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Association of Winegrape Growers, and
11 Ventura County Agricultural Association

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

14 Western Growers Association, California
Farm Bureau Federation, California
15 Business Roundtable, Grower-Shipper
Association of Central California,
16 California Association of Winegrape
Growers, and Ventura County Agricultural
17 Association,

18 Plaintiffs/Petitioners,

19 v.

20 California Occupational Safety and Health
Standards Board; David Thomas, Chris
21 Laszcz-Davis, Laura Stock, Barbara
Burgel, David Harrison, and Nola J.
22 Kennedy, in their official capacities as
Members of the California Occupational
23 Safety and Health Standards Board;
Christina Shupe, in her official capacity as
24 Executive Officer of the California
Occupational Safety and Health Standards
25 Board; California Division of Occupational
Safety and Health; and Douglas L. Parker,
26 in his official capacity as Chief, California
Division of Occupational Safety and
27 Health,

28 Respondents/Defendants.

Case No.

**VERIFIED PETITION AND
COMPLAINT FOR:**

- (1) **DECLARATORY RELIEF** [Code Civ. Pro., § 1060, Gov. Code, § 11350];
- (2) **WRIT OF TRADITIONAL MANDATE** [Code Civ. Pro., § 1085];
- (3) **Violation of California Occupational Safety and Health Act** [Lab. Code, § 6300, et seq.];
- (4) **Violation of California Occupational Safety and Health Act** [Lab. Code, § 6300, et seq.];
- (5) **Violation of California Administrative Procedure Act** [Gov. Code, § 11340, et seq.];
- (6) **Violation of California Administrative Procedure Act** [Gov. Code, § 11340, et seq.];
- (7) **Violation of Bagley-Keene Act** [Gov. Code, § 11120, et seq.]; and
- (8) **Violation of Due Process (U.S. Const. amend. XIV, § 2)**

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GLOSSARY OF ACRONYMS

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2		
3	Addendum #1 to the Finding of Emergency	Addendum #1
4	Aerosol Transmissible Diseases	ATD
5	Bagley-Keene Open Meeting Act	Bagley-Keene Act
6	California Administrative Procedure Act	APA
7	California Department of Food and Agriculture	CDFA
8	California Department of Housing and Community Development	CDHCD
10	California Department of Public Health	CDPH
11	California Employment Development Department	EDD
12	California Farm Bureau Federation	CFBF
13	California Highway Patrol	CHP
14	California Occupational Safety & Health Standards Board	Board
16	California Public Utilities Commission	PUC
17	Centers for Disease Control and Prevention	CDC
18	Department of Industrial Relations	DIR
19	Division of Labor Standards Enforcement	DLSE
20	Division of Occupational Safety and Health	Division or Cal/OSHA
21	Emergency Temporary Standard (Cal. Code Regs, tit. 8, §§ 3205, 3205.1, 3205.2, 3205.3 & 3205.4)	ETS Regs. or ETS
23	Farm Labor Contractors	FLC
24	Injury and Illness Prevention Plan	IIPP
25	May 20, 2020 Petition From Worksafe and the Labor & Employment Committee of National Lawyers Guild to Occupational Safety and Health Standards Board	Worksafe/NLG Petition or Petition 583
27		
28	Office of Administrative Law	OAL

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U.S. Department of Labor

U.S. DOL or DOL

1 Petitioners and Plaintiffs Western Growers Association, California Farm Bureau
2 Federation, California Business Roundtable, Grower Shipper Association of Central
3 California, California Association of Winegrape Growers, and Ventura County
4 Agricultural Association (collectively “Plaintiffs”) for their Verified Petition and
5 Complaint allege as follows:

6 **I. INTRODUCTION**

7 1. This action challenges an “emergency temporary standard,” or “ETS,”
8 promulgated on November 30, 2020 by the California Occupational Safety and Health
9 Standards Board (“**Board**”) in response to the COVID-19 pandemic. (Cal. Code Regs, tit.
10 8, §§ 3205 *et seq.*, hereinafter referred to as “**ETS Regs.**”) These “emergency” regulations
11 exceed the authority of the Board and undermine existing laws, regulations, and
12 enforceable guidance intended to prevent or slow the spread of COVID-19 in the
13 workplace.

14 2. While no one doubts that the COVID-19 pandemic constitutes a public
15 health emergency, the Board failed to provide substantial evidence or a reasoned
16 explanation as to why these “emergency regulations” are necessary to avert immediate and
17 serious workplace harm, why the Board delayed, for months, before deciding that there
18 was an urgent need to promulgate the ETS on five working days’ notice, or why the ETS
19 was even needed at all. In fact, the staff of the Board advised its members to reject the
20 request for an ETS, as additional COVID-19 related workplace rules would do little to
21 protect workers, and would create needless confusion as to employers’ compliance
22 obligations under existing law.

23 3. Plaintiffs are general business industry and agricultural trade associations
24 representing California farmers, packers, shippers, processors and distributors, all of
25 whom—together with their employees—are essential to maintaining a critical
26 infrastructure sector and the nation’s food supply chain. These organizations have a
27 compelling need to obtain a judgment of this Court as to their members’ obligations under
28

1 the ETS, particularly given the regulation’s unique burdens on California farmers, packers,
2 and shippers.

3 4. While the ETS places unprecedented financial and operational costs on all
4 employers in this state, it imposes unique threats to the agricultural industry, including:

- 5 a) **Mandatory “no cost” testing “during working hours”** for employees with
6 “potential COVID-19 exposure,” (ETS Regs., § 3205(c)(3)(B)(4)), and
7 continuing rounds of testing for all employees in an “exposed workplace”
8 should three or more employees test positive, regardless of the size of the
9 workplace or the number and location of the workers (*id.*, §§ 3205.1(b) and
3205.2(b)), without considering whether agricultural employers can meet this
en masse testing mandate, especially in rural communities already straining
to obtain and ration a finite number of test kits, lab services, and professional
resources to those most at risk.
- 10 b) **Mandatory workplace exclusion** requiring employers to remove, with ten
11 days’ paid leave and benefits, any worker claiming “COVID-19 exposure,”
12 whether they tested positive, tested negative, or were not tested at all. At the
13 same time, the ETS prohibits employers from requiring a negative test before
14 that worker is cleared to return to work (*id.*, §§ 3205(c)(10)-(11), 3205.1(c),
3205.2(c));
- 15 c) **Mandatory capacity restrictions on employer-provided housing,**
16 including “[p]hysical distancing and controls” on occupancy, without
17 considering the availability of housing in already scarce housing markets, the
18 potential loss of workers due to the inability to provide them with affordable
19 housing, or the increased risk that the mandated occupancy restrictions will
20 force employers to relocate some workers to rooms that had been set aside to
21 isolate workers should they test positive or be COVID-19 symptomatic (*id.*,
§ 3205.3(c) & (h)(1)-(3));
- 22 d) **Mandatory “[p]hysical distancing” in employer-provided**
23 **transportation,** thereby cutting capacity by (at least) fifty percent (50%),
24 without considering the availability (and cost) of additional buses that meet
25 current emissions standards for farm labor transportation, whether there are
26 sufficient certified, licensed bus drivers, or the impact on work schedules in
27 time-sensitive agricultural operations in particular (*id.*, § 3205.4).

