

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

Petition File No. 603

Board Staff Evaluation
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May 30, 2024



State of California
Gavin Newsom, Governor

INTRODUCTION

Petition File No. 603 (Petition) was received from Ricardo Beas (Petitioner) on March 11, 2024. The Petition requests the Occupational Safety and Health Standards Board (Board) rescind the COVID-19 Prevention Non-Emergency Regulations.

REQUESTED ACTION

The Petitioner requests the Board rescind the COVID-19 Prevention Non-Emergency Regulation arguing that the COVID-19 non-emergency regulations pose an inconvenient, time-consuming, costly, and unnecessary burden on employers in the state of California. The Petitioner states that these regulations are tied to California Department of Public Health (CDPH) declarations on how to treat COVID-19; CDPH guidelines have continued to vary since the inception of the temporary regulation; and employers are expected to be aware of CDPH guidelines and take action.

BACKGROUND/HISTORY

On May 20, 2020, the Board received Petition 583 filed by WorkSafe and the Labor and Employment Committee of the National Lawyers Guild (Petitioners) requesting the Board amend title 8 standards to create new temporary emergency standards related to the COVID-19 pandemic. Petitioners requested the Board provide specific protections to California employees who may have been exposed or are exposed to COVID-19, but who are not protected by the Aerosol Transmissible Diseases (ATD) standards (sections 5199 and 5199.1). The Board directed staff to prioritize the evaluation of petition 583 and the efficacy of existing regulations to address the health and safety of workers in the wake of the novel coronavirus. The evaluation process, which included an analysis of current regulations, found that while protections exist in the title 8 ATD standards, they are limited in scope primarily to medical facilities. In 2020, employers who were not included in the scope of the ATD standards were following generally applicable requirements, which included the Injury and Illness Prevention Program (IIPP) (section 3203), Washing Facilities (sections 1527, 3366, 3457, and 8397.4), Personal Protective Equipment (PPE) (section 3380), Respiratory Protection (section 5144), Sanitation (article 9), and Control of Harmful Exposures (section 5141).

Section 3203, which became effective July 1991, requires employers to protect workers from harmful exposures. However, it does not necessarily identify specific measures that must be taken to fight the spread of a novel infectious disease. Instead, the responsibility is placed on employers, given their knowledge of the hazards at issue and the workings of the place of employment, to devise such methods or procedures. Throughout the course of the pandemic, the Division of Occupational Safety and Health (Cal/OSHA) issued guidance on safe reopening for employers. This guidance, much of which was issued jointly with other state agencies, included industry-specific information. Nonetheless, cases began to rise precipitously in October and November 2020. Guidance was insufficient to address the increase in cases and the risk of occupational spread. The threat of exponential growth in COVID-19 cases demanded immediate action.

In May of 2020, the Board voted to grant Petition 583 in part, agreeing that “COVID-19 is a hazard to working people,” and that “an emergency regulation would enhance worker safety.”¹ The Board requested Cal/OSHA draft an emergency rulemaking proposal to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace.² On November 19, 2020, the Board approved the adoption of title 8 sections 3205 and 3205.1 – 3205.4. These emergency regulations became effective on November 30, 2020. Due to the ongoing nature of the pandemic, the need for the emergency temporary standard (ETS) continued. The ETS was readopted, with amendments, on June 17, 2021, and December 16, 2021, with effective dates of June 17, 2021, and January 14, 2022, respectively. On December 16, 2021, Governor Gavin Newsom issued Executive Order N-23-21, which waived the limitations found in Government Code section 11346.1(h) and allowed a third readoption of the ETS. The ETS was again readopted, with amendments, on April 21, 2022, and became effective May 6, 2022. Per Executive Order N-23-21, the third readoption of the ETS was not to remain in effect beyond December 31, 2022.³

On December 15, 2022, the Board voted to adopt non-emergency COVID-19 prevention regulations. These regulations took effect on February 3, 2023, and remain in effect for two years after the effective date, except for the recordkeeping subsections that will remain in effect for three years.

These non-emergency regulations included some of the same requirements found in the ETS, added new provisions aimed at making it easier for employers to provide consistent protections to workers and allowed for flexibility if CDPH needed to make changes to its guidelines in the future.

