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VIA EMAIL (staff@oal.ca.gov)

OAL Reference Attorney
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Re: OAL File # 2020-1120-01E
Occupational Safety and Health Standards Board, COVID-19 Prevention

Dear Sir/Madam:

On behalf of the California Employers COVID-19 Prevention Coalition (the Coalition),[1] we urge and request the Office of Administrative Law (the OAL) to reject the Proposed Emergency COVID-19 Prevention Rule (the Proposed Rule) adopted on November 19th by the California Occupational Safety and Health Standards Board (the Board), at least in its current form. Enclosed is a copy of the Coalition's written substantive comments expressing the Coalition's concerns about the Proposed Rule and the rulemaking process used to adopt it, which comments were timely submitted to the Board last week.

Fundamental to the development of executive branch regulation – even emergency regulation – is stakeholder involvement. The rushed process followed by the Board to promulgate this Rule has deprived interested parties, critical stakeholders, and the entire regulated community of any meaningful opportunity for input in the final rule. Apparently for the first time ever, the Division presented a proposed rule to the Standards Board without first convening an Advisory Committee to solicit input from stakeholders. And on top of that, the public was provided a mere five days to review, evaluate and prepare comments on a rule package that consisted of over 100 pages of background information and proposed regulatory text, and which necessitated review of hundreds if not thousands of additional pages of relevant material.

Despite this narrow timeframe, the Proposed Rule generated numerous comments, much of which were delivered on the exact same day as or the day before the public hearing during

[1] The Employers COVID-19 Prevention Coalition is composed of a broad array of California and national employers potentially impacted by the Proposed COVID-19 Rule. Included among its members are companies representing manufacturing, retail, airline operations, aerospace/defense, construction, wholesale food distribution, landscaping services, petroleum refining, logistics, veterinary services, and steelmaking industries, with a combined hundreds of workplaces with thousands of employees across California. The Coalition's membership includes segments of the regulated community significantly impacted by the Board's Proposed Rule and with a substantial interest in the outcome of this rulemaking.

which the Standards Board voted to adopt the rule; i.e., the written comments could not have been read, let alone considered by the Board before it cast its vote. The public hearing itself included more than 500 participants. Well over 100 of them – many of whom were cut off or severely limited in the time provided to address the Board – provided verbal comments highly critical of the rulemaking process that was being followed, the need for the rule, and/or various provisions included in the Proposed Rule. Notwithstanding, at the end of the public hearing, and despite most of the Board members acknowledging that the Proposed Rule needs further work, the Board voted unanimously to adopt, *as is*, the Proposed Rule.

This "ready, fire, aim" approach is not permitted under the fundamentals of California administrative process, and does not meet the basic applicable legal requirements for emergency rulemakings established under Government Code Section 11346.1. Even with an extremely abbreviated emergency rulemaking schedule, the public must be provided genuine opportunity to comment. *This legal requirement is not met if the Board does not even review those comments before adopting the Proposed Rule. Here, that is precisely what occurred.*

The result of this impermissible and unnecessarily rushed approach is the development of badly flawed regulation. Essential employers operating in California have been dealing with the SAR-CoV-2 pandemic for nine months. Listening to these stakeholders would not have taken long, and would have resulted in a much better rule. It is not too late to remedy this situation.

OAL's role in the rulemaking process is not perfunctory; it is a critically important backstop to ensure that the development of regulations meets certain basic elements established in California Government Code Sections 11349 *et seq*. Before OAL may approve and publish a rule, it must find that the rule meets the following mandatory prerequisites: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. As described more fully below, the Proposed Emergency Rule adopted by the Board last week to address COVID-19 does not meet numerous of these mandatory criteria.

Because the Rule does not meet those elements and was developed without true public comment, OAL must not approve this Rule.