28 5. The ETS does not solve a crisis as much as it creates one. Until now, the
agricultural industry, like other critical infrastructure sectors, followed state and local
public health directives, and guidance from the Centers for Disease Control and Prevention
 (“CDC”), which permitted essential employees, including agricultural workers, “to
continue work following potential exposure to COVID-19, provided they remain

1 8. The Board’s failure to consider the ETS’s disastrous impacts on essential
2 industries such as agriculture, food processing and distribution, illustrates the extent to
3 which this agency inserted itself into areas far beyond its competence or authority to
4 regulate. The Board has no expertise in H-2A housing, Class B licensing requirements for
5 farm labor transportation, or complex epidemiological, serological, or testing capacity
6 considerations for which public health officers are responsible. Its justifications for the
7 ETS are entitled to little, if any, deference by this Court.

8 9. Beginning as of January 1, 2021, the ETS will define an “exposed
9 workplace” to include “the building, store, facility, agricultural field, or other location
10 where a worker worked during the infectious period.” (ETS Regs., § 3205(b).) This means
11 that every farmworker who is now harvesting strawberries or citrus or milking dairy cows
12 or feeding livestock, or indeed any employee who works in any one of the vital links in the
13 food supply chain may potentially be excluded from work (with ten days’ paid leave and
14 benefits). The resulting labor shortages in an already scarce farm labor market could have
15 catastrophic consequences across every part of this critical infrastructure sector.

16 10. “Exposed workplace,” as defined, is unworkable for large, complex
17 operations where employees work in different “workplaces,” such as warehouses or
18 production floors that can encompass hundreds of thousands of square feet. In the case of
19 agricultural operations, several different farm labor crews could work in the same
20 “agricultural field,” as they move across hundreds of acres during harvesting, as is
21 happening right now in Imperial Valley (where winter vegetables are being picked),
22 Ventura County (where strawberries are being picked), and in Fresno, Tulare, and Kings
23 Counties (where citrus is being picked).

24 11. The ETS will not only impact the ability of grocery stores to provide fresh
25 milk, meat, and produce. In-store pharmacies have been designated by the U.S.
26 Department of Health and Human Services to administer COVID-19 immunization,
27 starting with essential workers, first responders, and older Americans as part of the first
28

1 phase of a broad and rapid rollout of the coronavirus vaccine.² Grocery stores that operate
2 in-store pharmacies were chosen because they have (to quote one analyst) “much larger
3 and existing storage areas, whether we’re talking in the backroom or on the sales floor.”³
4 The ETS would consider these “exposed workplaces,” along with store aisles, check-out
5 counters, loading docks, parking lots, and in-store pharmacies. It is not difficult to imagine
6 the consequences of enforcing the ETS’s mandatory workplace exclusion of essential
7 employees, including pharmacy workers, even if they test negative or may have acquired
8 immunity, whether through vaccination or prior exposure to COVID-19.

9 12. Employers and workers in critical infrastructure sectors, such as those
10 represented by Plaintiffs, had no choice but to remain open and bear the brunt of COVID-
11 19 during the first half of the year, when the entire nation was learning about the virus,
12 how it is transmitted, and how it may be slowed. In many ways agriculture was a leader in
13 developing best practices based on actual experience. Perhaps the most misguided aspect
14 of the ETS is that, as the Board staff warned against, the Board turned its back on what
15 **was** working, including its own performance-based, objective criteria standards
16 implemented through employer IIPPs based on what made sense for specific businesses
17 and industries.

18 13. On behalf of their members, Plaintiffs respectfully request the Court declare
19 the ETS invalid, or, in the alternative, invalidate and sever those provisions enumerated in
20 Paragraph 4, *supra*. These regulations conflict with existing local and state public health
21 directives, exceed the Board’s authority, and violate the California Administrative
22 Procedure Act (“**APA**”), the Bagley-Keene Open Meeting Act (“**Bagley-Keene Act**”), and
23 the Due Process Clauses of the California and U.S. Constitutions.

24 _____
25 ² Supermarket News, *FMI: Supermarket pharmacies set for delivery of COVID-19 vaccine*
26 (December 14, 2020) <<https://www.supermarketnews.com/health-wellness/fmi-supermarket-pharmacies-set-delivery-covid-19-vaccine>> [as of December 30, 2020].

27 ³ CNBC, *Here’s when the Covid vaccine could be available at your neighborhood*
28 *drugstore, grocery store* (December 14, 2020) <<https://www.cnbc.com/2020/12/14/covid-vaccine-cvs-walgreens-early-spring.html>>[as of December 30, 2020].

1 14. Because there is no “plain, speedy, and adequate remedy” at law to prevent
2 the likelihood of irreparable harm or the certainty that Plaintiffs’ members will, as a result
3 of the ETS, incur non-compensable damages, preliminary injunctive relief, including the
4 issuance of a peremptory writ of mandate, is appropriate and necessary.

5 **II. STATEMENT OF THE CASE**

6 15. Over the last nine months, our state, county, and local authorities have issued
7 unprecedented and sweeping orders, rules, and guidelines in response to the global
8 COVID-19 pandemic. Beginning on March 19, 2020, Governor Newsom directed all
9 residents to comply with current public health directives and to stay home unless needed to
10 maintain continuity of operations of critical infrastructure sectors.⁴ Those designated as
11 “essential” included employees in the agricultural sector and related production,
12 processing, and delivery systems critical to maintaining our nation’s food supply chain.⁵

13 16. Among the earliest guidance issued by the California Department of Public
14 Health (“**CDPH**”) was a March 11, 2020 memorandum addressing “Coronavirus Disease
15 2019 (COVID-19) and the Food Supply Chain.”⁶ This was the first of many COVID-19
16 public health and occupational safety guidelines issued by Cal/OSHA, CDPH, the
17 California Department of Housing and Community Development (“**CDHCD**”), and the
18 California Department of Food and Agriculture (“**CDF**A”).

19 17. On August 30, 2020, California became the first state in the nation to enact
20 legislation specifically addressing COVID-19 protections for farm workers. Among the
21 bills included in the “California COVID-19 Farmworker Relief Package” is the
22 Agricultural Workplace Health and Safety Act (AB 2043), which funds a targeted
23

24 _____
25 ⁴ Governor’s Exec. Order No. N-33-20 (March 19, 2020).

26 ⁵ *Essential workforce* (December 3, 2020) <<https://covid19.ca.gov/essential-workforce/>>
[as of December 30, 2020].

27 ⁶ CDPH, *Coronavirus Disease 2019 (COVID-19) and the Food Supply Chain* (March 11,
28 2020) <<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19andtheFoodSupplyChain.aspx>> [as of December 30, 2020].

1 bilingual outreach campaign to educate agricultural workers on Cal/OSHA COVID-19
2 workplace guidance and enforcement activities, and directs Cal/OSHA to track and report
3 COVID-19 investigations related to the agricultural industry. Other bills provide for
4 COVID-19-related paid sick leave and workers compensation benefits.⁷ A number of
5 these legislative enactments were the result of initiatives created and sponsored by
6 California agricultural associations, including “Housing for the Harvest,” modeled on a
7 program spearheaded by Plaintiff Grower-Shipper Association of Central California
8 (“GSACC”). This program offers temporary hotel housing (and related medical and food
9 services) to agricultural workers who need to isolate due to COVID-19.

