

OCCUPATIONAL SAFETY AND HEALTH  
STANDARDS BOARD  
(Board)

PETITION FILE NO. 583

BOARD STAFF EVALUATION

Submitted by: David Kernazitskas, MSPH, CIH, CSP

Senior Safety Engineer

August 10, 2020

### **INTRODUCTION**

Petition File No. 583 (Petition) was submitted by the Labor and Employment Committee of National Lawyers Guild and Worksafe (Petitioners) on May 20, 2020. The Petition seeks two Board actions to minimize the exposure of employees to SARS-CoV-2, the virus that causes COVID-19.

### **REQUESTED ACTION**

The Petitioners' first request is for an emergency temporary standard (ETS) to immediately place into effect protections from COVID-19 for employees, who are not covered by Title 8 CCR 5199 or 5199.1 (Aerosol Transmissible Diseases and Aerosol Transmissible Diseases – Zoonotic, respectively). The second request is for a permanent standard to protect all workers from current and future infectious diseases, including novel pathogens.

### **PETITIONER'S ASSERTIONS**

The Petitioners assert:

- “With respect to the request for an emergency temporary standard...time is of the essence.”
- The emergency temporary standard “will protect the lives not only of employees...[but also] of their families [and communities].”
- “Without specific occupational health and safety measures...Californians will die unnecessarily.”
- COVID-19 and infectious diseases are “toxic materials or harmful physical agents” covered by Labor Code 144.6, which requires the Board to: “*adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.*”
- “The COVID-19 pandemic is not going away anytime soon. And other novel pathogens may threaten this state and the world in the future. As more and more workers are brought back, their lives and livelihoods are pitted against each other. In order to protect the lives and health of workers and their families, in the face of this public health emergency, clarity is required.”
- With regard to protecting employees from COVID-19, Title 8 Section 3203 (Injury and Illness Prevention Program (IIPP)) and “a small number of more specific standards have not been adequate. Lives are being lost and will continue to be lost without consistent rules as a starting point.”

### **STAFF EVALUATION**

In support of their request, the Petitioners provide draft language for a proposed ETS, which follows the general outline of the existing IIPP standard (i.e. identify a person responsible for

implementing the plan, develop procedures for identifying and evaluating COVID-19 workplace hazards, develop procedures to control the hazard using hierarchy of controls, etc.). They propose some additional specific requirements to be included with the IIPP-like requirements, which they deem helpful to employers seeking to protect employees from exposure to COVID-19.

The proposed temporary standard aims to require employers to minimize the risk of COVID-19 transmission to employees from coworkers and the public. The suggested text requires employers to identify “a competent employer representative to develop and administer a written Compliance Action Plan [CAP] to protect employees.” The text proposes timelines for updating the CAP and requires the employer to share the information with workers and labor representatives.

Further, the text includes requirements for procedures to identify, evaluate, and control COVID-19 workplace hazards. The proposal also requires identification of job categories and tasks where employees can be exposed to COVID-19, as well as procedures to respond to employees exposed to, exhibiting symptoms of, or diagnosed with the illness. Finally, the proposal outlines requirements for performing job hazard analyses, social distancing, employee training and recordkeeping.

### **Relevant Standards**

#### **Federal Standards**

Federal OSHA regulations do not specifically address employee protections against COVID-19. Generally applicable standards that apply to controlling employee exposures to the virus include OSHA’s PPE standards (29 CFR 1910 Subpart I), which require gloves, eye and face protection, and respiratory protection. The General Duty Clause, which requires employers to furnish employees a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm, applies to the presence of SARS-CoV-2 in the workplace. Finally, OSHA’s Bloodborne Pathogens standard (29 CFR 1910.1030) may be helpful in providing a framework for controlling potential virus exposure from bodily fluids expressed via respiratory secretions<sup>1</sup>.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) brought suit against federal OSHA in the United States Court of Appeals for the District of Columbia Circuit, attempting to compel OSHA to create an ETS to provide specific employee protections against COVID-19 risks. In the suit, the AFL-CIO alleges that the guidance documents produced by OSHA do not carry the weight of enforceable standards and are therefore insufficient to protect employees from COVID-19 hazards.

