

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

1017 L Street, PMB #254
Sacramento, CA 95814-3805
(916) 274-5721
FAX (916) 274-5743
www.dir.ca.gov/oshsb



PETITION FILE NO. 583
PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on May 20, 2020, filed by Worksafe and National Lawyers' Guild, Labor & Employment Committee (Petitioners), requesting that the Board amend title 8 standards to create two new regulations. The first, a temporary emergency standard that would provide specific protections to California employees who may have exposure to COVID-19, but who are not protected by the Aerosol Transmissible Diseases standards (sections 5199 and 5199.1)¹. The second proposed standard would be a permanent rulemaking effort to protect workers from infectious diseases including novel pathogens (e.g. COVID-19).

Labor Code section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and render a decision no later than six months following receipt. This time frame has been extended by 120 days, by California Governor Gavin Newsom's Executive Orders N-63-20, and N-71-20, in recognition of the State of Emergency caused by COVID-19.

Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation. The Division has 60 days after receipt to submit an evaluation regarding the proposal; this timeline, running concurrently with the Board's timeline as described above, has also been extended by 120 days pursuant to Executive Orders N-63-20 and N-71-20.

SUMMARY

The Petition requests the Board adopt new regulatory requirements including, but not restricted to:

- Establishing a framework parallel to the Illness and Injury Prevention Program (IIPP) regulation, section 3203, which requires employers to create a written plan for employee protection;

¹ Unless otherwise noted, all references are to the California Code of Regulations, title 8.

- Creating procedures to identify and evaluate COVID-19 hazards, and to identify jobs categories, tasks, and procedures where employees may be exposed to COVID-19, as well as procedures to control the hazard of exposure;
- Creating procedures to respond to employees who have been diagnosed with COVID-19, who have symptoms of COVID-19, and who have been exposed to COVID-19;
- Establishing a job hazard analysis to identify modes of transmission in the workplace and adopt and implement preventative measures to minimize risk, including social distancing, ventilation systems, hygiene measures, and personal protective equipment (PPE);
- Institute a provision of employee training.

EMERGENCY RULEMAKING

The Government Code section 11346.1 provides for expedited rulemaking, under certain emergency circumstances, allowing for adoption of regulations generally remaining in effect for 180 days. The requisite “emergency” is defined as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (G.C. section 11342.545.) Per G.C. section 11346.1(b)(2), “[a] finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations... the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.”

At least five days prior to submission of the proposed emergency regulation to the Office of Administrative Law (OAL) for review, notice of the proposed action is to be sent to persons having filed a request for notice of regulatory action with OAL. (G.C. section 11346.1(a)(2).) OAL guidelines specify completion of its pre-adoption review within 10 calendar days of submission. (G. C. section 11349.6(b).)

The submitting agency is not required to provide the 5 day notice if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. (G.C. section 11346.1(a)(3).)

DIVISION EVALUATION

In its report concerning the Petition, dated July 30, 2020, the Division reviewed the Petitioner’s proposed changes to title 8. The review included an assessment of the hazards associated with exposure to COVID-19, information provided in the Petition, applicable title 8 standards, federal OSHA standards, and Cal/OSHA enforcement authority.

The Division staff evaluation recommends the Petition be approved. The Division’s report finds that an emergency regulation is warranted by the COVID-19 public health crisis. While section 5199 provides specific protections for infectious diseases such as COVID-19, it does not cover all California workers. The Division’s report also finds that while there are general title 8

provisions that constitute a basis for Cal/OSHA to enforce the protection of workers from COVID-19, enforcement efforts would benefit from a specific regulatory mandate related to prevention of the spread of infectious diseases. Moreover, guidance currently exists from a number of authorities—including both federal OSHA and Cal/OSHA—on how employers can best protect workers from COVID-19, making development of an emergency standard feasible.

The Division’s evaluation concludes that protections similar to current guidelines could be adopted via an emergency regulation, and the adoption of such standards would create clarity for employers and assist the Division’s enforcement efforts. The Division also recommends an advisory committee be convened after the pandemic subsides to determine whether a permanent regulation should be adopted to address the protection of non-5199 workers from infectious diseases, including novel pathogens.

