

State of California
Department of Industrial Relations
Occupational Safety and Health Standards Board

Petition File No. 594

Board Staff Evaluation
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February 25, 2022



State of California
Gavin Newsom, Governor

INTRODUCTION

Petition File No. 594 (Petition) was received from Greg McClelland, Executive Director, Western Steel Council (Petitioner), on November 8, 2021. The Petition requests the Occupational Safety and Health Standards Board (Board) amend title 8, section 3203, regarding employer responses to pandemics.

REQUESTED 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.

PETITIONER’S ASSERTIONS

The Petitioner asserts:

- Many labor and employer communities “were far ahead of the enforcers in digesting and following the advice of the experts on how to protect against the spread of COVID.”
- Advice for protecting employees against the spread of COVID “came from multiple sources and was not always consistent from authority to authority.”
- “The inflexible COVID Emergency Temporary Standards (ETS)... could not and did not evolve to match new developments in the course of the pandemic, which in some cases forced us to choose between what made the most sense even in the minds of the foremost authorities and what was required by regulation.”
- “It has become clear that fixed regulations like the ETS are not suitable to address a disease like COVID-19 that is caused by a novel pathogen.”
- “We believe the most effective regulatory approach to maximizing safety during a pandemic...is to focus on guidance issued by the [CDPH].

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (CAL/OSHA) REPORT

The Cal/OSHA report dated January 19, 2022, recommends denial of the Petition. The report states that section 3203 should remain a general regulation, instead of being amended to include language addressing the specific hazard of a pandemic. The report also discusses the challenges of enforcing guidance from the CDPH as a workplace standard. Finally, Cal/OSHA reminds the Board that its decision on Petition 583 has already tasked Cal/OSHA with developing a general infectious disease standard to address future pandemics.

STAFF EVALUATION

Effective July 1, 1991, the IIPP requires employers to establish, implement and maintain an effective injury and illness program for their workplace. Consistently the most cited regulation by Cal/OSHA enforcement, employers are expected to identify actual and potential workplace hazards and control or eliminate them. Although considered a performance standard, the regulation requires a framework that includes:

- Identification of the person(s) with authority and responsibility to implement the program
- A system of ensuring compliance with the program
- Means for two-way communication between management and employees regarding workplace hazards
- Procedures for identifying and evaluating hazards (workplace inspections)
- Injury and illness investigation
- Timely correction of unsafe and unhealthy conditions
- Training of supervisors and employees
- Employee access to the program

Performance standards, such as the IIPP, are the preferred type of regulation by the California Legislature, when appropriate, as stated in Government Code section 11340.1(a), regarding Legislative intent:

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.

Relevant Standards

Federal Standards

Federal OSHA does not have a regulation comparable to California's IIPP. Instead, federal OSHA relies upon 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, to require employers to take steps to protect employees when a specific regulation is not applicable.

California Standards

In regard to applicable regulations during the current and potentially future pandemics, the scope of Cal/OSHA's Aerosol Transmissible Diseases (ATD) standard (section 5199) is limited to medical offices, certain laboratories, correctional facilities, homeless shelters, drug treatment programs, and any other employer that Cal/OSHA informs in writing must comply with the ATD standard. Employers not covered by the ATD regulation have generally applicable requirements, which include the IIPP (section 3203), Washing Facilities (sections 1527, 3366, 3457, and 8397.4), Personal Protective Devices (section 3380), Respiratory Protection (section 5144), Sanitation (article 9), and Control of Harmful Exposures (section 5141), among others.

Although not yet developed, Cal/OSHA has already been asked by the Board to convene an advisory committee meeting to consider the necessity for a permanent regulation for the protection of workers not covered by section 5199 from airborne infectious diseases, including novel pathogens. The Board's request resulted from its decision on Petition 583.

Consensus Standards

A plethora of consensus standards and guidance documents are available to aid employers in protecting employees against health hazards, including those posed by current and potential future pandemics. Much of the information is tailored to specific work environments or industry sectors, such as construction, manufacturing, offices, agriculture, etc. The Centers for Disease Control (CDC), the World Health Organization, the American Industrial Hygiene Association (AIHA), and CDPH are examples of the many organizations that provide such information.

Staff Analysis

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.*

The Petitioner states the need for the Petition is to address some of the challenges employers experienced using the current ETS to protect employees from COVID-19 during the pandemic. According to the Petitioner, the relatively slow process for amending the ETS requirements, compared to the rate of emergence of new information for controlling exposures to the virus, created challenges amongst well-meaning employers trying to comply with the written regulation, while also trying to implement the latest information to protect their workers.

In support of the Petition, the Petitioner states that due to the procedural requirements governing emergency standards, the current ETS “could not and did not evolve to match new developments in the course of the pandemic,” causing some stakeholders “to choose between what made the most sense even in the minds of the foremost authorities and what was required by regulation.” The Petitioner expresses concerns with a “fixed regulation like the ETS” being used to protect employees from a disease caused by a novel pathogen.

The Petitioner proposes to designate the CDPH as the sole source of regulation for employers not covered by section 5199 Aerosol Transmissible Diseases when trying to protect employees from pandemic-related ATDs. The proposed text would require an employer to implement guidelines from the CDPH, as far as they are applicable to the employer’s operations, within seven days of being published. The CDPH would have said authority only during a state of emergency declared by the Governor in response to an aerosol transmissible pathogen, affecting workplaces, and only when directed by an executive order to develop such guidelines.

The Petitioner points out that information regarding protecting employees from the pandemic changed frequently and was not always consistent from authority to authority. Masking, distancing, and sanitizing requirements changed over the past two years, as well as recommendations for protecting vaccinated and unvaccinated employees. The requirements of the ETS often lagged the latest scientific findings of the CDC and CDPH.

Board staff, however, do not agree that the Petitioner’s proposal would lead to better employee outcomes, as it contains several potentially problematic provisions of its own. As a performance standard, the IIPP, in accordance with the above-mentioned Legislative intent, 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.” In the current pandemic, industry-specific guidance can be found from a variety of sources, but the CDPH site for “Employees & Workplaces Guidance” only lists four documents that address a specific non-health care industry: cruise ship operators, farmworkers, medical waste management and pharmacies¹. The “Back to Work Safely” website developed by the AIHA, conversely, contains 27 industry-specific guidance documents “developed for those smaller businesses that don't have readily available occupational health and safety resources.”² 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 are developed from the perspective of serving as a guide to the reader to assist in the performance of a task—in this case the development of safety and health protections for employees with COVID-19 exposure. The employer determines which provisions are beneficial to the workplace and implements them as appropriate. 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.

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.

¹ <https://www.cdph.ca.gov/programs/cid/dcdc/pages/guidance.aspx>. Of the 15 guidance documents listed, only four would be considered “industry specific”. Accessed 1/18/2022.

² <https://www.backtoworksafely.org/back-to-work-safely>. The links offer specific, easy-to-follow, science-based recommendations for limiting the transmission of the coronavirus while operating a wide variety of businesses, including restaurants, retail outlets, and hair and nail salons. Accessed 1/19/2022.

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STAFF RECOMMENDATION

Consistent with the foregoing discussion, Board staff recommends that Petition File No. 594 be **DENIED**. The Board should consider requesting Cal/OSHA invite the Petitioner to participate in the advisory committee resulting from Petition 583 when it takes place.