November 25, 2020

Office of Administrative Law
OAL Reference Attorney
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Sacramento, CA 95814-4339
Via e-mail: staff@oal.ca.gov

RE: COVID-19 Prevention Emergency Regulation (OAL File Number 2020-1120-01E)

Dear Reference Attorney:

The California Chamber of Commerce and the organizations listed below respectfully request the Office of Administrative Law (OAL) to reject the Division of Occupational Safety and Health's (Cal/OSHA) COVID-19 Prevention emergency standard (the "Regulation"). These comments are presented to the OAL regarding the limited review of emergency regulations as provided in the Administrative Procedure Act.

California Government Code Sections 11349 *et seq* set forth the standards by which the proposed regulations are analyzed for purposes of approval and publication, including: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication. As analyzed below, we do not believe that the proposed regulations satisfy these criteria. Most notably, we believe the proposed regulations lack the required legal authority and clarity pursuant to the Administrative Procedures Act, and request that OAL reject the regulation and compel Cal/OSHA to revise the Regulation so that it is within Cal/OSHA's proper authority and provides sufficient clarity to the regulated community.

A. The Board Has Not Met the Threshold Requirements for Emergency Regulation or the Required Legal Standards of Necessity and Nonduplication:

As an initial matter, the Board must comply with California rules for promulgating an emergency standard. California's Government Code Section 11346.1(b)(2) requires that a finding of an emergency must include a written agency statement of specific facts demonstrating the "existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency." A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, will not be adequate to demonstrate the existence of an emergency.

Further, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the Regulation complies with the legal standards set forth in Government Code Section 1139.1(a), including "necessity" and "nonduplication" among other standards. In this case, the existing health emergency is already being adequately addressed by enforcement of existing regulations and guidance for compliance with those regulations from the California Department of Industrial Relations Division of Occupational Safety & Health. Over the last few months, the Board has heard testimony from Cal/OSHA staff, employer organizations and worker organizations alike who all verified this. In fact, Cal/OSHA staff testified that they are enforcing COVID-19 workplace guidance documents and guidelines under the Injury and Illness Prevention Program (IIPP) regulation and have indeed issued COVID-19 workplace fines. Significantly, the Standards Board Staff Report regarding Petition 583, published in August of this year, stated as much, and recommended against the Regulation on that basis.[1]

In addition, there are recently passed state statutes that already provide employers with the authority to take measures to mitigate COVID-19 exposure in the workplace and the Board itself has acknowledged the sufficiency of its existing standards. Given that current law and procedures adequately protect employees,

[1] See "Board Staff Evaluation," page 5 ("Eric Berg, Deputy Chief of Health for Cal/OSHA has recently testified to the Board that Cal/OSHA is enforcing existing COVID-19 protections and providing consultative outreach."). Available at: https://www.dir.ca.gov/oshsb/documents/petition-583-staffeval.pdf

the Board has failed to do the following: (1) make a showing of the need for immediate action, (2) meet the requirement to show necessity or non-duplication and, by extension, (3) demonstrate that it has the authority to promulgate a rule that is merely expedient or in the best interests or needs of the public.

We raise these issues not to minimize the importance of COVID-19 or avoid enforcement against COVID-19 safety hazards – but to emphasize that there is no legal or health need to rush this regulation in this manner. Existing IIPP guidance is already in place, and violating employers are already being cited. This lack of necessity is particularly true in light of the breadth of concerns regarding the Regulation's text that have been raised since its public release on November 12, 2020, some of which are re-iterated below.

B. The Regulation Contains Multiple Provisions that Lack Required Clarity:

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "clarity" standard. [2] "Clarity" as defined by Government Code Section 11349(c) means "...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[3] Interpreting regulations add detail to this definition:

> A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
>
> **(1)** the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or . . .
>
> . . .
>
> **(3)** the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; . . .

Cal. Code Regs. tit. 1, § 16.

1) **"COVID-19 case" – Section 3205(b).** The Regulation defines a "COVID-19 case" in terms similar to those used in Labor Code Section 6409.6(d)(4), but adds that "[a] person is no longer a [case] when a licensed health care professional determines that the person does not have COVID-19 . . ." In conflict, Section 3205(c)(11) ("Return to work criteria") provides timelines for employees to return to the workplace after either testing positive or being potentially exposed to COVID-19. There, the Regulation provides explicitly that "[a] negative COVID-19 test shall not be required for an employee to return to work."