In a May 29, 2020, federal OSHA response to the action, OSHA claims:

---

<sup>1</sup> “Guidance on Preparing Workplaces for COVID-19.” U.S. Department of Labor, Occupational Safety and Health Administration. <https://www.osha.gov/Publications/OSHA3990.pdf>. Accessed 7/24/20.

Petitioner [AFL-CIO] fails to demonstrate that any employer has or would forgo compliance with any of the potential standards to which Petitioner alludes, simply because they are not set forth in an ETS. Nor could Petitioner do so, because the standards Petitioner seeks are largely already mandatory and enforceable either through existing OSHA requirements or the veritable gamut of non-OSHA public safety requirements enacted by federal, state, and local officials in response to the pandemic.<sup>2</sup>

The court ruled in favor of federal OSHA, stating:

In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments..., the OSHA reasonably determined that an ETS is not necessary at this time.<sup>3</sup>

### **California Standards**

Cal/OSHA's Aerosol Transmissible Diseases (ATD) standard (Title 8, Section 5199) directly applies to novel viruses such as SARS-Cov-2, but the scope of the standard is limited mostly to medical offices, certain laboratories, correctional facilities, homeless shelters, drug treatment programs, and any other employer that Cal/OSHA informs in writing that they must comply with the ATD standard. Employers not included in the scope of the ATD standard have generally applicable requirements, which include the Injury and Illness Prevention Program (IIPP, Section 3203), Washing facilities (Sections 1527, 3366, 3457, and 8397.4), PPE (Section 3380), Respiratory Protection (Section 5144), Sanitation (Article 9), and Control of Harmful Exposures (Section 5141).

Additionally, Cal/OSHA recommends that employers not covered by the ATD standard comply with the recommendations from the Centers for Disease Control (CDC) "Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)." Cal/OSHA provides a number of documents with guidance for specific industry sectors, as well as model ATD plans and programs<sup>4</sup>. Several Cal/OSHA guidance documents point out that updating the employer's IIPP to address exposure to SARS-Cov-2 is "mandatory in most California workplaces since COVID-19 is widespread in the community."<sup>5</sup>

---

<sup>2</sup> United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT, No. 20-1158. Document #1844937. Filed 5/29/2020. Page 24 of 73. An online copy was found here on 7/24/2020:

[https://www.ali.org/media/filer\\_public/2f/4f/2f4fcca1-8b14-4725-a6f3-4a302f3eb83d/osha\\_response\\_to\\_afl-cio\\_petition\\_for\\_writ\\_of\\_mandamus\\_2020.pdf](https://www.ali.org/media/filer_public/2f/4f/2f4fcca1-8b14-4725-a6f3-4a302f3eb83d/osha_response_to_afl-cio_petition_for_writ_of_mandamus_2020.pdf)

<sup>3</sup> United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT, No. 20-1158. Document #1846700. Filed 6/11/2020. Page 1 of 2. An online copy was found here on 7/24/2020:

<https://environblog.jenner.com/files/order-no-20-1158-1.pdf>

<sup>4</sup> "Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus." State of California, Department of Industrial Relations. <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>. Accessed 4/29/2020.

<sup>5</sup> "Safety & Health Guidance." Cal/OSHA Publications. <https://www.dir.ca.gov/dosh/puborder.asp>. Accessed 4/30/2020.

### **Consensus and Other Standards**

A variety of sources exist which provide information on reducing potential employee exposure to SARS-CoV-2. In general, the sources provide information on reducing transmission among employees, maintaining healthy business operations, and maintaining a healthy work environment. The CDC, the World Health Organization (WHO), the American Industrial Hygiene Association, and the California Department of Public Health are examples of the many organizations that provide such information.

The state of Virginia, which has a state-run OSHA program (VOSH), adopted an ETS on July 15, 2020, “designed to establish requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2.”<sup>6</sup> The standard is the first of its kind in the nation and is “designed to supplement and enhance existing VOSH laws, rules, regulations, and standards applicable [to COVID-19].” The standard allows businesses to comply with CDC guidelines, instead of VOSH regulations, where the CDC guidelines are more protective. In general, the VOSH program mandates compliance with many of the recommended practices found in guidelines from a variety of credible occupational safety and health organizations.