Note: These regulations apply to most workers in California who are not covered by the [Aerosol Transmissible Diseases standard](#).

PETITIONER’S ASSERTIONS

The Petitioner asserts that failure to rescind the COVID-19 prevention non-emergency regulations would be arbitrary and capricious and an abuse of discretion by the Board. The Petitioner states that the COVID-19 non-emergency regulations pose an inconvenient, time-consuming, costly, and unnecessary burden on employers in the State of California. Additionally, the Petitioner provided links to several articles and videos which he described as facts. The Petitioner states that recent updates made by the Centers for Disease Control and Prevention (CDC) support his request.

¹ Petition 583 Adopted Decision <https://www.dir.ca.gov/oshsb/documents/petition-583-adopteddecision.pdf>

² OSHSB Petition 583 <https://www.dir.ca.gov/oshsb/petition-583.html>

³ [The Standards Board September 15, 2022 Board Meeting Notice \(ca.gov\)](#)

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (Cal/OSHA) EVALUATION

Cal/OSHA evaluation was not available at the time of drafting this report.

STAFF EVALUATION

Board staff reviewed the relevant federal, state and consensus standards identified in the Relevant Standards section below. Board staff also spoke with CDPH and Cal/OSHA Research and Standard representatives and reviewed their respective websites as well as articles concerning COVID.

The SARS-CoV-2 virus that causes COVID-19 is an airborne transmissible pathogen. The virus is readily transmissible in workplaces because multiple people come into contact with one another for extended periods on a routine basis. When employees report to their workplaces, they may regularly encounter co-workers, the public, delivery people, patients, and other individuals who enter the workplace. Workplace factors that exacerbate the risk of virus transmission include working in indoor settings, working in poorly ventilated areas, and spending hours in proximity to others. Even in cases where work can be completed away from other workers, such as in a private office, there are shared common areas like hallways, restrooms, lunchrooms, and meeting rooms where the virus can be transmitted.

From December 2021 through April 2022, the Omicron variant emerged as dominant, proving at least two to four times more transmissible than the Delta variant.⁴ Exposure to the Omicron variant could result in “breakthrough infections” amongst vaccinated persons. The highly transmissible Omicron variant resulted in a surge of COVID-19 cases. From late December 2021 into mid-January 2022, the number of cases, emergency department visits, and hospital admissions were higher than in previous stages of the pandemic and the average daily number of deaths remained substantial. Subvariants of Omicron, such as BA.2 and others, have been more transmissible than the original Omicron variant.

Following recommended prevention strategies has been critical to preventing infections, severe illness, or death from COVID-19. Worker protection is still necessary in the event another variant emerges.

The Petitioner is relying primarily on information that was generated at the beginning of the pandemic (2020-2021). The Petitioner’s list includes videos shared on an online platform dedicated to peer-to-peer content sharing – committed to freedom of expression. Information shared on this site does not have to be factual, in fact, the owner of the site states:

⁴ CDPH. Tracking Variants, dated February 3, 2022. Accessed on May 6, 2024.
<https://web.archive.org/web/20220207170746/https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-Variants.aspx>

“The right to freedom of expression does not just apply to information and ideas generally considered to be useful or correct. It also applies to any kind of fact or opinion that can be communicated. The UN Human Rights Committee (UNHRC) has stressed that 'expression' is broad and not confined to political, cultural or artistic expression. It also includes controversial, false or even shocking expression.”⁵

A review of the articles cited by the Petitioner provided supplemental information that appears to contradict the Petitioner. For example, the Petitioner believes that natural immunity is the best way to be immunized against COVID-19 and that natural immunity lasts much longer than the COVID-19 vaccines. To support these statements, the Petitioner provided a link to an article published by the National Library of Medicine on May 20, 2023, comparing the long-term cumulative risk of SARS-CoV-2 infection associated with natural and vaccine-induced immunity. The authors stated, “[the] study did not offer evidence that immunity due to SARS-CoV-2 infection and that induced by complete (two-dose) anti-COVID-19 vaccination act differently in conferring protection against the risk of new SARS-CoV-2 infection. Conversely, both natural and induced immunity offer significant protection when compared to individuals who did not have COVID-19 immunity. These results are consistent with a systematic review and pooled analysis, showing equivalence of protection from natural immunity in COVID-19 recovered versus fully vaccinated individuals”.⁶