10 18. Well before AB 2043 was enacted, employers were relying on state and local
11 agency guidance to formulate and update their IPPs to reflect best practices in curbing
12 workplace spread of COVID-19. Cal/OSHA wielded considerable powers to investigate
13 the adequacy of, and compliance with, an employer’s COVID-19-related IIPP. On July
14 16, 2020, Cal/OSHA’s Deputy Chief of Health told the Board that Cal/OSHA was “doing
15 many [COVID-19 related] investigations and issuing citations” under existing Cal/OSHA
16 regulations, including those governing the control of harmful exposures or aerosol
17 transmissible diseases in certain workplace sectors, such as meat processing and packing.⁸

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22 _____
23 ⁷ Governor Newsom also signed into law another urgency statute, AB 1867, which
24 codified his Executive Order N-51-20 requiring employers to provide supplemental paid
25 sick leave to food sector workers unable to work due to specified reasons relating to
26 COVID-19, and SB 1159, which creates a rebuttable presumption, for purposes of
workers’ compensation, that an employee contracted COVID-19 in the workplace if
certain circumstances are met.

27 ⁸ The July 16, 2020 Board Meeting Minutes are attached as Exhibit 4, and also available at
28 <<https://www.dir.ca.gov/oshsb/documents/minutesJul2020.pdf>> [as of December 30,
2020].

1 A failure to comply with these regulations could result in sanctions and considerable
2 penalties.⁹

3 19. Given the relatively low number of COVID-19 citations against agricultural
4 employers reported by Cal/OSHA to date,¹⁰ there does not appear to be a systemic
5 breakdown in compliance or an urgent need for new regulations. To the contrary, all
6 employers, including those in critical infrastructure sectors such as agriculture, are highly
7 motivated to maintain a safe and healthy workforce and continue to expend substantial
8 resources to protect workers from infection in the workplace and to pay for leave when a
9 worker tests positive for COVID-19.

10 20. An August 10, 2020 evaluation by the Board’s staff supports this
11 conclusion.¹¹ Board staff could not identify a need to supplant or augment existing
12 COVID-19 guidance or regulations, concluding: “**Cal/OSHA is enforcing existing**
13 **COVID-19 protections** and providing consultative outreach to employers with exposed
14 employees. **Board staff is unable to find evidence that the vast majority of California**
15 **workplaces are not already in compliance with COVID-19 requirements and**
16 **guidelines.**” Board staff further advised the Board that new COVID-19 regulations
17 “**would place additional regulatory burden on California businesses that are already**
18 **compliant with California’s COVID-19 requirements and guidelines.**” Accordingly,
19 Board staff advised that the Petitioners’ emergency request was unnecessary and
20 recommended that the Petition be “DENIED.” (Exh. 2, p. 9 [emphasis added].)
21
22

23 ⁹ Cal/OSHA, *COVID-19 Infection Prevention for Agricultural Employers and Employees*
24 (October 27, 2020) <<https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Agriculture.pdf>> [as of December 30, 2020].

25 ¹⁰ DIR, *Citations for COVID-19 Related Violations*
26 <<https://www.dir.ca.gov/dosh/COVID19citations.html>> [as of December 30, 2020].

27 ¹¹ The Board Staff Evaluation is attached as Exhibit 2, and also available at
28 <<https://www.dir.ca.gov/oshsb/documents/petition-583-staffeval.pdf>> [as of December 30, 2020].

1 21. This staff evaluation was in response to a May 20, 2020 Petition submitted to
2 the Board by the National Lawyers Guild (Labor and Employment Committee) and
3 Worksafe (“**Worksafe/NLG Petition**” or “**Petition 583**”).¹² Worksafe is a California
4 nonprofit corporation, describing itself as “focused on ensuring the occupational safety and
5 health rights of workers through policy advocacy, capacity and coalition building, and
6 impact litigation.” Immediately prior to becoming Chief of Cal/OSHA in August, 2019,
7 Defendant Douglas L. Parker was the Executive Director of Worksafe.

8 22. The Worksafe/NLG Petition requested that the Board immediately
9 promulgate an “emergency temporary standard” to address COVID-19 issues and “a
10 permanent standard to protect all workers from current and future infectious diseases,
11 including novel pathogens.” (Exh. 2, p. 1.) The Board did not dispute the staff’s finding
12 that many of the regulatory additions requested by the Petition were already required by
13 existing title 8 regulations and enforceable agency guidance.¹³ Without providing any
14 reasoned response to the staff’s specific and documented concerns, the Board determined
15 that emergency regulations were required to address an urgent, unmet need, without
16 identifying that unmet need or the reasons for urgency.

17 23. Thus, on November 19, 2020, more than nine months after Governor
18 Newsom declared a state of emergency, the Board approved “emergency” regulations
19 based on a petition pending before the Board for six months. Although complex,
20 prescriptive, and unprecedented regulations of this nature should have been publicly vetted
21 through the APA’s notice and comment procedures, the Board did not make its first (and
22 only) version of the ETS publicly available until November 12, 2020—one week before
23 the Board adopted the ETS. The first time the Board heard public comments on the
24 proposed ETS was the day it adopted the new standard. The Board did not change one

25 _____
26 ¹² The Worksafe/NLG Petition is attached as Exhibit 1, and also available at
27 <<https://www.dir.ca.gov/oshsb/documents/petition-583.pdf>> [as of December 30, 2020].

28 ¹³ The Adopted Decision is attached as Exhibit 9, and also available at
<<https://www.dir.ca.gov/oshsb/documents/petition-583-adopteddecision.pdf>> [as of
December 30, 2020].

1 word in response to a myriad of concerns expressed by representatives from essential
2 industries, including agriculture.

3 24. Some of the ETS’s rules border on the absurd, such as the requirement that
4 employers “ensure that unwashed dishes, drinking glasses, cups, eating utensils, and
5 similar items are not shared” by workers living in employer-provided housing. (ETS
6 Regs., § 3205.3(c)(2).) Some requirements, e.g., continuous testing of workers (*id.*, §
7 3205.1(b)), are unrealistic for employers in remote areas, such as dairy farmers in Madera
8 and Stanislaus Counties, where there is limited access to COVID-19 testing services.
9 Other ETS requirements contradict existing guidance of county public health officers. As
10 one example of the ETS’s problematic one-size-fits-all approach, the Los Angeles County
11 Public Health Officer permits bunk beds in employer-provided housing, but the ETS
12 forbids them. Employers are thus forced to try and find additional housing (in an already
13 scarce affordable housing market), or potentially forfeit their ability to comply with guest
14 worker visa programs, such as the federal government’s H-2A program. Worse, by
15 directing employers to cut room occupancy in half, housing set aside by employers to
16 isolate workers who test positive may no longer be available, thus compounding the risk of
17 COVID-19 spread rather than alleviating the problem.

18 25. Employers are now being forced to try and find additional housing (in
19 already scarce housing markets) for existing guest workers, or to potentially forfeit their
20 ability to comply with the federal government’s H-2A guest worker program for future
21 visas. The H-2A guest worker program is critical to many growers, because they time the
22 hiring of these workers to coincide with when they are most needed. The California
23 Employment Development Department (“**EDD**”) is charged with certifying the ability of
24 employers to provide mandatory free housing before visa applications can be submitted. If
25 growers cannot guarantee sufficient housing, then visa applications will certainly be held
26 up, and could even be denied. As one example, the EDD is currently holding up
27 certifications for winegrape growers in need of labor for winter pruning.

28

1 26. The ETS testing provisions are impractical, confusing, and do harm to the
2 extent that they have any material impact on the workplace. The ETS directs employers to
3 pay for testing regardless of whether state and county public health officials are already
4 providing community-wide access to free testing. It also requires employers to
5 continuously test, and retest, whenever three or more employees test positive over a
6 fourteen-day rolling period, until there are no positive tests for two weeks. This rule
7 applies, whether the employer has thirty or three-hundred in the “workplace.” (ETS Regs.,
8 § 3205(b).) Because the Board did not conduct any feasibility or cost-benefit analysis, it
9 never determined whether employers would be able to locate enough test kits or laboratory
10 capacity to comply with the ETS testing mandates, or whether the turnaround time for
11 FDA-approved testing—in some agricultural communities it could take at least two to five
12 days to get results—would have any utility.