   This leaves a contradiction which two different employers could interpret in opposite. First, an employee remains a "COVID-19 case" unless an affirmative diagnosis is procured from a medical provider, but they may return to work without such a diagnosis. This would mean that employees return to work ***while remaining*** a "COVID-19 case" for purposes of the Regulation until such time as they procure a negative diagnosis. Correspondingly, the presumably non-infectious COVID-19 case would appear to trigger perennial obligations to comply with Sections 3205(c)(3)[4] and 3205(c)(9).[5] Alternatively, an employer could interpret these provisions to give primacy to the "return to work" section, and treat the tracking and recordkeeping obligations as no longer triggered

[2] Gov. Code Section 11349.1(a)(3).
[3] Those "directly affected" are defined as those who are legally obligated to comply with or enforce the Regulation. *See* Cal. Code Regs. tit. 1, § 16.
[4] Section 3205(c)(3) relates to investigating and responding to COVID-19 cases, and includes requirements to "verify[] COVID-19 case status" as well as "determine the day and time the COVID-19 case was present . . ."
[5] Section 3205(c)(9) relates to reporting and recordkeeping and obligates employers to track and keep track of COVID-19 cases in the workplace, while making no mention of whether they are in the high-risk exposure period.

because the employee should no longer be considered a "COVID-19 case" once they were allowed to return – which would certainly also be a reasonable interpretation, given that the apparent risk should be minimal at that point. Due to these two reasonable interpretations, we do not believe the "clarity" criterion is met.

2) **"Return to Work" – Section 3205(c)(11).** The Regulation provides that employees "shall not return to work until" certain requirements are met. This provision is noticeably vague as to whether an employee may "work" while being excluded from the workplace. For example, an employer could read this provision as forbidding an asymptomatic case or a mildly symptomatic case from being in the workplace,[6] but not legally prohibited from working remotely or from an alternative work location. Alternatively, employers could interpret this provision as it reads: forbidding "work" for the duration of the time periods provided in the section. This provision being subject to two contradictory interpretations, we believe it fails to meet the requirement of "clarity."

3) **"Earnings" – Section 3205(c)(10)(C).** The Regulation provides that all employees who are excluded, either on the basis of being a "COVID-19 case" or as being exposed to a "COVID-19 case," are to have their "earnings" maintained. Putting aside the issue of Cal/OSHA's authority related to this provision (which will be discussed below), we believe this provision is not clear as to how it applies to workplaces where "earnings" may not be easy to calculate. For background: where a similar provision has been applied (lead, methylene chloride, benzene, etc.), an employee's "earnings" was easier to calculate, as employees were generally full-time and on salary or under a collective bargaining agreement. In contrast, this regulation will apply to virtually all workplaces in California, where a variety of different situations may apply. For example, in some industries, employees may work on an hourly or part-time basis, or under variable scheduling. Further complicating matters, some industries (such as hospitality and restaurants) may have a significant portion of compensation provided as tips. For retail employees and salespersons, their usual compensation may largely be based on commissions earned. In addition, some workplaces utilize piece work compensation – raising a question of whether a minimum wage, or an average of prior week's work is required. Finally, some workplaces may be covered by a collective bargaining agreement, which may already have provisions addressing earnings payable for work. With those working arrangements in mind, how an employer calculates "earnings" is not clear. Without this provision being clarified, large sectors of the regulated community will find themselves with a requirement that is unfamiliar and subject to multiple interpretations.

4) **Exception 1 to "Earnings" Guarantee – Section 3205(c)(10)(C).** The Regulation provides an exception to Section (c)(10)(C) that it shall not apply to "any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission." This text is ambiguous in its application to COVID-19 cases whose medical condition worsens while excluded. For example: an employee could be excluded from the workplace pursuant to Section 3205(c)(10)(A)/(C) but be relatively asymptomatic and be physically able to continue work. However, if that employee's condition worsens, and they begin to cough and be less capable of exertion – how does this exception apply? Are they entitled to benefits for exclusion so long as their symptoms are minor, but lose benefits once they become serious? Or, alternatively, is the provision intended to cover COVID-19 cases that are excluded, unless a non-COVID-related condition prevents their work? Such as a broken leg or some similar structural injury? Without clarification, employers could make two different conclusions regarding this provisions: (1) that a COVID-19 case is entitled to earnings *unless* they suffer an injury unrelated to COVID, or (2) that a COVID-19 case is entitled to exclusion and earnings until their

[6] This interpretation (exclusion from the worksite) would be rational in light of the overall regulation, as well as the language utilized in Section 3205(c)(10).

symptoms become significant enough to, hypothetically, prevent them from being able to complete the tasks of their work.