Additionally, the Petitioner included updated information from the CDC declaring the SARS-CoV-2/COVID-19 virus is to be treated as nothing more than a typical flu and that natural immunity is the best way to be immunized for COVID-19 and lasts longer than COVID-19 vaccines. On March 1, 2024, the CDC released updated recommendations how people can protect themselves and their communities from respiratory viruses, including COVID-19.⁷ The recommendations bring a unified approach to addressing risks from common viral illnesses. The recommendations provide core prevention steps and strategies, including:

- Staying up to date with vaccination to protect people against serious illness, hospitalization and death. This includes flu, COVID-19 and RSV, if eligible.
- Staying home and away from others when respiratory virus symptoms are present and returning to normal activities once symptoms are better overall and fever-free for at least 24 hours.⁸

⁵ Bitchute <https://support.bitchute.com/policy/our-commitment/>

⁶ Petitioners Link

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10198735/#:%7E:text=Real%2Dlife%20evidence%20has%20consistently,SARS%2DCoV%2D2%20infection>

⁷ CDPH <https://www.cdc.gov/respiratory-viruses/guidance/respiratory-virus-guidance.html> Updated March 1, 2024

⁸ CDC <https://www.cdc.gov/respiratory-viruses/prevention/precautions-when-sick.html> Updated March 1, 2024

These updates contradict the Petitioner's statements regarding mask and social distancing being ineffective. The CDC continues to encourage additional prevention strategies to curb the spread of the disease, such as wearing well-fitting masks, keeping distance from others and/or getting tested for respiratory viruses.⁹

The COVID-19 Prevention Non-Emergency Standards incorporate definitions from the California Department of Public Health (CDPH) within the standards. CDPH works with various agencies, including the CDC, when generating public health orders. On January 9, 2024, CDPH made updates to their isolation and testing guidelines, the State Public Health Officer Order, which remains in place and has not been updated since. On May 22, 2024, Cal/ OSHA updated their Executive Summary to clarify that the changes recently made by CDPH do not affect the standard at this time. Cal/OSHA also updated their FAQ's. (See, [May 22, 2024, UDPATE: COVID-19 Prevention - Non-Emergency Regulation What Employers Need to Know Executive Summary \(ca.gov\).](#))

Relevant Standards

Federal Standards

On June 10, 2021, federal OSHA issued healthcare emergency temporary standards (ETS) for COVID-19 (29 Code of Federal Regulations (CFR) 1910.502 through 1910.509). These federal emergency regulations address COVID-19 hazards in some healthcare services and healthcare support services, with specified exceptions.

These federal regulations apply to a subset of the facilities, services, and operations that California addresses under existing regulation title 8, section 5199 [Aerosol Transmissible Diseases]. There is no federal regulation governing airborne exposure to infectious diseases, such as SARS-CoV-2, in general industry.

On November 5, 2021, federal OSHA issued an ETS for COVID-19 vaccination, testing, and face coverings (29 CFR 1910.501); however, federal OSHA withdrew the vaccination, testing, and face coverings ETS effective January 26, 2022.

Federal OSHA also has the "General Duty Clause" in subsection 5(a)(1) of the Occupational Safety and Health Act of 1970. The General Duty Clause addresses conditions that are not subject to other federal OSHA regulations. As such, it can be used by federal OSHA to require employers to protect employees from harmful airborne pathogens, such as SARS-CoV-2.

⁹ CDC <https://www.cdc.gov/media/releases/2024/p0301-respiratory-virus.html> Updated March 1, 2024.

Other federal OSHA regulations, such as those governing respiratory protection (29 CFR section 1910.134), sanitation and washing facilities (29 CFR section 1910.141), Personal Protective Equipment (PPE) (29 CFR sections 1910.132, 1910.133, and 1910.138), and employee access to medical and exposure records (29 CFR section 1910.1020) are similar to their counterpart CCR, title 8 regulations.

The mandatory COVID-19 Health Care Emergency Temporary Standard (Healthcare ETS), which had become effective June 21, 2021 (29 CFR section 1910.502), had similarities with title 8, section 5199. On December 27, 2021, federal OSHA withdrew all but the recordkeeping provisions of the Healthcare ETS – COVID-19 log and reporting provisions (29 CFR sections 1910.502(q)(2)(ii), (q)(3)(ii)-(iv), and (r)).