13 27. At the same time, the ETS requires employers to provide ten days’ paid leave
14 and benefits for employees “exposed” to a “COVID-19 case,” without requiring a test to
15 determine whether that employee is infected at the time they are excluded from the
16 workforce (ETS Regs., § 3205(c)(10)(B)), or at the time they return to work. (*Id.*, §
17 3205(c)(11)(C).) The ETS’s continuous testing mandate requires that all employers
18 provide testing for their entire workforces—potentially hundreds of tests over a multi-
19 week period. Yet, it does not require an employee take that test, or to demonstrate that
20 COVID-19 related “exposure” occurred at the workplace to be paid leave and provided
21 benefits.

22 28. These rigid directives were made without stakeholder input, expert
23 testimony, or any opportunity to hear from agencies with authority to regulate housing,
24 transportation, and testing, or to protect public health from the spread of COVID-19, and
25 without any consideration of “the latest available scientific data in the field, the
26 reasonableness of the standards, and experience gained under this and other health and
27 safety laws,” as is required under the Board’s enabling statute. (Lab. Code, § 144.6.)
28

1 29. The California Supreme Court has articulated why the APA provisions for
2 notice, comment, initial and final agency reasons, response to comments, regulatory
3 cost/benefit analysis, and Office of Administrative Law (“OAL”) review are essential in
4 order “to ensure that those persons or entities whom a regulation will affect have a voice in
5 its creation ... as well as notice of the law’s requirements so that they can conform their
6 conduct accordingly”:

7 The Legislature wisely perceived that the party subject to
8 regulation is often in the best position, and has the greatest
9 incentive, to inform the agency about possible unintended
10 consequences of a proposed regulation. Moreover, public
11 participation in the regulatory process directs the attention of
12 agency policymakers to the public they serve, thus providing
13 some security against bureaucratic tyranny.

14 (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 569 [59
15 Cal.Rptr.2d 186] [(internal citations omitted)].)

16 30. Given the chance, employers would have explained why, in the absence of
17 substantial evidence that existing regulations, agency guidance, and employers’ IPPs were
18 not working, there is no need, urgent or otherwise, to promulgate new—and
19 counterproductive—COVID-19 “emergency regulations.” But these employers were not
20 given that chance because the Board invoked its authority to promulgate the ETS as an
21 “emergency regulation,” thereby eliminating any opportunity by the public to inform itself
22 and the Board of the consequences of the regulation **before** it was adopted.

23 31. The Board sidestepped these due process safeguards by claiming that the
24 COVID-19 pandemic requires “immediate action to avoid serious harm to the public
25 peace, health, safety, or general welfare.” (Gov. Code, § 11342.545.) This claim was, at
26 best, fanciful, given the Board’s months long delay and Cal/OSHA’s concession that many
27 provisions of the ETS would “complement and augment” or “provide clear guidance” for
28 existing law and regulation, rather than filling an urgent, unmet need to protect workers
29 from serious harm.

30 32. No one, least of all employers responsible for maintaining the nation’s food
31 supply chain, would dispute the pandemic is an unprecedented, global crisis. For purposes

1 of demonstrating the need for “emergency” regulations under the California Government
2 Code, the question before the Board was not whether COVID-19 is a **public health**
3 emergency. Clearly it is. The question is whether COVID-19 presents an **occupational**
4 **health** emergency necessitating immediate enforcement of new rules in order to avoid
5 serious and imminent injury. The Board did not and cannot satisfy this test. In addition,
6 the Board must explain the justification for promulgating “emergency” regulations with
7 minimal stakeholder input nine months into an ongoing public health threat.

8 33. First, by attempting to act as the arbiter of private businesses’ financial
9 responsibility to address a public health crisis, the Board failed to recognize the limits of
10 its authority to regulate workplace safety hazards. Cal/OSHA is responsible for
11 occupational safety, not regulating public health in general or employee housing,
12 transportation, workers’ compensation, or wage and hour requirements. Cal/OSHA may
13 not invade the jurisdiction of those state agencies authorized to regulate in these areas, just
14 as it may not overstep or contradict the directives of local public health officials who bear
15 primary responsibility for making public health decisions, including whether a person
16 exposed to COVID-19 should be tested, isolated, or quarantined, or permitted to return to
17 school or work.

18 34. Second, rather than offer any substantial evidence that could support the
19 required link between the immediate harm to be averted and the proposed regulations, the
20 Board’s Finding of Emergency largely confines itself to a discussion of the COVID-19
21 crisis, without explaining how the ETS would protect workers from serious **workplace**
22 **harm** due to **working conditions** at the place of employment. And while the Board
23 asserts that “[e]mployers and employees would benefit from a specific set of regulations
24 related to COVID-19 in all workplaces,” convenience or expedience are not synonymous
25 with urgency and exigency.

26 35. Yet the best evidence of the lack of any “emergency” is the Board’s post hoc
27 attempt to paper over the lack of substantial evidence and deficiencies in the record by
28 purporting to amend the Finding of Emergency **after the regulation was already in force.**

1 Although this “Addendum #1” is dated November 19, 2020, it appears to have been
2 created on December 3, 2020, and did not appear on the Cal/OSHA website until two
3 weeks after the Board adopted the ETS—or anywhere on the agenda, minutes, or materials
4 made public before the Board’s decision to adopt the ETS.

5 36. To permit meaningful judicial review, an agency must disclose the basis of
6 its action **before** it takes that action. As Chief Justice Roberts explained last term when
7 another, powerful government agency sought to contrive an explanation:

8 The reasoned explanation requirement of administrative law,
9 after all, is meant to ensure that agencies offer genuine
10 justifications for important decisions, reasons that can be
scrutinized by courts and the interested public. Accepting
contrived reasons would defeat the purpose of the enterprise.

11 (*Department of Commerce v. New York* (2019) 588 U.S. ---, 139 S.Ct. 2551, 2575, 204
12 L.Ed.2d 978.) This Court “cannot ignore the disconnect between the decision made and
13 the explanation given.” (*Ibid.*)

14 37. These *ultra vires* “emergency” findings still fail to justify the necessity or
15 urgency requirements which the Board was required to demonstrate by specific facts. At a
16 minimum, the remedy is to declare the ETS void, remand the matter with directions that
17 the Board invalidate its decision, provide proper notice to both the public and the OAL
18 (which appears to have not been told about Addendum #1 at the time it reviewed and
19 approved the regulations on November 30, 2020), and reopen the record, so all interested
20 parties are aware of these events and are provided an opportunity to respond to the Board’s
21 pretextual justifications to impose rules which could potentially jeopardize the ability of
22 farmers to bring their crops to market. More broadly, the deeply flawed process, and the
23 patently inadequate record, cannot support promulgation of the ETS.

24 38. Employers have no recourse to obtain a variance or exemption from the
25 Division or the Board before compliance with the ETS imposes massive, non-recoverable
26 costs and depletes their labor supply. The sloppy and secretive way in which the ETS was
27 thrown together shows a failure to appreciate that the Board’s hard and fast prescriptions,
28

1 to the extent they work at all, fail to account for differences in workplaces in general, and
2 in particular the unique nature of essential industries, such as agriculture.