5) **Potential Application of Aerosol Transmissible Disease Standards – Section 3205(c)(8)(E)(2).** By requiring employers to "evaluate the need for respiratory protection in accordance with Section 5144 when the physical distancing requirements of Subsection (c)(6) are not feasible or are not maintained," the Draft Regulation creates an unclear obligation. During a "major outbreak", this provision suggests that employers could, if the "need" arose, be required to adopt a new "respiratory protection program" similar to that required by Section 5144. However, how that "need" might be identified or quantified is unclear. That uncertainty is particularly problematic in light of the scale of obligations that Section 5144 provides for employers, including substantial engineering controls, as well as providing of air filtering respirators, with associate fit testing and medical evaluations. Without clarification, this provision leaves employers guessing at whether a major outbreak compels adoption of an entirely new safety program.[7]

6) **Outbreaks among visitors – Sections 3205.1(a) and 3205.2(a).** The Regulation provides that an outbreak occurs "when there are three or more COVID-19 cases in an exposed workplace within a 14-day period" or "20 or more COVID-19 cases in an exposed workplace within a 30-day period." Notably, COVID-19 case is not defined to be limited to employees. This raises a critical ambiguity – can an outbreak be triggered by a passing visit of a customer or member of the public to the workplace? In essential workplaces that are open to the public, such as grocery stores and retail, that distinction is critical because three cases among a daily customer flow of hundreds seems quite predictable. The related testing obligations (Sections 3205.1(b) and 3205.2(b)) apply only to employees – as does most of the discussion in the Regulation – but COVID-19 case is not defined to include only employees. This ambiguity is critical because it could be the difference between whether an employer is required to begin the "outbreak" protocols.[8]

7) **Testing availability – Sections 3205(c), 3205.1, and 3205.2.** The Regulation requires testing in multiple sections (discussed below) but fails to provide in any clarity what employers are to do if testing is not available in their area. This is a particularly strong concern for employers in more rural areas of California, or in areas where testing shortages (particularly for the more affordable antigen testing) may run short as testing increases due to this regulation.

8) **Refusal of Testing – Sections 3205(c), 3205.1, and 3205.2.** Though employers are required to have a procedure for "verifying COVID-19 case status,"[9] and to "offer" and "provide", it is not clear what an employer is to do if an employee refuses to take a test. This distinction becomes important if an employer has an employee who – the employer believes – has been exposed and may have been infected with COVID-19, but who refuses testing. Employers' obligations in various sections rest on information received as part of that test. For example, employers are required to exclude individuals with positive tests (or "COVID-19 cases") pursuant to Section 3205(c)(11) for a different duration than "employees with COVID-19 exposure" pursuant to Section 3205(c)(10). When an employee refuses testing, an employer has no guidance as to how long that individual should be excluded from the workplace – and could reasonably guess and apply the 14-day timeline provided

[7] This is particularly bizarre given that a major outbreak is defined as an event of limited duration (much like the Regulation itself), whereas such a respiratory plan would be a considerable change in long-term policy.

[8] Notably, this ambiguity has been implicitly recognized in similar efforts – where **AB 685** was ambiguous on this point in its text, the California Department of Public Health subsequently issued guidance to clarify that "[a] COVID-19 outbreak in a non-healthcare workplace is defined as at least three COVID-19 cases ***among workers*** at the same worksite." *See* https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-**AB-685**-Definitions.aspx (emphasis added).

[9] *See* Section 3205(c)(3)(A).

for exclusion, or reasonably guess and apply the symptom-based provisions of Section 3205(c)(11). With this ambiguity, this provision lacks the requisite clarity. As another example: Sections 3205.1 and 3205.2 (regarding outbreaks and major outbreaks, respectively) require that employers "shall provide" COVID-19 testing "immediately," and rely on negative tests in order to trigger the end of an "outbreak."[10] But if an employer has employees who should be undergoing repeated testing as part of an outbreak, but are refusing to take such tests – can an employer consider the "outbreak" as ended? The employer cannot, in this situation, be certain that there truly are no new cases in the workplace, but also cannot compel testing to ascertain this information. This situation is not addressed in the Regulation, leaving employers to guess at when the significant additional requirements of an "outbreak" will no longer be necessary.