The state of Oregon has also started the process of developing regulations to protect employees in healthcare settings and in general industry. A timeline for such actions anticipates emergency regulations to be in place by September 1, 2020, and permanent regulations to be in place, at least in part, by March 1, 2021<sup>7</sup>.

### **Position of Division (Cal/OSHA)**

In its July 30, 2020, evaluation of Petition 583, Cal/OSHA recommends that the Standards Board grant the petition, in part, by requesting Cal/OSHA to develop a proposed emergency temporary standard for the consideration of the Standards Board. Cal/OSHA also recommends that the Board request Cal/OSHA to convene a future advisory committee to determine whether a permanent regulation should be promulgated to protect Non-5199 Workers from infectious diseases, including novel pathogens.

In support of the recommendation, the evaluation states,

If COVID-19-specific protections similar to the [COVID-19-specific] guidelines were spelled out in the Title 8 standards, Cal/OSHA could more easily enforce requirements that would be specific, detailed, and more protective of workers...A specific COVID19 emergency regulation in Title 8 would provide clear instructions to employers and

---

<sup>6</sup> Virginia Department of Labor and Industry. “16VAC25-220 Emergency Temporary Standard, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19.” Safety and Health Codes Board. July 15, 2020. <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf>. Accessed 7/24/2020.

<sup>7</sup> Potential Oregon OSHA Rulemaking Timeline COVID-19/Infectious Diseases. Rev. July 13, 2020. <https://osha.oregon.gov/rules/advisory/infectiousdisease/Documents/Infectious-Disease-Public-Timeline.pdf>. Accessed 7/28/2020.

employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance.

### **Analysis**

As the Board is aware, the WHO declared the COVID-19 outbreak a pandemic on March 11, 2020.<sup>8</sup> On March 19, 2020, Governor Newsom signed Executive Order N-33-20<sup>9</sup>, requiring all residents of California to shelter in place, except as needed to maintain critical infrastructure sectors.

The Petitioners assert that employees not covered by one of California's ATD standards, which would include the majority of California workers, are not sufficiently protected by existing regulations and are at risk of death from COVID-19 without their proposed ETS or another enforceable standard. They state:

Lives are being lost and will continue to be lost without consistent rules as a starting point for our state's workplaces that allow employers some flexibility with respect to individual needs in their places of employment.

Cal/OSHA's webpage for COVID-19 guidance to employers contains the following statement:

Workplace safety and health regulations in California require employers to take steps to protect workers exposed to infectious diseases like the Novel Coronavirus (COVID-19), which is widespread in the community. Cal/OSHA has posted guidance to help employers comply with these requirements and to provide workers information on how to protect themselves and prevent the spread of the disease. (Emphasis added.)<sup>10</sup>

Eric Berg, Deputy Chief of Health for Cal/OSHA has recently testified to the Board that Cal/OSHA is enforcing existing COVID-19 protections and providing consultative outreach to employers with exposed employees. Board staff is unable to find evidence that the vast majority of California workplaces are not already in compliance with COVID-19 requirements and guidelines.

A Nevada OSHA press release on July 17, 2020 reported that an average of 80%-90% of Nevada businesses from a variety of sectors are in compliance with the state's guidelines for employee COVID-19 protections. The release states:

Follow up visits have been conducted at 192 businesses where Nevada OSHA officials found that 93 percent of those locations are now in compliance.

---

<sup>8</sup> "WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020." <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. Accessed 4/28/20.

<sup>9</sup> "Executive Order N-33-20." Executive Department, State of California. <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>. Accessed 4/30/2020.

<sup>10</sup> Cal/OSHA and Statewide Industry Guidance on COVID-19. <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>. Accessed 7/27/2020.