3 39. The hard reality of agriculture, like COVID-19, is that it does not wait.
4 California farmers provide over a third of the country’s vegetables and two-thirds of the
5 fruits and nuts grown in the United States.¹⁴ In 2019, its top producing commodity—dairy
6 products and milk—is also one of its most perishable. Cows must be milked daily, winter
7 pruning of grape vines must begin, and strawberries and winter vegetables must be picked,
8 now, before spoilage, organisms and lack of care threaten the entire crop—there must be a
9 steady supply of skilled workers to do all of that. Now that the citrus season is in full
10 swing, growers do not have an indefinite amount of time to bring in the fruit before frost
11 overtakes the harvest. This will not happen if, as a result of its enforcement, the ETS puts
12 any part of the agricultural labor force on the bench.

13 40. Employers now face the choice between implementing impracticable, costly,
14 or unworkable requirements, or risk substantial penalties for non-compliance,¹⁵ and in
15 some cases a real threat of going out of business. Across this State, small businesses and
16 small farmers and new businesses and new farmers, including farmers of color who
17 comprise the majority of vendors in big city outdoor farmers’ markets, are particularly at
18

19 _____
20 ¹⁴ CDFA, *California Agricultural Production Statistics*
21 <[https://www.cdfa.ca.gov/Statistics/#:~:text=California%27s%20agricultural%20abundan](https://www.cdfa.ca.gov/Statistics/#:~:text=California%27s%20agricultural%20abundance%20includes%20more,the%20nation%27s%20total%20agricultural%20value)
22 [ce%20includes%20more,the%20nation%27s%20total%20agricultural%20value](https://www.cdfa.ca.gov/Statistics/#:~:text=California%27s%20agricultural%20abundance%20includes%20more,the%20nation%27s%20total%20agricultural%20value)> [as of
December 30, 2020].

23 ¹⁵ Violations of Cal/OSHA’s regulations can result in penalties ranging from a minimum
24 of \$18,000 up to \$25,000 per violation for “Serious Violations.” (Cal. Code Regs., tit. 8, §
25 336.) Because Cal/OSHA has determined COVID-19 exposure in the workplace could
26 result in death or serious physical harm, a violation of the ETS will likely be deemed a
27 “Serious Violation.” (Cal. Code Regs, tit. 8, § 334(1) (“There shall be a rebuttable
28 presumption that a ‘serious violation’ exists in a place of employment if the division
demonstrates that there is a realistic possibility that death or serious physical harm could
result from the actual hazard created by the violation.”).) If employers do not rectify
violations by the compliance date given by Cal/OSHA, they face additional daily penalties
of up to \$15,000. (Cal. Code Regs, tit. 8, § 336(f).)

1 risk. Many are not eligible for federal relief, such as Paycheck Protection Program loans
2 or the Coronavirus Food Assistance Program payments, which excludes those who rely on
3 direct-to-consumer sales.¹⁶

4 41. It seems unimaginable that we might see, as we did during the Great
5 Depression, fields of unpicked lettuce, orchards of rotting fruit, or dairy farms dumping
6 milk because it was no longer economically rational to deliver products to market. But this
7 is already happening in California and other parts of the country.¹⁷ Reduced demand has
8 led farmers to plow under healthy crops or euthanize livestock. Due to a lack of
9 agricultural labor, farmers are breaking eggs rather than raising their chicks for market,
10 while millions of unemployed people across the nation wait in line for hours to obtain a
11 week’s worth of groceries.¹⁸ The ETS can only exacerbate and accelerate this tragedy.

12 42. All those in the agricultural sector recognize that emergency situations may
13 require emergency measures. Given what we know (or do not know) about the impact,
14 duration, velocity and mutability of the novel coronavirus, it is no longer plausible to call
15 the ETS an “emergency” measure to address a “temporary” exigency. The Board all but
16 concedes this by announcing at the time of its promulgation that these regulations remain
17 in force until at least October 1, 2021, and may become permanent should the Board
18 decide to follow the notice-and-comment procedures it dispensed with when it
19 promulgated the ETS.

20 43. The ETS provides no streamlined (or any) process whereby an employer
21 may obtain relief from immediate compliance. Employers have no “plain, speedy, and
22

23
24 ¹⁶ Washington Post, *Going it alone in two of America’s agricultural towns* (December 8,
25 2020) <<https://www.washingtonpost.com/graphics/2020/road-to-recovery/farmers-ranchers-coronavirus-food-california-west-virginia/>> [as of December 30, 2020].

26 ¹⁷ econlife, *How the 2020 Pandemic Is Like the 1930s Depression* (April 12, 2020)
27 <<https://econlife.com/2020/04/dumping-dairy/>> [as of December 30, 2020].

28 ¹⁸ Bloomberg Quint, *A Tenth of the World Could Go Hungry While Crops Rot in Fields*
(August 31, 2020) <<https://www.bloombergquint.com/global-economics/hunger-is-threatening-to-kill-more-people-than-covid-this-year>> [as of December 30, 2020].

1 adequate remedy, in the course of law” (Code Civ. Pro., § 1086), to avoid the confiscatory
2 threat posed by these regulations. Under the facts and law presented by this case, this
3 Court may not only declare the ETS invalid, in part or in whole, but also may issue a
4 preemptory writ to command the Board “to do the act required to be performed” (Code
5 Civ. Pro., § 1088), and to comply with its obligations under the Labor Code, the APA, and
6 the safeguards of due process.

7 **III. PARTIES**

8 44. Plaintiff Western Growers Association, founded in 1926, is a nonprofit
9 association representing local and regional family farmers in California, Arizona, Colorado
10 and New Mexico. Western Growers members grow, pack, and ship over half of the
11 nation’s fresh produce, including nearly a third of America’s fresh organic produce.
12 Western Growers member companies are dedicated to providing a great variety of safe and
13 healthy fresh fruits, vegetables and tree nuts to consumers. With offices and dedicated
14 staff in Sacramento, California and Washington, D.C., Western Growers is a leading
15 public policy advocate for the fresh produce industry and has a longstanding interest in
16 employment and labor and employee health and safety matters.

17 45. Plaintiff California Farm Bureau Federation (“CFBF”) is an incorporated
18 nonprofit trade association. Organized in 1919 and headquartered in Sacramento, CFBF is
19 the largest organization of its kind in California. CFBF’s members consist of 53 county
20 Farm Bureau organizations—each an incorporated trade association—covering 56
21 California counties, with more than 31,700 members, including more than 23,000
22 agricultural (i.e., voting) members. CFBF’s purposes include representing and protecting
23 the economic interests of California’s farmers and ranchers, and it has done so in many
24 legislative and regulatory proceedings involving workplace safety and health.

25 46. Plaintiff California Business Roundtable is a nonpartisan organization
26 comprised of the senior executive leadership of major employers throughout the State of
27 California, with a combined workforce of over 750,000 employees. For more than forty
28

1 years, the Roundtable has identified the issues critical to a healthy business climate and
2 provided the leadership needed to strengthen California’s economy and create jobs.

3 47. Plaintiff Grower-Shipper Association of Central California (“GSACC”) is a
4 regional trade association, offering advocacy, programs and services to over 300 members.
5 Founded in 1930, today the organization’s membership consists primarily of growers,
6 shippers, handlers, and processors of vegetables and fruits produced in the Central Coast
7 region of California, encompassing Monterey, Santa Cruz, San Benito and Santa Clara
8 Counties. The mission statement of GSACC is to advance solutions benefitting families,
9 food and farming on the Central Coast. As such, GSACC is dedicated to providing
10 programs and services covering diverse areas, including active crisis management and
11 action, and has created a renowned COVID-19 housing, testing, and education program;
12 implemented large scale personal protective equipment acquisition and distribution efforts
13 to support employer-driven protective efforts; and advanced solutions that address the
14 technical, legal, scientific, and economic basis of challenges with a disproportionate effect
15 onto the region covering water quality and the environment, worker protection, food safety
16 and security, and pest and disease management and prevention.