C. The Regulation Includes Multiple Provisions That Fall Outside of Cal/OSHA's Authority.

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation is within the agency's "authority," meaning that there must be a "provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."[11]

1) **Medical Removal & Earnings Guarantee – Section 3205.1(c)(10)(C).** The Regulation provides that all employees who are excluded, on the basis of being a "COVID-19 case" or as being exposed to a "COVID-19 case", are to have their "earnings" maintained. While we acknowledge that Cal/OSHA has authority, in some scenarios, to provide for medical removal with accompanying income,[12] we do not believe this authority extends to one category of employees: Noninfected / potential COVID-19 cases**.** Unlike the medical removal provisions for the lead standard, which does not provide earnings for *hypothetical* blood lead level increases, this Regulation provides an earnings guarantee for *non-confirmed* COVID-19 cases. As these exposed individuals are not a confirmed COVID-19 case resulting from a workplace hazard, but are instead a hypothetical case, we do not believe this falls under Cal/OSHA's authority to regulate workplace hazards.

2) **Employer-Provided Housing – Section 3205.3.** The Regulation provides that employers must comply with a host of requirements related to employer-provided housing, which is broadly defined, including ensuring the orientation and spacing of beds,[13] the cleaning of dishes,[14] and procuring additional housing to isolate exposed occupants.[15] The citations offered in support of Cal/OSHA's authority for these provisions are Labor Code Sections 142.3 and 144.6. However, these sections do not refer to housing. To the contrary, the Department of Housing and Community Development, holds authority related to ". . . occupancy . . . sanitation, maintenance, and ventilation of all hotels, motels, apartment houses and dwellings, or portions thereof . . ."[16] We are also not aware of any comparable standard that governs conduct inside of housing under the mantle of workplace safety. As a practical matter – and further demonstrating the authority issue – employers do not even have legal control over some of the elements inside of employee housing.

3) **Employer-Provided Transportation – Section 3205.4.** The Regulation provides employers must comply with a host of requirements related to employer-provided transportation to and from work. However, the Vehicle Code provides that the Department of Motor Vehicles "shall regulate the safe operation of the following vehicles: . . . (c) [b]uses . . . farm labor vehicles . . ."[17] In addition, the

[10] Sections 3205.1(b) &3205.2(b), and also (a)(2) regarding the trigger to end an outbreak.
[11] 1 CCR § 14; Gov Code § 11349.
[12] Notably, the lead regulation provides an example (Section 5198(k)) of medical removal and "earnings." *See generally, United Steelworkers of Am., AFL-CIO-CLC v. Marshall,* 647 F.2d 1189, 1228 (D.C. Cir. 1980).
[13] Section 3502.4(c)(2).
[14] Section 3502.4(e)(2).
[15] Section 3502.4(h)(1).
[16] Section 1 CCR 25.
[17] Veh. Code § 34500.

Public Utilities Commission regulates passenger carriers, such as commercial buses or vans, as common carriers.[18] In addition to these issues, as a practical matter, an employer does not have any power to influence the conduct of a third-party transportation company which is contracted to provide transportation to employees (aside from what is provided in the two companies' contract). For these reasons, we see this provision as beyond the scope of Cal/OSHA's authority as well.

Conclusion

The text of this regulation must be compliant with the APA requirements particularly because – due to the extended duration for regulations asserted by Executive Orders N-40-20 and N-71-20 – it will remain in effect for far longer than emergency regulations otherwise would. We appreciate your consideration of our concerns and comments and respectfully request the OAL to reject the proposed regulations at this time and require the above concerns be addressed.

Sincerely,

Robert Moutrie
California Chamber of Commerce

African American Farmers of California
Agricultural Council of California
Associated General Contractors
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors, National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Automatic Vendors Council
California Beer and Beverage Distributors
California Cable & Telecommunications Association
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Framing Contractors Association
California Fresh Fruit Association
California Grocers Association
California League of Food Producers
California Life Sciences Association
California Manufacturers & Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Special Districts Association
California State Association of Counties
California Trucking Association
Family Business Association of California
Grower-Shipper Association of Central California
LeadingAge California
League of California Cities
Los Angeles County Business Federation (BizFed)
Motion Picture Association
National Automatic Merchandising Association
Nisei Farmers League
Public Risk Innovation, Solutions and Management
Residential Contractors Association
Santa Maria Valley Chamber of Commerce
Specialty Equipment Market Association
Tri County Chamber Alliance
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Western Steel Council

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[18] Pub. Util. Code § 211(c).