Since initial observations to determine compliance with mandated health and safety measures began, Division of Industrial Relations officials have visited 2,257 business establishments in northern and southern Nevada. As of July 15, the overall compliance rate for all business sectors statewide stood at 82 percent, with an 86 percent compliance rate in northern Nevada, and 80 percent in the south.<sup>11</sup>

Board staff cautions that a new regulation would place additional regulatory burden on California businesses that are already compliant with California's COVID-19 requirements and guidelines. Some employers exhibit a lack of regard for Cal/OSHA regulations and continue to do so despite robust efforts on the part of regulatory agencies and employer and labor groups. It is the opinion of Board staff that during the pandemic crisis, Cal/OSHA's limited resources should continue to be focused on enforcement and consultation outreach specifically targeted at employers and sectors of the economy with deficient COVID-19 protections, as this is more likely to be effective at ensuring employee protections.

The Petitioners' effort to prescribe specific requirements in conjunction with an IIPP-like framework may contradict the legislative intent described in Government Code Section 11340.1(a):

It is the intent of the Legislature that agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process. (Emphasis added.)

California's IIPP regulation is a performance standard that has been used successfully since its effective date in 1991 to require employers to identify and address workplace hazards in accordance with the referenced legislative intent. Unnecessarily creating an offshoot of the IIPP, without substantial evidence of need, can harm the existing protective nature of the regulation and its benefit to California workplaces by diluting its capacity to serve as the primary regulation requiring employers to address newly discovered hazards.

Because of the novel nature of the COVID-19 virus, guidelines for employers to reference for assistance in protecting employees frequently change. Attempting to codify some of those requirements will no doubt result in confusion when the updated guidelines conflict with the written regulation. Although the Petitioners suggest a requirement for employers to update their programs within 10 days of new information, current regulations require employers address hazards "in a timely manner based on the severity of the hazard". As it would be

---

<sup>11</sup> "DIVISION OF INDUSTRIAL RELATIONS ANNOUNCES CITATIONS, INDUSTRY-LEVEL COMPLIANCE RATES WITH COVID-19 HEALTH AND SAFETY REQUIREMENTS." Division of Business and Industry. Las Vegas, NV. July 17, 2020. [http://business.nv.gov/News\\_Media/Press\\_Releases/2020/Industrial\\_Relations\\_COVID-19/Division\\_of\\_Industrial\\_Relations\\_announces\\_citations\\_industry-level\\_compliance\\_rates\\_with\\_COVID-19\\_health\\_and\\_safety\\_requirements/](http://business.nv.gov/News_Media/Press_Releases/2020/Industrial_Relations_COVID-19/Division_of_Industrial_Relations_announces_citations_industry-level_compliance_rates_with_COVID-19_health_and_safety_requirements/). Accessed 7/27/2020.

improper for employers to delay 10 days prior to addressing some hazards, the Petitioners' proposal would be less protective than current regulations. It is already the responsibility of employers to be aware of new information, and regulations setting specific prescriptive requirements are likely to become quickly outdated in the rapidly evolving crisis, creating a potential for wasteful enforcement actions.

For example, the state of Virginia's recently adopted ETS would encounter conflicts with the Petitioners' proposal for updating the program. VOSH allows employers to follow CDC guidance instead of state law where the CDC guidance is more protective, without providing information for determining the effectiveness of the protective measures. VOSH also requires employers to screen employees for signs or symptoms of COVID-19 before each shift. Updated guidance now recommends employees self-screen at home before coming to work<sup>12</sup>. Relying on California's performance-based IIPP allows employers to respond to updated worker protection guidelines in a more efficient and responsive manner, which translates into more-effective employee protections.

As of July 26, 2020, at 11:00am, the <https://covid19.ca.gov/> website for California's COVID-19 data, says that there are 453,659 cases in the state and that 8,416 people have died from the illness. As pointed out by several observers, the Latino population in California has been disproportionately affected by the virus. The following figures are reproduced from the COVID-19.ca.gov website:



Figure 1. California data indicating that 56% of the identified COVID-19 cases and 46% of the deaths have occurred in the Latino population. The vertical gray lines indicate the percentage of the population for each Race/Ethnicity.

<sup>12</sup> Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#more-changes>. Accessed 8/5/2020.



