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The Occupational Safety
& Health Standards Board

Representing Management in the Ironworker, Steel Fabricating, Erecting, and Placing Industry

November 8, 2021

The Honorable David Thomas, Chair
Occupational Safety and Health Standards Board
1017 L Street, PMB #254
Sacramento, CA 95814-3805

Attention: Executive Officer, Christina Shupe

By email: CShupe@dir.ca.gov
and OSHSB@dir.ca.gov

Re: Petition to amend 8 CCR Section 3203 to include provisions addressing how employers not covered by the aerosol transmissible disease standard, 8 CCR Section 5199, shall be required to respond to the presence of disease constituting a pandemic or potentially constituting a pandemic caused by an aerosolized transmissible pathogen

Dear Chair Thomas:

By this letter, the undersigned hereby submit a petition to the Occupational Safety and Health Standards Board pursuant to Labor Code Section 142.2 requesting that the Board amend 8 CCR Section 3203 as described in this letter.

Since the beginning of the pandemic, the labor and employer communities we represent have made it our highest priority to protect employees from the spread of COVID-19. Many of us were far ahead of the enforcers in digesting and following the advice of the experts on how to protect against the spread of COVID. And as the advice continued to evolve, we continued to change our procedures to keep pace with the changing advice, which came from multiple sources and was not always consistent from authority to authority.

At the end of November 2020, when the inflexible COVID Emergency Temporary Standards (ETS) took effect, we had yet another authority to respond to in making sure we were as consistent as we could be with current wisdom on how to manage the COVID hazard. However, the crucial difference brought about by the ETS was that it 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.

As our understanding of COVID-19 has grown and scientific recommendations have evolved, 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. The procedural requirements for the adoption and amendment of regulations – including emergency

regulations – are simply not flexible enough to keep pace with evolving scientific knowledge and the protective recommendations arising out of it.

We believe the most effective regulatory approach to maximizing safety during a pandemic like the one we are in the midst of now now is to focus on guidance issued by the agency having the deepest expertise as recognized by the state to track and respond to the rapidly changing circumstances and information that emerge as the pandemic runs its unpredictable course. With the proper approach, following guidance as a new emergency situation arises can be made mandatory and lawful, producing a far more effective response than can be achieved through rulemaking, regardless of the procedural shortcuts that apply to emergency adoptions or amendments.

Our proposal:

We believe that the best regulatory response possible to COVID-19 and subsequent similar pandemics is to incorporate within the existing requirements of the Injury and Illness Prevention Program (IIPP) standard the duty to keep abreast of, and take action consistent with, guidance issued by the California Department of Public Health (DPH). We believe DPH must be the single designated source because it is best equipped with deep expertise to understand the hazard and prescribe competent guidance to address it.

Therefore, we formally and respectfully petition the Board to amend Section 3203 by adding subsection (a)(9) 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 clarify the intent of this amendment, we propose adding to the Initial Statement of Reasons the following language:

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 any executive order directed to protecting the public from an aerosol transmissible disease pandemic or similar emergent severe aerosol transmissible disease.*
- *While DOSH has expertise related to occupational duties and circumstances that DPH may not have, only 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.*
- *DOSH will prioritize providing its expertise to DPH on the heightened risk of disease transmission that may be present in specific industries, so that 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, DPH, and DOSH.*
- *DOSH will, to the extent resources and available information permit, issue best practices guidance either through its consultation service program or other appropriate unit.*

The primary lesson learned from the last two years has been the inability of the ETS to keep up with changing information about how to protect against the pandemic.

Once the COVID-19 ETS took effect at the end of November 2020, it became apparent almost immediately that parts of these standards were rapidly becoming out of date. As this Board is very aware, emergency regulations can only be re-adopted (or amended) twice, and then the emergency regulation must expire unless it is made permanent. The concerns raised by this legal limitation have prevented much-needed scientific and feasibility corrections from being implemented in the ETS until months following important changes in guidance issued by the experts.