17 48. Plaintiff California Association of Winegrape Growers (“CAWG”),
18 established in 1974, serves a unique role as the only statewide organization focused
19 specifically on California winegrape growers. CAWG helps to ensure the implementation
20 of sound public policies through monitoring and advocating on state and federal
21 legislation, advancing safe and sustainable farming practices, and promoting education and
22 research to enhance the California winegrape industry.

23 49. Plaintiff Ventura County Agricultural Association is a non-profit business
24 trade association representing the interests of over two-hundred agricultural and related
25 employers in Ventura and Santa Barbara Counties since 1970. Its membership includes
26 virtually all of the major agricultural employers, cooperatives, packinghouses, farm labor
27 contractors, trucking businesses and agricultural-related support industries. The
28 Association routinely represents the interests of many of the above employers before the

1 Department of Industrial Relations (“**DIR**”). The Association has been deeply involved in
2 the COVID-19 pandemic through its partnerships with many local farmers, worker
3 advocacy groups, the County Agricultural Commissioner and the County Public Health
4 Department in i) preparing COVID-19 guidance documents; ii) disseminating federal, state
5 and local COVID-19 guidance documents, workplace training and posters to its
6 membership; and iii) providing consultation on workplace issues involving workers who
7 have contracted or have been exposed to the COVID-19 virus.

8 50. Defendant California Occupational Safety and Health Standards Board, i.e.,
9 “the Board,” is charged with adopting, amending, and repealing standards governing
10 occupational health and safety in the State of California. It is “the only agency in the state
11 authorized to adopt occupational safety and health standards.” (Lab. Code, § 142.3(a)(1).)
12 The Board is comprised of up to seven members, appointed by the Governor. The Board
13 also responds to petitions for new or revised standards.¹⁹

14 51. Defendants David Thomas, Chris Laszcz-Davis, Laura Stock, Barbara
15 Burgel, David Harrison, and Nola J. Kennedy, in their official capacities, are appointed
16 members of the Board who approved, by unanimous vote, the ETS.

17 52. Defendant Christina Shupe, in her official capacity, is Executive Officer of
18 the Board.

19 53. Defendant California Division of Occupational Safety and Health, i.e.,
20 Cal/OSHA or the “Division,” is the governmental agency responsible for overseeing
21 workplace safety in California and enforcing health and safety standards promulgated by
22 the Board.

23 54. Defendant Douglas L. Parker, in his official capacity, is Chief of the
24 California Division of Occupational Safety and Health, responsible for enforcement of the
25 ETS.

26 **IV. JURISDICTION, VENUE, AND STANDING**

27 _____
28 ¹⁹ See DIR, *Occupational Safety & Health Standards Board (OSHSB)*
<<https://www.dir.ca.gov/oshsb/oshsb.html>> [as of December 30, 2020].

1 55. This Court has jurisdiction over this action pursuant to Government Code
2 section 11350 and Code of Civil Procedure sections 526, 1085, and 1060.

3 56. Venue is proper in the County of Los Angeles pursuant to Code of Civil
4 Procedure section 401 because the California Attorney General maintains an office in the
5 County of Los Angeles.

6 57. Plaintiffs have standing to bring this action: (a) Plaintiffs’ members are
7 directly impacted by the Defendants’ conduct and would have standing on their own to
8 seek the relief requested herein; (b) the case is germane to Plaintiffs’ organizational
9 purpose of advocating for the interests of their members; and (c) the case does not require
10 the participation of Plaintiffs’ individual members because this case does not involve a
11 question driven by individualized factors, but rather involves the overarching questions of
12 whether Defendants had the authority to promulgate the ETS (at all or on an emergency
13 basis) and whether the ETS violate the Labor Code, the APA and the California and U.S.
14 Constitutions.

15 58. Plaintiffs are “interested persons” under Government Code section 11350(a),
16 and therefore may obtain a judicial declaration as to the validity of the ETS based on its
17 “substantial failure to comply” with the requirements of the APA, or “upon the ground that
18 the facts recited in the finding of emergency . . . do not constitute an emergency” under
19 Government Code section 11346.1.

20 **V. FACTUAL ALLEGATIONS**

21 **A. The State of Emergency and the Governor’s Declaration of the**
22 **Agricultural Industry as a “Critical Infrastructure Sector”**

23 59. In response to the novel coronavirus, i.e., COVID-19, Governor Newsom
24 declared a “State of Emergency” on March 4, 2020, followed by a Stay-at-Home Order on
25 March 19. That order indefinitely prohibited “non-essential businesses” from operating.²⁰
26 Governor Newsom specified that California’s response to the coronavirus pandemic “must
27

28 ²⁰ See Governor’s Exec. Order No. N-33-20 (March 19, 2020).

1 be done using a gradual, science-based and data-driven framework.”²¹ Agricultural sector
2 businesses were designated as “essential” and its employees were exempted from the Stay-
3 at-Home Order.

4 60. All non-essential businesses remained closed until May 4, 2020, when
5 Governor Newsom issued Executive Order N-60-20.²² That Executive Order delegated to
6 the State Public Health Officer the authority “to take any action she deems necessary to
7 protect public health in the face of the threat posed by COVID-19,” including whether a
8 business would be deemed “essential,” and allowed to remain operating.

9 61. Businesses deemed “essential” were allowed to remain open. Food and
10 agriculture businesses were designated “essential” by the State Public Health Officer, in
11 accordance with Governor Newsom’s March 19, 2020 Executive Order N-33-20, and
12 remain classified as “essential” businesses.²³ This designation recognizes the paramount
13 importance of maintaining the integrity of the food supply chain.²⁴

15 ²¹ See *Governor Newsom Outlines Six Critical Indicators the State will Consider Before*
16 *Modifying the Stay-at-Home Order and Other COVID-19 Interventions* (April 14, 2020)
17 <[https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-](https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-interventions)
18 [the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-](https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-interventions)
19 [interventions](https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-interventions)> [as of December 30, 2020].

20 ²² See Governor’s Exec. Order No. N-60-20 (May 4, 2020).

21 ²³ See *Essential workforce* (December 3, 2020) <[https://covid19.ca.gov/essential-](https://covid19.ca.gov/essential-workforce/)
22 [workforce/](https://covid19.ca.gov/essential-workforce/)> [as of December 30, 2020].

23 ²⁴ In a rare moment of national consensus, both the state and the federal government
24 agreed that employees in “critical infrastructure industr[ies],” including food and
25 agricultural workers, have a “special responsibility” to continue providing food during the
26 national emergency. (The White House, *30 Days to Slow The Spread*
27 <[https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)
28 [guidance_8.5x11_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)> [as of December 30, 2020].) On April 28, 2020, President
Trump issued Executive Order 13917, entitled “Delegating Authority Under the Defense
Production Act with Respect to the Food Supply Chain Resources During the National
Emergency,” which directed certain food and agriculture industries, such as meat and
poultry producers, to “continue operating and fulfilling orders” to the extent possible.
(Exec. Order No. 13603, 85 Fed.Reg. 26313 (April 28, 2020).) The Executive Order
stated that the nation’s interest in the “continued supply of protein for Americans” had

1 **B. California Issues COVID-19 Guidelines as Part of Mandating Updates**
2 **to Employer Injury and Illness Prevention Programs**

3 62. Industries throughout California, and in particular critical infrastructure
4 sectors such as food and agriculture, collaborated with elected officials, state and county
5 regulatory agencies, and public health and occupational safety authorities, including the
6 CDC, CDPH, CDHCD and Cal/OSHA, to develop industry-specific guidelines to assist
7 employers in developing and updating their IIPP to incorporate evolving public health,
8 scientific and medical understanding of the virus, and best practices to contain the spread
9 of COVID-19.