The same website also provides the number of cases and deaths by county:

Positive Cases by County (Updated 7/25/2020)			Deaths by County (Updated 7/25/2020)		
Los Angeles	172,611	38%	Los Angeles	4,351	52%
Riverside	34,921	8%	Riverside	637	8%
Orange	33,978	7%	Orange	562	7%
San Bernardino	29,265	6%	San Diego	533	6%
San Diego	26,703	6%	San Bernardino	372	4%
Kern	16,910	4%	Santa Clara	184	2%
Fresno	12,866	3%	Imperial	181	2%
Alameda	10,361	2%	Alameda	178	2%
San Joaquin	10,347	2%	Tulare	168	2%
Santa Clara	8,767	2%	Kern	123	1%

Figure 2. California data showing that Los Angeles County has more COVID-19 cases than the next seven counties combined and more deaths than the next nine counties combined.

Public health experts are at a loss for an explanation of the disproportionate impact on the Latino communities. The phenomenon has appeared in several other states, including Arizona, Florida, North Carolina, Texas, Washington, and Wisconsin. In an attempt to explain the data, a New York Times article says that contact tracers have found large spikes in the number of cases associated with large family gatherings both in the United States and in Latin American countries. The article also states that:

During the lockdown, millions of Latino workers kept a bare-bones economy running: at the cutting tables of food-processing plants, as farmhands, as hospital orderlies, food preparers, supermarket workers and in many other jobs deemed essential. And they brought the virus home to often cramped living quarters, compounding the spread.<sup>13</sup>

Instead of directing limited resources to create new regulations to prescriptively require what is already required by the existing IIPP performance regulation, enforcement and consultative efforts could continue to focus on businesses in specific parts of the state, such as Los Angeles County, where about 40% of the cases and 50% of the deaths in California have occurred, or on specific industries identified as having disproportionately high incidents of infection. Developing an ETS and a follow-up permanent regulation for the entire state may not be the most effective use of California’s limited Cal/OSHA and Board resources.

<sup>13</sup> Shawn Hubler, Thomas Fuller, Anjali Singhvi and Juliette Love. “Many Latinos Couldn’t Stay Home. Now Virus Cases Are Soaring in Their Communities.” New York Times. Published June 26, 2020. Updated June 28, 2020. <https://www.nytimes.com/2020/06/26/us/corona-virus-latinos.html>. Accessed 7/27/2020.

The Petitioners have identified a concern in that the tragic effects of the COVID-19 pandemic disproportionately affect people of generally lower-income and socio-economic status, but they have provided no evidence that their proposed statewide ETS, which is necessarily limited to workers, will remedy this concern. Alternatively, the State's approach to date has utilized tactics learned from emergency management, focusing finite resources asymmetrically to provide containment and abatement. Crowded public places and inadequate social distancing and face-covering provide opportunities for virus transmission not limited to workplaces. Cal/OSHA's continued coordination of efforts with other State agencies, including the California Department of Public Health, is more likely to be effective in addressing the need in disproportionately impacted communities.

Board staff is not aware of any California studies or data showing that employers are lacking the information necessary to provide employee protections from COVID-19 hazards, nor that the vast majority of employers are not already doing as much as they are able to keep their employees, customers, and businesses functioning safely in accordance with federal, state, and local requirements. Cal/OSHA enforcement officers are able to cite employers who flout worker protection regulations. Employers who fail to properly address the hazard to employees presented by COVID-19 incur risks of being shut down, fined, having licenses revoked, and a damaged reputation in the public forum.

After reviewing the Petition and existing regulations governing the concerns raised by the Petitioners, Board staff is of the opinion that while the risk of exposure to SARS-CoV-2 is significant, new regulations, whether in the form of an emergency or permanent regulation, are not likely to significantly improve employee outcomes. Employers have ready access to credible information to combat exposure to SARS-CoV-2 and are already required to effectively address such challenges in their workplace. Continued enforcement of existing regulations and consultative outreach is a more efficient and likely effective use of the Cal/OSHA's limited resources.

#### **STAFF RECOMMENDATION**

Consistent with the foregoing discussion, Board staff does not believe that the Petitioners' emergency request is necessary and recommends that Petition File No. 583 be DENIED.