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Occupational Safety and Health Standards Board
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PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 590)

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition from Kevin Schwantz (Petitioner) on May 4, 2021, requesting the amendment or repeal of title 8, section 5199, subdivision (h)(3)(A), an Aerosol Transmissible Diseases (ATD) standard requiring certain covered employers to provide tuberculosis (TB) tests and other forms of TB assessment at least once a year.

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.

Further, as required by Labor Code section 147, any proposed occupational safety and 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 the receipt to submit an evaluation regarding the proposal.

SUMMARY

The Petitioner states that annual TB testing programs are flawed, because they do not stop the spread of TB, the majority of positive tests are actually false positives, and because mandated annual testing violates the principle of informed consent. Petitioner requests that the Board eliminate any annual testing requirement from the regulations. The Petitioner also asks the Board to affirmatively prohibit employers from mandating TB testing in the absence of title 8 requirement to do so.

DIVISION'S EVALUATION

In its evaluation dated August 5, 2021, the Division takes issue with the Petitioner's contention that section 5199, subdivision (h)(3)(A), requires mandatory annual testing for TB. According to the Division, employers covered by the ATD standard, including most health care facilities, certain police and public health services, correctional/detention facilities, homeless shelters, and drug treatment programs, are only required to offer latent TB infection testing to

employees who have occupational exposure to TB.¹ Employers are required to train employees regarding the employer's TB surveillance procedures. Covered employers should also provide information to employees on TB incidence and cases in the facility, so that employees can make informed decisions about participation in offered testing.

The Division outlines a number of other California regulatory schemes that address TB testing of healthcare workers. Many of these regulations are found in title 22, and relate to the licensing and certification of healthcare facilities. These regulations, unlike the ATD standard, include mandated TB testing of employees as a condition of facility licensing.

The Division also notes that the 2019 Centers for Disease Control (CDC) publication, "Tuberculosis Screening, Testing, and Treatment of U.S. Health Care Personnel: Recommendations from the National Tuberculosis Controllers Association and CDC" replaces 2005 guidance regimen which recommends no routine serial testing of health care workers for latent TB infection, in the absence of a known exposure or ongoing transmission. Rather, the 2019 CDC guidelines recommend "timely symptom evaluation and additional testing, if indicated[,]” for employees who have a known exposure to potentially infectious TB.

In its evaluation, the Division provides important context for this discussion; California has the largest proportion of TB disease cases in the U.S., excluding Alaska and Hawaii. The TB incidence rate in California was 5.3 per 100,000 in 2019—over twice the national rate. TB cases are primarily clustered in California's large urban counties, while rural California is largely untouched by TB. The Division estimates that there are 16 to 32 health care workers in California who develop TB each year due to occupational exposure. Lastly, the Division's evaluation concludes that the Board cannot prohibit employers from mandating annual TB

¹ Occupational exposure is defined at section 5199, subdivision (b) as "Exposure from work activity or working conditions that is reasonably anticipated to create an elevated risk of contracting any disease caused by ATPs or ATPs-L if protective measures are not in place. In this context, "elevated" means higher than what is considered ordinary for employees having direct contact with the general public outside of the facilities, service categories and operations listed in subsection (a)(1) of this standard. Occupational exposure is presumed to exist to some extent in each of the facilities, services and operations listed in subsection (a)(1)(A) through (a)(1)(I). Whether a particular employee has occupational exposure depends on the tasks, activities, and environment of the employee, and therefore, some employees of a covered employer may have no occupational exposure. For example, occupational exposure typically does not exist where a hospital employee works only in an office environment separated from patient care facilities, or works only in other areas separate from those where the risk of ATD transmission, whether from patients or contaminated items, would be elevated without protective measures. It is the task of employers covered by this standard to identify those employees who have occupational exposure so that appropriate protective measures can be implemented to protect them as required. Employee activities that involve having contact with, or being within exposure range of cases or suspected cases of ATD, are always considered to cause occupational exposure. Similarly, employee activities that involve contact with, or routinely being within exposure range of, populations served by facilities identified in subsection (a)(1)(E) are considered to cause occupational exposure. Employees working in laboratory areas in which ATPs-L are handled or reasonably anticipated to be present are also considered to have occupational exposure."

testing, given that it is mandated in some instances by portions of title 22. The Division recommends the Petition be denied.