10 63. State agencies began promulgating detailed COVID-19 guidance specific to
11 agriculture shortly after the March 19, 2020 Stay-at-Home Order and throughout the year.
12 As early as March 20, 2020, the industry was working with state, county and local
13 jurisdictions to formulate guidance for agriculture.²⁵ Subsequent guidance addressed
14 employer-provided housing for migrant farmworkers,²⁶ detailed social distancing
15 restrictions for migrant farmworker contractors,²⁷ guidance on cleaning and disinfecting
16 procedures for COVID-19 gathered from the CDC,²⁸ a COVID-19 general checklist jointly

17 been jeopardized by “recent actions in some States” that “have led to the complete closure
18 of some large processing facilities.” (*Id.*)

19 ²⁵ See *Monterey County and Agriculture Industry Associations Endorse Advisory for*
20 *Agricultural Worker Protection During COVID-19 Crisis* (March 20, 2020)
21 <<https://www.co.monterey.ca.us/home/showdocument?id=88067>> [as of December 30,
22 2020]; *Monterey Herald, COVID-19 exposure: Monterey County issues recommendations*
23 *for farmworkers* (March 21, 2020) <[https://www.montereyherald.com/2020/03/21/covid-](https://www.montereyherald.com/2020/03/21/covid-19-exposure-monterey-county-issues-recommendations-for-farmworkers/)
24 [19-exposure-monterey-county-issues-recommendations-for-farmworkers/](https://www.montereyherald.com/2020/03/21/covid-19-exposure-monterey-county-issues-recommendations-for-farmworkers/)> [as of
25 December 30, 2020].

26 ²⁶ CDHCD, *Intake Guidance in Response to COVID-19* (April 8, 2020)
27 <[https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms-memo-covid-19-](https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms-memo-covid-19-intake-guidance-2020-04-08.pdf)
28 [intake-guidance-2020-04-08.pdf](https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms-memo-covid-19-intake-guidance-2020-04-08.pdf)> [as of December 30, 2020].

29 ²⁷ CDHCD, *COVID-19 Guidance on Social Distancing* (April 27, 2020)
30 <[https://www.hcd.ca.gov/coronavirus19/docs/oms-memo-covid-19-guidance-on-social-](https://www.hcd.ca.gov/coronavirus19/docs/oms-memo-covid-19-guidance-on-social-distancing.pdf)
31 [distancing.pdf](https://www.hcd.ca.gov/coronavirus19/docs/oms-memo-covid-19-guidance-on-social-distancing.pdf)> [as of December 30, 2020].

32 ²⁸ CDHCD, *Guidance on Cleaning and Disinfecting Procedures for COVID-19* (May 15,
33 2020) <<https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms%20covid->

1 prepared by Cal/OSHA and CDPH for agricultural employers, which covered the
2 requirements of a worksite specific plan, worker training topics, screening measures,
3 cleaning and disinfecting protocols, physical distancing guidelines,²⁹ revised guidance
4 issued two weeks later by Cal/OSHA,³⁰ joint “Industry Guidance” from CDPH, CDFA and
5 Cal/OSHA for agriculture and livestock industries, and guidance for food packing and
6 processing industries “to support a safe, clean environment for workers.”³¹ As already
7 noted (paragraph 17 *supra*), AB 2043 directed Cal/OSHA to disseminate, in English and
8 Spanish, all “Guidance Documents” relating to COVID-19 in the food and agricultural
9 sector.³²

10 **C. Industry Implements State-Directed Mandates for COVID-19**
11 **Workplace Safety**

12 64. At the outset, all employers faced two, related challenges: First, how to
13 immediately implement mitigation and prevention measures to slow the spread of COVID-
14 19 in their workplace, while at the same time adjusting strategies as more was learned

15 [19%20guidance%20for%20cleaning%20and%20disinfecting%20ada.pdf](#)> [as of
16 December 30, 2020].

17 ²⁹ CDPH, *COVID-19 General Checklist for Agriculture and Livestock Employers* (July 2,
18 2020) <<https://files.covid19.ca.gov/pdf/checklist-agriculture.pdf>> [as of December 30,
19 2020].

20 ³⁰ DIR, *Cal/OSHA COVID-19 Daily Checklist for Agricultural Employers* (July 21, 2020)
21 <<https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Daily-Checklist-Employers.pdf>>
22 [as of December 30, 2020].

23 ³¹ *COVID-19 Industry Guidance: Food Packing and Processing* (July 29, 2020)
24 <<https://files.covid19.ca.gov/pdf/guidance-food-packing.pdf>> [as of December 30, 2020].

25 ³² *See* Lab. Code, § 6725(a)(2) (identifying “Guidance Documents” to include Cal/OSHA
26 Interim General Guidelines on Protecting Workers from COVID-19 (dated May 14, 2020),
27 Cal/OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural
28 Employers and Employees (dated October 27, 2020), COVID-19 Industry Guidance: Food
Packing and Processing, issued by the division, the State Department of Public Health, and
the Department of Food and Agriculture (dated July 29, 2020), COVID-19 Industry
Guidance: Agriculture and Livestock, issued by the division, the State Department of
Public Health, and the Department of Food and Agriculture (dated July 29, 2020), and
“any other guidance or guidelines made available on the division’s internet website
pertaining to novel coronavirus (COVID-19) infection prevention for agricultural
employees”).

1 about the transmission and effects of the virus. Second, to reconcile the myriad of rapidly-
2 changing state and local Executive Orders, agency directives and guidance, and federal,
3 state, county, and municipal laws and ordinances.

4 65. Various industries, through trade associations and other organizations,
5 worked with various state and federal regulators to promulgate guidelines that were
6 sufficiently categorical to inform employers how to update and comply with their legal
7 requirements to implement an IIPP which would appropriately address COVID-19
8 workplace risks without prescribing arbitrary rules or benchmarks. Agriculture provides
9 an example of the coordination that took place.

10 66. Agriculture is already one of the most heavily-regulated sectors in
11 California. It is also one of the most diverse, given that the state produces about four-
12 hundred different agricultural products grown or harvested in different seasons and
13 localities, and with different labor needs and resources. It is not unusual, for example, for
14 one agricultural employer to operate in several counties, if not in more than one state, thus
15 requiring them to comply with potentially different sets of rules. In addition to
16 promulgating clear, timely, and actionable guidance, it was critical that every state actor
17 with aspects of agricultural oversight had to insure that they were operating within the
18 scope of their statutory authority.

19 67. Section 144.6 of the Labor Code directs the Board to promulgate
20 performance-based standards “expressed in terms of objective criteria and of the
21 performance desired,” rather than rigid, or prescriptive metrics which make no allowance
22 for differences across workplaces and industries. Although the IIPP has a specific
23 framework, Cal/OSHA uses a performance-based standard that requires an employer to
24 develop an IIPP that, ideally, is tailored to their company’s operations. (*See generally* Cal.
25 Code Regs., tit. 8, § 3203 (describing performance-based standards for IIPPs).)

