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Joseph M. Alioto Jr., Board Chair
Occupational Safety & Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

RE: WPV ADVISORY COMMITTEE PROCESS – TRAUMA COUNSELLING

Chair Alioto and Board Members:

This letter uses the workplace violence prevention rule for general industry to illustrate the status of reform in advisory committee procedures used by Cal/OSHA. The specific example is the proposed mandate of trauma counseling as a component of post incident response. The specific issues are applicable APA requirements including authority and clarity.

RECOMMENDATIONS OF THE BOARD’S SUBCOMMITTEE ON ADVISORY COMMITTEES

The Subcommittee on Advisory Committees consisted of Chris Laszcz-Davis (Management Representative) and Dave Harrison (Labor Representative). At the May 15, 2025, board meeting, they reported findings and recommendations in a slide presentation including:

Takeaways from Interviews

- The Standards Board procedure is generally perceived as more inclusive, collaborative and advisory in nature.
- The Cal/OSHA process is perceived as a public forum, providing all an opportunity to be heard, but leaving little opportunity to dialogue, work through controversial elements and align on language.

Takeaways from Interviews, continued

- Parties discussed creation of a new AC process that borrows from both the Cal/OSHA and Board processes, with the first step being an open forum to talk about the key issues at hand, providing general comments and concerns. This step replicates the current Cal/OSHA procedure and reflects an opportunity by stakeholders to share key concerns.
- After the open forum session, Cal/OSHA staff would identify those “thorny or complex” issues requiring a smaller, well-represented group to dialogue the elements of alignment, implementation concern and disparity. This would replicate the existing Standards Board procedure which is perceived as presenting an opportunity to dialogue.

THE WPV ADVISORY COMMITTEE PROCESS

The first clear example of reform was the November 12, 2025, advisory committee online and in Oakland. Mr. Berg chaired the committee with far more engagement than the traditional hearing format. There was more discussion of issues and rationale. The board may recall numerous stakeholders making favorable comments at a subsequent board meeting.

The November meeting revealed several thorny and complex issues needing further dialogue with and between stakeholders. Mr. Berg expressed the likelihood of second smaller advisory group to address those issues in line with the subcommittee's recommendation. However, that meeting never materialized. Instead, the division did what it has done before – published revisions and called for written comments.

Numerous issues remain which the board will hear about as it appears they will not be resolved in the advisory process. While it's true, disagreement among stakeholders is inevitable. That should not excuse unresolved issues that should be resolved. The trauma counseling provision is such an issue. The requirement fails four of the six tests imposed by the Administrative Procedures Act:

- Nonduplication: The regulation must not needlessly repeat or serve the identical purpose of any other existing state or federal statute or rule.
- Consistency: The proposed rule must be in harmony with and not in conflict with existing state or federal laws.
- Clarity: The language must be easily and plainly understood by the specific people and public groups who are affected by it.
- Authority: The agency must cite a specific provision of state law that explicitly empowers or requires it to enact the regulation.

WPV TRAUMA COUNSELING REQUIREMENT

This is the trauma counseling requirement as it existed at the November 2025 advisory committee meeting. It is from the May 13, 2025, discussion draft.

(11) Effective procedures for post-incident response and investigation including:

(C) ~~For employers with more than 25 employees, Offering or~~ making available individual trauma counseling to employees affected by the incident upon request;

Note: trauma counselling offered to an employee through workers' compensation satisfies this requirement.

Above change made in response to comments. The employers only role is to offer services and is not responsible for diagnosis, prognosis, or treatment. Treatment offered through an employee assistance programs (EAPS) satisfies this requirement as well.

Prior to the meeting, the California Chamber of Commerce submitted a coalition letter dated November 10, 2025, including a comment about trauma counseling:

6) **The Proposed Standard's requirement of individual trauma counseling is already covered by the Workers Compensation system and was also specifically rejected by the Legislature. ((c))(11)(C))**

During the legislative debates regarding SB 553, the issue of post-incident counseling being provided on an individual basis was also discussed repeatedly – and was also removed from the bill before its final passage and signature by the Governor. We strongly oppose its re-introduction here in the Proposed Standard.

First and foremost – counseling is already provided as part of the workers compensation system for employees who need it after an incident. Requiring employers to provide such counseling to all “employees affected by the incident” is duplicative of that system.

