



# Memorandum

To: Christina Shupe, Executive Officer  
Occupational Safety and Health Standards Board  
2520 Venture Oaks Way, Suite 350  
Sacramento, CA 95833

Date: January 19, 2022

From: Eric Berg, Deputy Chief of Health  
Division of Occupational Safety and Health

Subject: Evaluation of Petition 594 to Amend Title 8, section 3203 to address both the current COVID-19 pandemic and future infectious disease pandemics.

## 1.0 INTRODUCTION

On November 15, 2021, the Division of Occupational Safety and Health (Cal/OSHA) received a petition from Greg McClelland (petitioner) representing the Western Steel Council. The petitioner requests changes to the California Code of Regulations, Title 8, section 3203, Injury and Illness Prevention Program (IIPP).

Labor Code section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health, and requires the Occupational Safety and Health Standards Board (Standards Board) to consider such proposals. Labor Code section 147 requires the Standards Board to refer to Cal/OSHA for evaluation any proposed occupational safety and health standard.

## 2.0 PETITIONER'S REQUEST TO AMEND SECTION 3203

The petitioner requests changes to Title 8, section 3203 of the California Code of Regulations (section 3203) to address pandemics, including COVID-19. The proposed changes would require employers to keep abreast of and take action consistent with the California Department of Public Health (CDPH) guidelines during a pandemic. The following is the petitioner's suggested regulatory language in underline format:

§3203. Injury and Illness Prevention Program.

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

\* \* \* \*

(9) For every place of employment not covered by Section 5199, include procedures to implement, as applicable to the employer's operations, workplace safety guidance published by the California Department of Public Health (DPH) within 7 days from the date of issuance when both of the following apply:

(A) Pursuant to the California Emergency Services Act, Section 8550 et seq. of the Government Code, the governor has declared a state of emergency and issued an executive order directing a

response to the presence of disease caused by an "aerosol transmissible pathogen" as defined by Section 5199(b), which may be transmitted in the workplace.

(B) The executive order is in effect and directs DPH to publish and keep updated guidance to prevent or reduce the transmission in the workplace of disease caused by the aerosol transmissible pathogen.

### **3.0 APPLICABLE TITLE 8 REGULATIONS**

#### **3.1 Section 3203, Injury and Illness Prevention Program (IIPP)**

Section 3203 requires that the employer establish, implement, and maintain an effective IIPP. The IIPP is a written workplace safety and health program, which requires employers to implement policies, procedures, and training to find and fix workplace hazards before injuries or illnesses occur, and to investigate and fix hazards if an incident, injury, or illness does occur. The IIPP does not specify any particular hazards, but is intentionally general so that it covers any and all workplace hazards. The IIPP applies to all employers in California, and must contain the following elements:

1. Responsibility
2. Compliance
3. Communication
4. Identifying and evaluating work place hazards
5. Investigation of occupational injuries and illnesses
6. Hazard Correction
7. Training and Instruction
8. Employee Access
9. Recordkeeping

#### **3.2 Sections 3205 – 3205.4, COVID-19 Prevention Regulations**

Sections 3205 through 3205.4 are temporary emergency regulations that contain comprehensive and specific requirements to protect employees from COVID-19. These regulations are based on recommended prevention methods from the Centers for Disease Control and Prevention (CDC) and the California Department of Public Health (CDPH). The emergency regulations will expire on December 31, 2022, and Cal/OSHA proposes to establish permanent regulations to protect employees from COVID-19 that could extend protections for up to an additional two years.<sup>1</sup> The COVID-19 prevention regulations do not apply to employers covered by section 5199, Aerosol Transmissible Diseases.

#### **3.3 Section 5199, Aerosol Transmissible Diseases**

Section 5199 requires employers to protect employees from aerosol infectious diseases, including COVID-19. Section 5199 only applies to certain workplaces such as, but not limited to, healthcare, certain police services, correctional facilities, homeless shelters, drug treatment programs, and certain laboratories.

