

DEPARTMENT OF INDUSTRIAL RELATIONS
Occupational Safety and Health Standards Board
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PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 594)

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on November 8, 2021, from Greg McClelland, Executive Director, Western Steel Council, (Petitioner). The Petitioner requests the Board to amend title 8, section 3203, regarding employer responses to pandemics caused by an aerosolized transmissible pathogen, when employers are not covered by the aerosol transmissible disease standard, section 5199.

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 (Cal/OSHA) must be referred to Cal/OSHA for evaluation. Cal/OSHA has 60 days after the receipt to submit an evaluation regarding the proposal.

SUMMARY

The Petitioner requests the Board take one or more of the following courses of action:

The Petitioner requests that section 3203 Injury and Illness Prevention Program (IIPP) be amended to designate the California Department of Public Health (CDPH) as the “single designated source” for occupational safety and health requirements for the current and future pandemics similar to COVID-19.

The Petitioner requests to add subsection (a)(9) to section 3203 as follows:

§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.

To establish the intent of the suggested language, the Petitioner proposes the following text to be included in the Initial Statement of Reasons (ISOR), a document required by the Administrative Procedures Act, explaining the specific purpose and intended benefit of each amendment to a regulation. The Petitioner states:

This proposed new rule is based in part on the expectation that:

- The Governor will address the need to protect against workplace disease transmission in [an] executive order directed to protecting the public from an aerosol transmissible disease pandemic or similar emergent severe aerosol transmissible disease.*
- While [Cal/OSHA] has expertise related to occupational duties and circumstances that [C]DPH may not have, 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.*
- [Cal/OSHA] will prioritize providing its expertise to [C]DPH on the heightened risk of disease transmission that may be present in specific industries, so that [C]DPH can formulate and issue appropriate industry-specific guidance.*
- This issue is of such high priority that it must be addressed at the level of a state departmental agency, and that agency must be the one that has the greatest expertise in infectious disease transmission.*
- Setting out this structure is the most effective way to ensure integrated cooperation among the Governor's Office, [C]DPH, and [Cal/OSHA].*

- *[Cal/OSHA] will, to the extent resources and available information permit, issue best practices guidance either through its consultation service program or other appropriate unit.*

CAL/OSHA'S EVALUATION

The Cal/OSHA report dated January 19, 2022, opposes incorporating CDPH guidance in place of a regulation for the following reasons: not all CDPH guidance has the force of law; 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; and Cal/OSHA has already been tasked with working on a general infectious disease standard that will cover future pandemics.

Cal/OSHA notes that 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.

The Cal/OSHA report states that section 3203 should remain a general regulation, noting that instead of being amended to include language addressing a specific hazard, any proposed regulation to address pandemics (such as one resulting from petition 583) could instead reference the IIPP and contain a similar structure.

Cal/OSHA has already been tasked with working on a general infectious disease standard that will cover future pandemics. The 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. 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. Therefore, Cal/OSHA recommends the Petition be DENIED.

BOARD STAFF EVALUATION

Board staff believe the Petitioner's proposal contains several potentially problematic provisions.

As a performance standard, the IIPP was relied on during the initial months of the COVID-19 pandemic, prior to the ETS becoming effective. The Board, after hearing testimony from the public and subject matter experts, determined that relying on the IIPP alone was not providing employers with the necessary information and regulatory structure to best protect employees from COVID-19. As a result, the Board determined that the ETS would be necessary.

One concern that Board staff has regarding the proposed language of the Petition is the requirement to implement applicable CDPH guidelines within seven days of being published. As more information becomes available, employers could be in a near-constant state of change to respond and adapt to the new guidelines, incurring training costs with each new and potentially-innumerable change. The burden experienced by employers would not necessarily be less than that of employers in the current pandemic.

Another concern of the Board staff is the assumption that CDPH has the available resources to “formulate and issue appropriate industry-specific guidance.” Placing additional responsibilities on the CDPH during a pandemic may not be the best use of limited CDPH resources, especially when other organizations are already developing such information, available at no charge.

Guidance documents allow flexibility and can be adapted to a workplace in an earnest effort to protect employees. Regulations, however, have the force of law and are typically inflexible in their requirements and application. Requiring employers to implement CDPH guidance is likely to affect the content of such guidance because the CDPH will need to consider how the guidance will apply to every covered workplace. Furthermore, guidelines would not necessarily have the benefit of public notice and comment as regulations do.

Finally, in the suggested text for the ISOR, the Petitioner expects that “[Cal/OSHA] will, to the extent resources and available information permit, issue best practices guidance either through its consultation service program or other appropriate unit.” Board staff notes concerns with potential conflicts between Cal/OSHA guidance and CDPH guidance.

Board staff recommends that Petition 594 be DENIED and the Board consider requesting Cal/OSHA invite the Petitioner to participate in the advisory committee resulting from Petition 583 when it takes place.

DISCUSSION

Both Cal/OSHA and Board staff are in agreement that Petition 594 should be denied. As noted by Cal/OSHA, 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. Cal/OSHA also recommends against modifying section 3203 from a general performance standard to address specific hazards, to prevent diluting the intent of the IIPP.

Board staff notes that instead of modifying section 3203 to address a future pandemic, the Petitioner and supporters of the Petition should seek to participate in the advisory committee that will be convened as a result of the Board’s decision on Petition 583, requesting Cal/OSHA to consider the need for a permanent infectious disease standard for employers not covered by section 5199. The Petitioner can raise the concerns mentioned in the present Petition during the Petition 583 advisory committee process.

CONCLUSION AND ORDER

Having considered Petition 594, and evaluations of it by Cal/OSHA and Board staff, the Board hereby DENIES the Petitioner's request to amend section 3203 Injury and Illness Prevention Program to designate the California Department of Public Health as the single designated source for occupational safety and health requirements for the current and future pandemics.

The Board encourages Cal/OSHA to invite the Petitioner to participate in the the advisory committee process for Petition 583, when it commences.