BOARD STAFF EVALUATION

The Board staff evaluation dated August 10, 2020, included a review of the Petition, and relevant federal, California, consensus, and other standards. The evaluation notes that as of September 8, 2020, state government website <https://covid19.ca.gov> reports there were over 453,000 COVID-19 cases in California, and over 8,000 people had died from the illness. That website, as of September 2, 2020, reports over 737,000 cases of COVID-19, and 13,758 deaths. Moreover, the overall impact of the illness has been disproportionately borne by the state’s Latino population.

The Board staff evaluation recognizes that COVID-19 exposure is a significant issue, but the evaluation is not persuaded that further rulemaking is necessary. Many of the regulatory additions requested by the Petitioner were found by the Board staff evaluation to already be required by existing title 8 regulations. The Board staff evaluation suggests that enforcement and consultative outreach, rather than new regulations, would be the most effective use of limited state resources.

DISCUSSION

According to research cited in the Division’s evaluation, organ failure and death may result from COVID-19. (Division, p. 5.) Approximately 14% of COVID-19 patients are hospitalized, and individuals with underlying health conditions being most at risk for hospitalization and death. (*Id.*) Both the Division and Board staff evaluations clearly set forth the seriousness of the COVID-19 pandemic, which is responsible for the illnesses, hospitalizations, and deaths of thousands of Californians. The Board staff evaluation, however, questions whether new regulations are necessary.

The Board acknowledges the concerns presented by the Board staff evaluation, regarding promulgation of new regulations and use of State resources. While those concerns are taken seriously, ultimately, the Board is in agreement with the Petitioners’ assessment, and Division’s assertion as the enforcement agency, that an emergency regulation would enhance worker safety. COVID-19 is a hazard to working people. The Division is well positioned, as the State agency

responsible for enforcement, to advise the Board regarding the enforceability of new safety order requirements under consideration. Accordingly, the Board also accepts the Division's assertion that an emergency regulation would strengthen, rather than complicate, the Division's enforcement efforts.

CONCLUSION AND ORDER

The Board has considered the Petition and the recommendations of the Division and Board staff. For reasons stated in the preceding discussion, the Petition is hereby GRANTED in part as follows:

The Division is requested to work with Board staff to expeditiously submit a proposal for an emergency regulation to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace, for consideration no later than the November 19th, 2020 Board meeting. The proposal should include the proposed Emergency Regulatory Text, Finding of Emergency, and an Economic Impact Statement.

In the event the Board adopts an emergency regulation as a result of said proposal:

The Board requests the Division work with Board staff to convene a representative advisory committee to review any emergency COVID-19 rulemaking(s) adopted by the Board, for the purpose of establishing reasonable and necessary improvements required to avoid serious harm, as further guidance on the prevention of workplace transmission and exposure becomes available. The emergency rulemaking advisory committee should address these issues:

1. The prevailing guidance for worker protections from COVID-19 exposure in the workplace;
2. Notification for affected employers and workers;
3. Current industry best practices and guidelines; and
4. Considerations for the most vulnerable/impacted industries and professions.

The Petitioners should be invited to participate. Representatives for the following stakeholders should also be invited to participate:

1. California Department of Public Health
2. A representative cross-section of County and City Public Health Officers
3. A representative cross-section of Labor and Management representatives

The Division is requested to report back to the Board within 4 months, and again at 8 months, after the initial adoption of an emergency regulation, and within 4 months of any re-adoption.² The Board requests that this report include the following items at a minimum:

² Pursuant to Governor's Executive Order N-40-20, the timelines for filing, refiling, certification and/or review of regulations and emergency regulations are extended for a period of 60 calendar days. These timelines are further extended for 60 days by Executive Order N-66-20.

1. The dates of any advisory committee meetings and a list of invitees and participants;
2. A brief summary of the discussion, including participant concerns, and any available minutes;
3. Dates of future meetings, if applicable; and
4. Whether the Division is preparing to propose amendments to the emergency rulemaking, and the projected timeframe for providing the proposal to Board staff for notice of proposed emergency rulemaking.

If proposed amendments to an emergency rulemaking are being prepared, it should include the proposed updated Emergency Regulatory Text, updated Finding of Emergency (including evidence of necessity to avoid serious harm), and updated Economic Impact Statement.

Furthermore, the Board requests the Division convene a representative advisory committee after the COVID-19 pandemic subsides, as evidenced by the lifting of the State of Emergency declared by Governor's proclamation on March 4, 2020, to consider the necessity for a permanent regulation to protect workers not covered by section 5199 from airborne infectious diseases, including novel pathogens.