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<sup>1</sup> See <https://www.dir.ca.gov/dosh/doshreg/covid-19-emergency-standards/> for further information on Cal/OSHA's COVID-19 emergency regulations and proposed updates.

The petitioner's proposal would not apply to workplaces covered by section 5199.

### 3.4 CDPH COVID-19 GUIDANCE

As of December 23, 2021 CDPH has approximately 70 different Public Health Officer Orders, Public Health Order Questions & Answers, and Guidance documents for COVID-19, in effect excluding COVID-19 healthcare and treatment guidelines. Most of these orders and guidelines are applicable to some workplaces. A list of all CDPH COVID-19 documents are available at:

<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Guidance.aspx>

### 4.0 PETITIONER'S BASIS FOR THE NEED FOR A NEW REGULATORY AMENDMENT

The petitioner states that, during a pandemic such as COVID-19, a regulation that requires employers implement current guidance from CDPH is the most effective means of protecting employees because the scientific understanding of the disease evolves quickly, resulting in rapidly changing recommended prevention measures.

According to the petitioner, more specific regulations, such as the current COVID-19 emergency regulations, cannot be changed quickly enough in response to the progressing science. Regulations, including emergency regulations, must go through a rulemaking process before changes can be made. The rulemaking process includes the preparation of several extensive rulemaking documents, public notice and comments, and approval by the Standards Board and the Office of Administrative Law. The petitioner also notes that emergency regulations can only be re-adopted twice<sup>2</sup> and then must be made permanent through the lengthy regular rulemaking process, or expire.

According to the petitioner, their proposed regulation need not undergo any follow-up rulemaking once established since the requirements would automatically change when CDPH guidance is changed.

The petitioner contends that the proposed incorporation by reference of changing CDPH guidance would be legally permissible because the operation of the proposed language would be contingent on a Governor's executive order pursuant to the Governor's emergency powers under the California Emergency Services Act and Government Code Sections 8567, 8571, and 8627. The petitioner contends that these laws provide the Governor with the authority to issue regulations in emergencies.

The petitioner references CDPH guidelines in their proposed regulatory language because, according to the petitioner, "*only [C]DPH has the level of expertise and resources necessary to adequately gather and understand the available research and information on infectious disease risk and how to control it.*"

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<sup>2</sup> [Governor's Executive Order N-23-21](#) permits a third re-adoption of the Title 8 COVID-19 Emergency Temporary Standards. The effective period of a third re-adoption would expire on December 31, 2022.

## 5.0 ANALYSIS

### 5.1 Title 8, section 3203 should remain a general regulation.

The petitioner proposes to amend section 3203, the IIPP regulation, to include language addressing a specific hazard, made operational contingent on a state of emergency declared in response to an infectious disease pandemic.

The IIPP regulation is intentionally non-specific to ensure it is able to encompass any and all current and future workplace hazards. Specifically identifying one particular hazard may imply that other hazards, not specifically mentioned, are not covered by the IIPP regulation. This is especially true for those hazards not typically thought to be encompassed by the regulation, but which nonetheless are, such as workplace harassment and violence. For this reason, Cal/OSHA opposes the inclusion of specific hazards in the IIPP regulation. Any proposed regulation to address pandemics should not be added to section 3203; it could, however, reference the IIPP and contain a structure similar to the IIPP.<sup>3</sup>

### 5.2 Cal/OSHA opposes incorporating CDPH guidance in place of a regulation.

The petitioner proposes to incorporate CDPH guidelines in lieu of having any requirements in the regulation. Cal/OSHA opposes this proposal for the following reasons:

- Not all CDPH guidance has the force of law. Indeed, according to this Petition, in order for proposed section 3203(9) to activate - and the CDPH's guidance to be enforceable by Cal/OSHA - the Governor would have to issue an executive order "directing a response to the presence of disease caused by an 'aerosol transmissible pathogen' as defined by Section 5199(b)..." The Standards Board was formed to issue regulations regarding occupational safety and health; it can neither direct the Governor to issue an Executive Order nor predict when or whether the Governor will do so. The Standards Board is responsible for regulating occupational safety and health under its own authority, subject to the requirements of the Administrative Procedures Act.
- Cal/OSHA already works closely with CDPH and uses CDPH guidelines in the development of regulations.
- Cal/OSHA regulations can be written to reference changing public health orders and regulations without violating the Administrative Procedures Act.
- Cal/OSHA has already been tasked with working on a general infectious disease standard that will cover future pandemics.