Here we find expression of at least two APA issues. First, how can SB 553 be a source of authority for something the legislature specifically removed from the final version passed? Second, it states the obvious duplication. The treatment of worker illness and injury is the domain of workers compensation.

ADVISORY COMMITTEE MEETING (NOVEMBER 12, 2025) – CLARITY

At the November 2025 meeting, the committee discussed the trauma counseling requirement for most of an hour starting at 3:26 pm. The recording is available through Cal/OSHA's advisory committees web page. One notable outcome was the revelation to many that “*offering or making available*” is not limited to the counseling offered by workers compensation insurance or an employer's employee assistance program. This was clarified with a scenario put to Mr. Berg. If a person goes to workers comp for trauma counseling and they find it is not medically necessary, does that end the employer's obligation?

4:14p Mr. Berg. “No. If they don't receive anything from workers compensation, the employer would be required to make it available by other means.”

Many in the meeting did not understand this continuing obligation intended by those words and said so at the meeting. And these are professionals in the OSH world! For example:

4:15p Ms. Cleary. “I was confused about ‘*offering and making available*’. It was not my understanding that meant that if worker's comp denied it, you're now responsible to pay for it and provide it... It was not my understanding that ‘*offering*’ meant ‘*paying for and providing*’.”

4:16p Mr. Berg. “We could change the language ‘*If not covered by workers compensation make counselling available*’ if that would help... Would that be clearer to understand?”

4:16p Ms. Cleary. “Absolutely, that would make it clearer. But, I still don't think it's appropriate.”

So, a valuable lesson was learned by the public engagement. The trauma counseling requirement as worded in the May 13, 2025 discussion draft is misleading.

And it is easy to understand the stakeholder concern. The proposed construct would have the employer burden determined on a case-by-case basis by employees, counselors, Cal/OSHA inspectors and ultimately the OSH Appeals Board and courts. Mr. Berg offered that this might be resolved by scaling back the requirement to information only on sources of trauma counseling beyond workers comp and employee assistance programs.

ADVISORY COMMITTEE MEETING (NOVEMBER 12, 2025) – AUTHORITY

There was as well a discussion of authority. Mr. Berg confirmed (4:12 pm) that the statute cited for authority is Labor Code 142.3(c).

*In addition, where appropriate, the occupational safety or health standard or order shall prescribe the type and frequency of **medical examinations or other tests** which shall be made available, by the employer or at his or her cost, to employees exposed to such hazards **in order to most effectively determine whether the health of such employee is adversely affected** by this exposure.*

Some commenters, including Cal/OSHA staff, confused the distinction between authority to prescribe a medical examination or test to determine whether the health of an employee has been adversely affected versus authority to prescribe treatment for a discovered adverse health effect. Some also supposed Cal/OSHA must have authority because the WPV rule for healthcare has a similar requirement. That rulemaking also cited Labor Code 142.3(c) for authority. If the authority is not there in the second place, it was not there in the first place. Cal/OSHA cannot confer authority upon itself by precedent. It must be statutory. And the enforcement of APA requirements has been uneven over the years. At the same November meeting, Mr. Berg announced the Office of Administrative Law (OAL) would no longer tolerate notes in rules. The fact of notes in prior rules does not grant authority to continue the practice.

Regarding Labor Code 6401.9 (the WPV statute) as a source of authority, the board once asked Mr. Berg for the rationale to restore elements the legislature specifically took out of the statute. Mr. Berg cited a provision of the same statute giving authority to prescribe “any additional requirements the division deems necessary and appropriate to protect the health and safety of employees”. This raises the question of legislative intent. Did the legislature really intend for Cal/OSHA to restore what it removed? Moreover, that provision of Section 6401.9 gives authority **to protect** the health and safety of employees, not prescribe treatment for their adverse health effects.

All agree that trauma counseling is a good idea for those who need it, but the construct for providing it is critical. Adjudicating the satisfaction of a continuing treatment requirement is not something Cal/OSHA is equipped to do for the obvious reason it has never had authority to prescribe treatment. Prescribing treatment is controversial even on the subject of first aid.