One clear example among others of the ETS growing out of date in a hugely consequential way was the inability to address the contribution of vaccinations until June 2021 – more than six months after distribution of vaccines began.

The proposed amendment to section 3203 is necessary because without a guidance-based approach that is not dependent on rulemaking to be kept current, timely and competent direction to employers is not possible.

Using the rulemaking approach has proven to be an inadequate means of addressing the pandemic. What is needed is a guidance-driven approach free of the procedural hurdles presented by rulemaking. An approach using the fundamentally sound procedural approaches of the IIPP, e.g., procedures for communication, training, hazard correction, etc., to incorporate guidance as it evolves from the most expert government agency in the state, DPH, is the ideal method to confront future novel pathogens. No rulemaking is required for the obligations of an employer to change along with changing circumstances and resulting official guidance.

While we believe DPH should be the single governmental authority to issue guidance for incorporation into employers' IIPPs, we also believe that DOSH can contribute substantially to the adoption of that guidance. DOSH can assist DPH by offering its expertise on workplace safety and health to inform DPH guidance. Additionally, DOSH can create and issue purely advisory, best-practices guidance directly to employers, as it did in the first few months of the pandemic in early 2020.

The proposed amendment to section 3203 will be lawful because it will be linked to issuance of an executive order pursuant to the Governor's emergency powers under the California Emergency Services Act (CESA).

We recognize that the approach of requiring ongoing compliance with changing guidance, as opposed to changing regulations, may raise the legal concern that this would constitute an unlawful delegation of rulemaking authority to the agency issuing guidance. However, this issue does not exist as a barrier to the requirement we are proposing because of its linkage to the issuance of an executive order pursuant to the CESA.

In particular, Government Code Sections 8567 and 8571, and 8627 provide the Governor with authority to issue an executive order in times of emergency. Specifically, Section 8627 states,

During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. **In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567.** (*Emphasis added.*)

In fact, Governor Newsom relied on the authority provided in Section 8567 in issuing several executive orders relative to public safety in response to the pandemic. Those orders were upheld by the California Court of Appeal on May 5 (*Newsom v. Superior*

Court (2021) 63 Cal.App.5th 1099), and the California Supreme Court denied review of the appellate opinion on August 11, 2021.

This proposal calls for an extraordinary approach to an extraordinary situation, and the recent experience we have all labored through has painfully demonstrated the need to go beyond the usual. While we hope this provision will never have to be invoked, we believe this is the most competent regulatory measure we can have in place to be ready for a future disease event reaching pandemic proportions. It provides not only for fast and flexible responsive measures, but also for coordination among government authorities to provide the most consistent and well-thought-out approach as possible. That coordination will begin with recognition by the Governor that an extraordinary situation exists necessitating direct executive action.

Conclusion

We urge the Board to consider and acknowledge the difficulties it has encountered, despite its diligence and best efforts, in attempting to address the COVID-19 pandemic through an ETS that has proven to be captive to a rulemaking process that is far too rigid and lengthy to be current and effective. The proposal we are putting forward is calculated to be effective, flexible, and responsive to a rapidly changing environment that cannot be effectively managed by either normal or emergency rulemaking procedures.

To build on the ETS as a model for a permanent standard would be an uncertain attempt to predict the unknown. As time runs out on the ETS itself, the solution we propose addresses both the current pandemic and potential future pandemics, precisely because it does not constitute an attempt to predict the unpredictable.

We greatly appreciate the hard work of the Board, DOSH, and associated staff in confronting this global pandemic, and we believe what we propose here provides a pathway to efficiently move forward against the current threat of COVID-19 and similar threats in the future. In the interest of progressing toward that resolution, we respectfully request the fastest possible action to place this Petition on the Board's agenda for discussion and action, and we thank you in advance for your prompt action.

Respectfully submitted,



Greg McClelland
Executive Director
Western Steel Council