#### 5.2.1 CDPH Guidance is generally directed at the public, and would be difficult to enforce as workplace standards.

CDPH recommendations are generally directed to the public and do not always address occupational hazards. As such, they do not provide employers with needed specific occupational health guidance. The example below illustrates where well-crafted guidance language would be difficult for employers to follow and for Cal/OSHA to enforce.

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<sup>3</sup> See Title 8 sections [3345](#) and [5120](#) for examples of regulations that reference the IIPP and are structured similar to the IIPP.

## **When is improved workplace ventilation and air filtration required, and what minimum standards must it meet?**

The CDPH COVID-19 Guideline “[Interim Guidance for Ventilation, Filtration, and Air Quality in Indoor Environments](#)” contains broad, general advice. This is useful as public health guidance, but would be extremely difficult to enforce and unhelpful to employers seeking to comply with their legal requirements. The following excerpts (with emphasis added), together with comments in brackets below each excerpt, detail how the guideline is not adaptable to an enforceable regulation.

*... Decrease occupancy in areas where outdoor ventilation cannot be increased...*

[The guidance language does not specify what occupancy levels would be acceptable and what the minimal level of outdoor ventilation is needed before occupancy levels need to be decreased.]

Because this is unsuitable as a regulatory mandate, it was included in the Covid-19 Emergency Standard, section 3205, as a document which employer must review when developing their own COVID-19 prevention policies.

### **5.2.2 Cal/OSHA already works closely with CDPH, and uses CDPH guidelines in the development of regulations.**

As part of occupational health rulemaking, Cal/OSHA routinely collaborates with CDPH. This includes holding regular meetings to consult with CDPH, reviewing draft regulatory text with CDPH, and incorporating recommendations from CDPH. For example, CDPH closely reviewed drafts of the different versions of the title 8 COVID-19 emergency regulations, and their recommendations were instrumental in revising the proposed language. In this manner, Cal/OSHA incorporates CDPH expertise into the process, while ensuring that the exacting requirements of proposed regulatory text are met.

### **5.2.3 Cal/OSHA regulations can be written to reference changing public health orders and regulations without violating the Administrative Procedures Act.**

In some circumstances, depending on the particular matter at issue, the Standards Board may adopt language stating that specific requirements must be followed unless otherwise mandated by CDPH order or regulation. This would give CDPH the opportunity to alter requirements (or definitions) in response to changing science, if that entity determined it was necessary to do so.

### **5.2.4 Cal/OSHA has already been tasked with working on a general infectious disease standard that will cover future pandemics.**

The Standards Board granted petition 583 in part, and requested Cal/OSHA convene an advisory committee to consider an infectious disease regulation for workers not protected by section 5199 as follows:

*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.<sup>4</sup>*

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<sup>4</sup> <https://www.dir.ca.gov/oshsb/documents/petition-583-adopteddecision.pdf>

Cal/OSHA will draft regulatory language and hold advisory meetings for a general infectious disease standard once work on the permanent COVID-19 regulation is complete. Cal/OSHA will consider referencing CDPH orders and regulations, where appropriate, to supplement regulatory language during the development of this general infectious disease standard.

## **6.0 CONCLUSION**

Cal/OSHA reviewed the petitioner's proposed changes to Title 8, section 3203 of the California Code of Regulations. The review included information provided in the petitioner's application, review of existing CDPH guidelines, and research of existing law and regulations. Cal/OSHA recommends the petition be DENIED.

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