1. The Board's Finding of An Emergency Is Impermissibly Flawed

The entire predicate of this rulemaking is legally flawed. To support its finding of an "emergency," purportedly authorizing the severely condensed administrative process and public input opportunities provided, the Board asserted that "*immediate* action must be taken to avoid *serious harm* to the public peace, health, safety or general welfare[.]" (Finding of Emergency, p. 1)[2] However, as the Code makes clear, "A finding of emergency based only

[2] Despite its phrasing, the Board did not seek to avail itself of the exception in Section 11346.1(a)(3) ("An agency is not required to provide notice … if the emergency situation poses such an *immediate, serious harm* that delaying action to allow public comment would be inconsistent with the public interest.").

upon expedience, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency." (Section 113246.1(2))

Despite this, the Board points to no specific facts supported by substantial evidence to support either the alleged need for immediate action, or any overriding reason beyond a general public need, and instead largely bases its emergency finding on Executive Orders dated *as long as eight months ago.* (Finding of Emergency, p. 2-3) *Indeed, Petition 583 – to which the Proposed Rule purports to respond*[3] *– was filed in May, more than six months ago.*

Instead, the Board admits this emergency rulemaking was improperly based on expedience and convenience, stating that "[r]egular rulemaking cannot be completed in time to address these significant and ongoing risks," and later suggests this is due to the fact that regular rulemaking "requires a fiscal analysis and approval from the Department of Finance[.]" (Finding of Emergency, p. 4, 37) The Board includes no discussion at all of the timeline for regular rulemaking, or why it would prove inadequate to the current situation, or why any fiscal analysis or approval by the Department of Finance would prevent the use of regular rulemaking.

In fact, the Code states that "[i]f the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations…the finding of emergency *shall include facts explaining the failure to address the situation through nonemergency regulations*." (Section 11346.1(2)). The Board provided no facts explaining its failure to address the situation through nonemergency regulations. The "emergency" nature of the pandemic existed last March, April and May, when it first began spreading in the State and before the myriad of regulatory and state orders and guidance were in place. If the Board wished to rely on its extraordinary emergency rulemaking authority, it should have done so last spring. The Board's failure to do so, and its failure to explain such failure, makes this emergency rulemaking fundamentally flawed.

Of course, the Coalition does not deny the horrific nature of the worldwide COVID-19 pandemic. Indeed, its employers moved quickly and proactively to develop and implement a myriad of extremely effective exposure control, mitigation and prevention protocols last spring when it first became clear that the SARS-CoV-2 virus was rapidly spreading in California. As did Governor Newsom's Office in the issuance of multiple executive orders, the California Department of Public Health (CDPH) and the county health departments, since March, the Division of Occupational Safety and Housing (DOSH or the Division) itself has created and issued a host of guidance (by industry), frequently asked questions, educational materials, webinars and even a "Cal/OSHA Training Academy" with 24- and 17-minute

[3] In this respect, it is interesting that although the Board now declares the need for "immediate" promulgation of an emergency standard, it apparently did not itself see and recognize the need until prompted by an outside entity some two months into the pandemic and following the initial Executive Orders and other actions the Board now cites to justify the existence of an emergency.

COVID-19 training videos for employers and employees, respectively.[4] In the context of these public health orders and agency guidance, the Board's failure to move immediately into rulemaking appears to be a matter of choice and priorities, rather than lack of opportunity. Regardless, its actions are too late, and, therefore, it must follow the legal requirements mandated by the California Code to ensure public input into the rulemaking process. The Standards Board cannot *now*, nine months into this pandemic, declare an emergency of such urgency that it can *de facto* dispense with all meaningful rulemaking process and deny the public its right to meaningful input into the development of a rule of such import and which will have such impact on the regulated community.

In sum, there is nothing in the Finding of Emergency to justify the current emergency rulemaking, without an advisory committee or any other procedural safeguards that normally help ensure regulations are tailored to the situation and do not cause more harm than they prevent.[5] The Coalition respectfully suggests the lack of a properly and sufficiently supported emergency finding is fatal to the Proposed Rule. (Section 11349.6(b)) ("The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency[.]")