BOARD STAFF EVALUATION

The Board staff evaluation begins by introducing the two types of TB infections:

TB is a potentially fatal lung disease caused by the bacterium *Mycobacterium tuberculosis*. There are two types of TB infections: latent TB and active TB. People with latent TB infection (LTBI) are not contagious and do not have any illness symptoms. However, if left untreated, approximately 5 to 10 percent of people with LTBI will eventually develop active TB disease, where the person has symptoms of illness and can spread the disease to others. Untreated active TB can be deadly. The identification and treatment of LTBI is important for preventing latent TB from turning into active TB and for controlling the spread of TB.

There are both public health and occupational safety and health concerns to this discussion; while the Board has jurisdiction over occupational safety and health matters, issues of broader public health are regulated by the California Department of Public Health (CDPH), as well as other state agencies.

Title 22 mandates TB testing for many healthcare workers, but in response to the 2019 CDC guidelines discussed above, CDPH issued an "All Facilities Letter"², which creates a process for health care facilities to request permission from CDPH to engage in TB testing of their workers on a less frequent basis than required by the regulations. Board staff raises the concern that having significantly different requirements for testing under title 8 and title 22 may create confusion for regulated facilities, and their employees, who may be subject to both mandatory testing under title 22, and optional testing per the requirements of title 8.

Board staff recommends changes to the language of the regulation that would add greater clarity. The recommendation includes amending section 5199, subdivision (h)(3) to have assessment for latent TB infection be made "available to all employees with occupational exposure to TB" and changing section 5199, subdivision (h)(3)(A) to read "TB tests or ~~and~~ other forms of TB assessment shall be provided at least annually", to allow for an annual risk assessment to be conducted to identify individual and facility risk factors that might warrant testing, such as patients with TB treated at a health care facility.

² CDPH, All Facilities Letter (AFL 19-28), Updated Centers for Disease Control Tuberculosis Screening Recommendations for Health Care Personnel (HCP) and Nationwide Shortage of Tuberculin Skin Test Antigens, Issued August 16, 2019. <https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-19-28.aspx>

Finally, Board staff recommends making regulated facilities aware of the Board's variance process, through which an employer may demonstrate that an alternative program, method, practice, means, device, or process will provide equal or superior safety to the standard at issue. Facilities may be able to engage in alternative testing programs, as long as they are able to show that the program provides equal or superior safety protections to employees.

Board staff recommend the Petition be granted for the purpose of convening an Advisory Committee to discuss potential amendments to section 5199 to update TB testing requirements for healthcare workers, where permitted by title 22 and as recommended by federal guidance, while still providing for annual testing of healthcare workers at higher risk for TB.

DISCUSSION

The Board concurs with the Division's argument that employers covered by the ATD standard are only required to offer latent TB infection testing to employees who have occupational exposure to TB. The Board also finds that it does not have the authority to overturn or modify title 22 regulations mandating employee vaccination for licensing purposes, and thus cannot grant the Petitioner's request to end mandatory testing requirements for California workers. The Board is in agreement with Board staff, however, that several simple, non-substantive changes to the language of the safety regulation at issue would greatly improve its overall clarity and intent.

As discussed in Board staff's evaluation, CDPH has created a process whereby healthcare facilities can gain permission to engage in less frequent testing of workers than required by title 22. The Labor Code at section 143 similarly provides a process by which an employer may apply for a variance from a health and safety order, after demonstrating that the conditions, practices, means, methods, operations, or processes used or proposed to be used will provide safe working conditions equivalent to those provided by the regulation. The Board encourages those healthcare facilities that believe an alternative TB testing regime, would provide such equivalent safety, particularly in cases where such a regime has been previously approved by CDPH, to apply for a permanent variance.

CONCLUSION AND ORDER

Having considered Petition 590, and evaluations of it by the Division and Board staff, the Board hereby DENIES the Petitioner's request to eliminate testing requirements and affirmatively prohibit employers from mandating TB testing in the absence of title 8 requirement to do so.

In the alternative, Board staff are directed to review section 5199, subdivision (h)(3)(A), for the limited purpose of proposing non-substantive, clarifying amendments to the language of the safety regulation. Further, Board staff are directed to work with CDPH and healthcare facilities to communicate the purpose and benefits of the permanent variance application process as allowed for by Labor Code section 143.