WPV DISCUSSION DRAFT (APRIL 23, 2026)

In April 2026, Cal/OSHA released a new version of the rule addressing some stakeholder concerns. This is how the trauma counseling requirement was revised.

(11) Effective procedures for post-incident response and investigation including:

- (C) Offering or making available individual trauma counseling to employees affected by the incident. ~~upon request; Trauma counseling offered to an employee through workers' compensation or initial counseling offered by the employer satisfies this requirement.~~

~~Note: trauma counselling offered to an employee through workers' compensation satisfies this requirement.~~

"Upon request" was deleted based on written comments and comments from the November 2025 advisory meeting. The note was deleted and moved to subsection (c)(11)(C) based on OAL guidelines.

The employer's only role is to offer services and is not responsible for diagnosis, prognosis, or treatment. Treatment offered through employee assistance programs (EAPs) satisfies this requirement as well.

The previous note about workers compensation or initial counseling was moved into the body of the rule. In response, the California Chamber of Commerce submitted another coalition letter dated June 1, 2026, which says in part:

[W]e continue to be concerned about the obligation to provide counseling after workers comp determines that no counseling is appropriate. In that situation, the Proposed Regulation could be read to require ongoing counseling at significant expense.

To ensure that the Proposed Standard's terms are consistent, and that this ambiguous obligation is interpreted in light of the limited obligation to "offer ... initial counseling", we would request the following change:

- (C) Offering or making available individual trauma counseling to employees affected by the incident. upon request; Trauma counseling offered to an employee through workers' compensation or initial counseling offered by the employer satisfies this requirement. **The employer's obligation does not exceed the limits of worker's comp or the employer providing initial counselling.**

Clearly, the coalition believed that changes to the April 23, 2026, discussion draft were intended to impose the stated limitation.

WPV DISCUSSION DRAFT (JULY 22, 2026)

Cal/OSHA rejected the clarifying language without explanation and released a new draft with the following provision:

(11) Effective procedures for post-incident response and investigation including:

- (C) Offering or making available individual trauma counseling to employees affected by the incident. Trauma counseling offered to an employee through workers' compensation, an employee assistance program, or initial counseling offered by the employer satisfies this requirement.

The revision was made to subsection (c)(11)(C) based on stakeholder comments to clarify that an employee assistance program will satisfy this requirement.

At the board meeting in Alameda on August 20, 2026, I asked Mr. Berg to clarify whether changes to the requirement are meant to limit the obligation to that offered by workers compensation, including when denied. Mr. Berg explained. If workers compensation doesn't provide the trauma counseling, then the employer has not offered it, so has a continuing obligation to offer it.

ADDITIONAL ISSUES OF CLARITY AND CONSISTENCY

At the November 2025 advisory meeting, Mr. Berg was asked about the addition of *effective* at the beginning of post incident requirements (3:33 pm) and how Cal/OSHA would determine whether trauma counseling had been effective. He explained the regulatory force of *effective* is limited to the employer's offer of trauma counseling, not the trauma counseling itself. It isn't clear whether others would limit the force of *effective* as explained by Mr. Berg.

Also at the November advisory meeting, several speakers noted inconsistencies with the requirements of state and federal workers compensation insurance. For example, a claim for trauma counseling might arise long after the WPV incident. However, state and federal workers compensation insurance have time limits on making those claims.

CONCLUSION

It appears the above thorny issues will come to the board without having gone through an advisory process designed to resolve them with better stakeholder consensus and APA compliance. Mr. Berg's intent for the trauma counselling requirement is not the understanding conveyed by the words despite opportunities to clarify the language, including clear words offered by Mr. Berg at the November advisory meeting.

Most troubling is the intent. Is the board prepared to launch a new era in which the board dictates medical treatment, Cal/OSHA enforces it, the employee dictates whether the condition is a workplace injury, the Appeals Board determines the medical necessity of continuing treatment and the employer must pay out of pocket when the workers compensation system determines the treatment is not work related or not medically necessary?

Sincerely,

Dan Leacox

CC: Eric Berg, Chief Deputy for Health, Cal/OSHA and OSH Board Members (Chair Joseph Alioto, Chris Laszcz-Davis, Derek Urwin, David Harrison, Nola Kennedy, Cassie Hilaski, Joshua Lepper)