2. The Board Lacks the Authority to Issue Portions of the Proposed Rule

As set forth more fully in attached comments 4, 6, 7, 12 and 13, there is legitimate concern among the Coalition that the Board lacks any jurisdictional authority to promulgate certain aspects of its Proposed Rule. For OAL to approve the Emergency Rule, it must first examine and find that the Board's regulatory authority extends to the areas at issue and addressed in the Coalition's and other stakeholders' comments.

Our concern is based on more than simply the violation of a legal nicety. The governmental authorities with jurisdiction over the subject matter addressed by the Board in its Rule have the expertise, experience and understanding to consider the broad panoply of issues at play when addressing earnings, wages and seniority rights. The Board has no comparable experience. Accordingly, in promulgating legal requirements in these areas, it has unintentionally created a number of very serious consequences.

For example, the Emergency Rule not only excludes from the workplace employees who have tested positive for COVID-19, but any employee with "COVID-19 exposure," as defined in the regulation while also requiring that the employer "continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job."

[4] https://www.dir.ca.gov/dosh/coronavirus/

[5] The Finding of Emergency notes that the Division will convene a representative advisory committee "to review the emergency COVID-19 rulemaking(s), for the purpose of establishing if there exist any reasonable and necessary improvements to the emergency regulation required to avoid serious harm," but only *after* the Proposed Rule is already in place.

As noted in the Coalition's comment 13, under this requirement, individual employees could claim or qualify for multiple paid leaves of 14 or more days without testing positive or even showing any symptoms. But the Board only has authority to adopt *occupational safety and health standard*s (Cal. Lab. Code. 142.3(a)(1)), and it is far from clear whether this authority extends to the lengths it has now been stretched by the Board, to include, in effect, the provision by every employer in the State of California of substantial amounts of potential paid leave.[6]

As they are not directly accountable to the people through elections, there are legitimate bounds within which administrative agencies must be kept. The Coalition urges the OAL to carefully ensure that the Board is so kept here. (Section 11349.1(a)(2))

3. The Proposed Rule is Not Necessary and Is Duplicative of Other Statutes and Regulations

Taking into account the totality of the record, the Board has failed to establish that the Proposed Rule is a necessity. Indeed, as it approved the Proposed Rule without even a cursory review of the full set of written comments, and denied a full presentation of oral comments, it is impossible for the Board to have considered the "totality of the record," as required under California law. (Section 11349.1(a)(1))

In any event, the record before the Board failed to demonstrate that, absent the Proposed Rule, any employer would forego compliance with the already-existing standards directed towards legitimate public health concerns related to COVID-19 workplace prevention and containment. As discussed below, the public health standards set forth in the Proposed Rule largely overlap with and duplicate existing standards (see generally attached comments, Section I), and there is no record evidence that proves California employers will avoid compliance with such rules in the absence of the Proposed Rule.

The Board also has failed to justify the numerous duplicative portions of the Proposed Rule. Indeed, Cal/OSHA itself has declared for many months on its website that workplace safety and health regulations already in existence "require employers to take steps to protect workers exposed to infectious diseases like the Novel Coronavirus (COVID-19)[.]"[7] At a minimum, this is an admission (as further explained below) that there is no need for an emergency rulemaking to adopt these duplicative rules.

In fact, in its Finding of Emergency, the Board repeatedly downplays the estimated costs of compliance by explaining that many of the Proposed Rule's most onerous requirements are "already required" under Section 3203. That very phrase is used no less than ten times in

[6] For example, could the Board determine that employees are far healthier or safer overall when they have increased time away from the stress and confines of work, and mandate all California employers to provide paid vacation time to their employees?

[7] (*See* https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html)(accessed November 23, 2020)

discussing the estimated cost requirements of the Proposed Rule. (Finding of Emergency, pp. 45-51).

