standard has provided very valuable protection for the workers in healthcare, but it contains specifics that would be difficult to apply to all employers through the IIPP.

Ms. Burgel asked Mr. Berg if notification requirements similar to those in the ATD standard exist somewhere in the General Industry Safety Orders or the IIPP standard and pertain to infectious disease. **Mr. Berg** stated that there aren't any notification requirements outside of Section 5199 and 5199.1 that pertain to hazard communication.

Mr. Harrison stated that the total number of COVID-19-related deaths is already more than twice the number of fatalities in agriculture and construction combined, so an emergency standard is needed. He said that several Board Members have requested information from the Division regarding how many citations have been issued regarding COVID-19 exposure in the

workplace, and under what standards the Division is citing, but the Division has yet to provide this information. He asked the Board and Division staff to move forward with petition 583 and develop an emergency standard that is COVID-19-specific.

Ms. Laszcz-Davis stated that developing rulemaking does not guarantee that employers will comply, so if an emergency regulation is developed, there needs to be enough tension between the rulemaking and the compliance that will make a difference. It is important to note that the Division has recommended undertaking emergency rulemaking in this case, but they have not made it clear what the gap is that needs to be addressed. It is also important that if emergency regulation is undertaken, the process to develop the regulation needs to be much better than it was for developing the emergency wildfire smoke regulation so that everyone is on the same page. The resulting regulation needs to be simple, clear, understandable, and easy to implement.

Ms. Stock stated that there have been some situations, such as heat illness and wildfire smoke, where an emergency regulation has been issued due to the urgent need for one, followed by a process to refine it allowing further input from stakeholders. The language in the petition is a starting point, and she hopes that if the petition is adopted, that further discussion with stakeholders will take place. It is especially important for them to discuss how the emergency regulation can be refined in light of new science that is discovered regarding COVID-19.

3. Board Member Comments and Future Agenda Items

No future agenda items were mentioned.

C. CLOSED SESSION

The need did not develop for the Board to hold a closed session at this time.

D. ADJOURNMENT

Mr. Thomas adjourned the Business Meeting at 1:11 p.m.