California Standards

Cal/OSHA's Aerosol Transmissible Diseases (ATD) standard (title 8, section 5199) directly applies to novel viruses such as SARS-Cov-2, but the scope of the standard is limited mostly to medical offices, certain laboratories, correctional facilities, homeless shelters, drug treatment programs, and any other employer that Cal/OSHA informs in writing that they must comply with the ATD standard. Employers not included in the scope of the ATD standard have applicable requirements, which include the Injury and Illness Prevention Program (IIPP, section 3203), Washing facilities (sections 1527, 3366, 3457, and 8397.4), PPE (section 3380), Respiratory Protection (section 5144) and Control of Harmful Exposures (section 5141).

Additionally, Cal/OSHA urges employers not covered by the ATD standard to comply with the COVID-19 Prevention Non-Emergency Standard (new sections 3205, 3205.1, 3205.2 and 3205.3, effective February 3, 2023).

Consensus Standards

A variety of sources exist which provide information on reducing potential employee exposure to SARS-CoV-2. In general, the sources provide information on reducing transmission among employees, maintaining healthy business operations, and maintaining a healthy work environment. The CDC, the World Health Organization (WHO), the American Industrial Hygiene Association, and the CDPH are examples of the many organizations that provide such information.

Staff Analysis

The Petitioner provided over a dozen links to articles and videos in his request. A review of the articles provided by the Petitioner revealed most did not include any recently published data and failed to reflect what has been learned about COVID-19. None of the Petitioner's supporting evidence includes scientific research, but instead are articles posted by various online news media outlets (i.e., "Just the News", "News Target", "Need to Know News") or videos.

The Petitioner provided links to video recordings (in some cases partial video recordings) of interviews on YouTube and BitChute, which did not include any data or facts. The following are a sample of links provided by the Petitioner:

- <https://www.bitchute.com/video/RUAIrKMMCK7e/> (December 5, 2020). The first minute of the video displays snippets of four different speakers discussing the efficacy of the vaccine based on what they knew at that time (2020); the last 53 seconds show the host summarizing these statements and then the video is abruptly cut off. No information in this video supports any of the Petitioner's claims.
- <https://www.bitchute.com/video/Cd6YCT3xc4Y4/> is a two-minute video in Italian that does not include subtitles or translation and, therefore, cannot be admissible as evidence.
- <https://www.bitchute.com/video/rLJqG4N8LAcf/> is a 50-second video of Dr. Fauci responding to an unknown question, so the context of the response is not clear.

Board staff reviewed numerous updated published documents and data from the CDC, CDPH, and other experts who performed systematic reviews of the evidence to develop evidence-based recommendations. The 2023-2024 fall and winter virus season, four years after the start of the COVID-19 pandemic, provided ongoing evidence of the changing face of respiratory diseases.

As of May 14, 2024, the SARS-CoV-2 Omicron variants JN.1 and KP.2 (JN.1.11.1.2) have a high prevalence in the United States. CDC Nowcast projections estimate KP.2 to account for nearly 30% of new COVID-19 illnesses in the U.S. The proportion of illnesses caused by KP.2 is rapidly increasing from 3.9% (estimated the week of March 30, 2024) to 28.2% (estimated the week of May 11, 2024).¹⁰ This data makes it clear that COVID-19 remains a health threat.

¹⁰ ID Society Covid-19 Real-Time Learning Network https://www.idsociety.org/covid-19-real-time-learning-network/diagnostics/covid-19-variant-update/#/+0/publishedDate_na_dt/desc/

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The Petitioner's request is based on the belief that the COVID-19 non-emergency regulations pose an inconvenient, time-consuming, costly, and unnecessary burden on employers in the state of California. The supplemental information cited by the petitioner does not provide any evidence to support their claims or request. The Board is tasked to assure safe and healthy working conditions for all California workers (Labor Code section 6300), the Petitioner's request does not take into account the workers' safety nor does the evidence they provide prove their claims to be factual.

Based on the information gathered during this evaluation, Board staff recommends that Petition File No. 603 be **DENIED**.