Specifically, the Board notes that under existing 8 California Code of Regulations (CCR) Section 3203, "employers in California are *already required* to have a written and effective Injury and Illness Prevention Plan" with multiple items mandated. The Board acknowledges that "All these requirements *already apply* to the hazard of COVID-19; indeed, the Division has issued COVID-19-related citations to employers based on section 3203."[8] Likewise, in discussing Section 3205(c), the Board notes that "[m]uch of that subsection makes explicit actions that are *already required* by existing section 3203[.]" (*Id*.) Numerous other statements further establish that large portions of the Proposed Rule are overlapping and/or duplicative, in violation of Section 11349.1(a)(6). (*See* Finding of Emergency, p. 47 ("This minimal evaluation is *already required* by the existing section 3203."); p. 48 ("The existing section 3203 *already requires* effective procedures to investigate workplace illnesses."); p. 50 ("Employers are *already required* to provide training and instruction regarding COVID-19 hazards and prevention under section 3203(a)(7)[.]"); p. 50 ("the Division believes that all counties *already require* face coverings and social distancing of at least six feet when it is possible to do so"); p. 50 ("Evaluating the need for such partitions is *already required* under section 3203"); p. 51 ("Counties *already require* the handwashing and cleaning/disinfection protocols required here"); p. 51 ("Such offices are *already required* to provide the specified respiratory protection under existing section 5144"); and p. 51 ("Existing section 3203 *already requires* employers to maintain illness records and records of steps taken to implement COVID-19 hazard correction.").

Perhaps even more troubling in terms of the lack of need for and duplicative nature of this Rule, the California legislature and Governor Newsom have recently finalized COVID-19 legislation affecting employers' requirements to protect workers from spread of the virus in the workplace, which will take effect in just over a month. The Board's Rule completely fails to account for this fact.

Because so much of the Emergency Rule is "already required," and because the Board has failed to justify the very significant overlap and duplication between the Rule and existing statutes, executive orders, and regulations (as well as the new legislation about to become effective), it does not meet the minimum requirements necessary for OAL to approve it. [9] OAL should, therefore, reject the Rule.[10]

[8] Finding of Emergency, p. 45.

[9] In light of the severe time constraints, the Coalition has focused on only a few concerns with the Emergency Rule under OAL's mandate, however, the Coalition believes that its comments to the Board establish that the Emergency Rule also fails to meet the Clarity, Consistency and Reference requirements for OAL approval.

[10] The fact that the Rule is not necessary and is in large measure duplicative of existing legal requirements applicable to California employers should not indicate that approval of this Rule will not harm the regulated community or further burden California employers. To the contrary, this is not a "no harm, no foul" situation, as described more fully in the Coalition's comments. For example, even if the Rule was wholly duplicative of

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California employers have learned much in the last nine months, and through their careful and thoughtful actions have helped to change the situation dramatically for the better. Due to their own innovations and compliance with the numerous executive orders issued by Governor Newsom, the public health orders issued by every county and the California Department of Public Health, and the ubiquitous guidance issued by a wide array of state and federal agencies, including the Board, employers are in a vastly different position than they were when this pandemic began.

As was repeatedly made clear by the written and oral comments last week, most employers are keenly aware of and are currently meeting the risks from COVID-19 and already have systems and policies in place to deal with the ongoing issues arising from the pandemic. In fact, as early as August 10, 2020, Board staff noted that it was "unable to find evidence that the vast majority of California workplaces are not already in compliance with COVID-19 requirements and guidelines."[11]

Simply put, no further regulation is needed at this time. As demonstrated herein and in the attached comments, such a rejection would not leave California workers unprotected; nor would it prevent the Board from moving with all deliberate speed within the existing regulatory framework to promulgate – with appropriate input from all stakeholders – a permanent rule, should that ultimately prove necessary. Any rule developed from this process would undoubtedly provide better, more thoughtful and fairer protection against COVID-19 in California workplaces.

Accordingly, the Coalition urges that OAL reject the Proposed Rule.

Sincerely,

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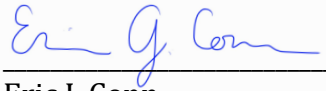
Counsel to the California Employers COVID-19 Prevention Coalition



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existing requirements, it provides an additional basis to cite and penalize an employer if a purported compliance failure is identified. That alone demonstrates the significance of promulgation of this standard.

[11] (OSHSB Petition File No. 583, Board Staff Review, August 10, 2020)

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