26 68. The IIPP is mandated under section 3203 of Cal/OSHA’s Title 8 regulations.
27 Section 3203 specifies every major programmatic category—from developing a hazard
28 response plan, investigating workplace illnesses, and providing training concerning

1 workplace hazards, to protocols for communications with employees, law enforcement,
2 and public health officers. In order to comply with Cal/OSHA’s requirement that
3 employers “establish, implement, and maintain an effective Injury and Illness Protection
4 Program” (Cal. Code Regs., tit. 8, § 3203(a)), all California employers above a certain size
5 must develop an IIPP to prevent, mitigate, and slow the spread of COVID-19 in the
6 workplace.

7 69. As discussed (Part V.G. *infra*), the Board staff told the Board that COVID-
8 19 workplace regulations proposed by Petition 583 were not advisable, in part because
9 California’s performance-based IIPP standard would better allow employers to respond to
10 rapidly evolving worker protection guidelines issued by various agencies, including
11 Cal/OSHA. In the case of agriculture, best practices may depend on where, when, and
12 how crops are cultivated and harvested, including how to retrofit or reconfigure the
13 worksite to provide for social distancing, physical barriers, mask wearing, and so on.³³ For
14 many agricultural-related industries, including packing and processing of perishable
15 products, safety and hygiene protocols are not new. Masks, eyewear, hand sanitation,
16 protective garments, disposable gloves, and rigorous separation of food handling for food
17 safety purposes are imbedded practices.

18 70. The agriculture industry’s long familiarity with farmworker needs also led to
19 COVID-19 related innovations. For example, agricultural employers in Monterey County
20 created an employer-funded, “wrap around housing” program to provide facilities for
21 isolating and quarantining farmworkers, whether or not these workers were residing in
22 _____

23 ³³ Western Growers, *COVID-19 Resources* <[https://www.wga.com/covid-19-resources-](https://www.wga.com/covid-19-resources-page)
24 [page](https://www.wga.com/covid-19-resources-page)> [as of December 30, 2020]; Western Growers, *WG COVID-19 Webinar Series*
25 *Resources Available* (July 14, 2020) <[https://www.wga.com/blog/wg-covid-19-webinar-](https://www.wga.com/blog/wg-covid-19-webinar-series-resources-available)
26 [series-resources-available](https://www.wga.com/blog/wg-covid-19-webinar-series-resources-available)> [as of December 30, 2020]; Agricultural Council of California,
27 *COVID-19 Resources* <<https://www.agcouncil.org/covid-19>> [as of December 30, 2020];
28 County of Monterey, *Advisory for Agricultural Worker Protection During COVID-19*
Crisis on the Central Coast of California <<https://www.co.monterey.ca.us/home/showdocument?id=88063>> [as of December 30,
2020].

1 employer-provided housing. Administered by the GSACC and coordinated with the
2 County, any one of the participating employers' employees who tested positive or
3 exhibited symptoms would be moved to at a hotel or motel at the industry's expense. In
4 addition to housing, the program offered three meals a day and daily visits by nurses for up
5 to fourteen days for those in self-isolation. To qualify, the employee must work in
6 agriculture and have tested positive or been exposed to COVID-19.³⁴ It was the model for
7 a program sponsored jointly by the state and FEMA, called Housing for the Harvest.³⁵

8 71. As another example, the agricultural industry recommended incorporating
9 into IPPs worker "cohorting." Worker "cohorting" involves grouping workers or crews
10 such that they live, transport, and work together, effectively creating a "COVID bubble"
11 that minimizes the chance of infections from outside affecting the cohort and the chance of
12 an infection within a cohort from spreading to those outside.

13 72. In addition to agency guidance, agricultural employers were required to
14 adapt their COVID-19 compliance program to the unique circumstances of their
15 businesses. For example:

- 16 a) Because their work force is seasonal and fluid, IIPP compliance could
17 include repeated trainings, in multiple languages and dialects, to educate and
18 train employees about workplace mitigation and prevention of COVID-19,
including basic information such as what COVID-19 is, how workers are
exposed, etc.;
- 19 b) Tailoring social and physical distancing requirements to comply, wherever
20 feasible, with CDC and CDPH guidance, while taking into account the
21 realities of cultivation and harvesting, as well as the differences between
picking row crops, such as lettuce and strawberries, versus vine and tree
fruits;
- 22 c) Because agricultural communities are remote, and tend to be underserved
23 with testing and medical facilities, to assist by providing free access to
24 medical professionals, such as Teledoc services with insurance companies,
or bringing physicians out to working crews (often dozens of them), so that

25
26 ³⁴ CA.gov, *Housing for agricultural workers* (November 25, 2020)
<https://covid19.ca.gov/housing-for-agricultural-workers/> [as of December 30, 2020].

27 ³⁵ See Western Growers, *Governor Newsom Announces Housing for the Harvest Program*
28 (July 28, 2020) <<https://www.wga.com/blog/governor-newsom-announces-housing-harvest-program>> [as of December 30, 2020].

1 employees could speak directly with such health care providers about
2 COVID-19;

- 3 d) Conducting daily screenings whereby employees must answer specific
4 questions about their health and potential exposure to COVID-19, and/or
5 take temperatures, before entering the workplace;
- 6 e) Many agricultural employers—particularly those with larger, more complex,
7 or vertically-integrated operations—have developed sophisticated and
8 aggressive contact tracing protocols, the data from which they have agreed to
9 provide to county health officials trying to develop their own databases for
10 reporting purposes;
- 11 f) In connection with employer provided transportation, implementing some or
12 all of the following measures: proactively limiting the number of passengers
13 on vehicles, requiring screenings before entering the vehicles, requiring
14 handwashing before and after transportation on vehicles, wearing masks at
15 all times on the vehicle, requiring windows to remain open (unless extreme
16 hot or cold weather in effect, during which time ventilation measure were
17 taken), requiring seating charts for the day or longer, transporting cohorted
18 employees together, installing barriers between workers on the bus, and/or
19 installing barriers between passengers and the bus driver (to keep the driver
20 safe); and
- 21 g) In connection with employer-provided housing, and aside from the wrap-
22 around housing program discussed above, implementing some of all of the
23 following measures: proactively limiting the number of individuals in units,
24 testing workers before placing them into housing, providing additional
25 cleaning and sanitation supplies, closing and prohibiting congregation in
26 certain common areas and making other common areas (such as laundry
27 rooms) subject to appointments or other scheduling limitations, enhanced
28 cleaning and sanitation of common or high-use areas, and/or housing
cohorted employees together.

73. Because agricultural employers work closely with local health, agricultural,
housing, and occupational safety agencies, certain agricultural communities, such as
Ventura County, have been able to track positivity rates based on various demographic and
occupational characteristics. As of December 23, 2020, the County reported 506 cases
where farmworkers tested positive. Roughly half of these cases traced back to two major
outbreaks in the first half of 2020. The downward trend is reflected by the fact that only
1.5 percent of total Ventura County cases reported involved farmworkers, as compared to
other essential workers or vulnerable populations, such as long-term care and skilled
nursing (2.7%), healthcare workers (2.8%), those 65+ (9.2%) or those with underlying

1 health conditions (11.5%).³⁶ Workers in the grocery and food service section amounted to
2 1.1% of the total cases. The Ventura County statistics strongly suggest that the agriculture,
3 grocery, and food services industries have learned from experience, and adjusted best
4 practices in dealing with COVID-19.

5 74. Employers have continuing obligations to ensure that all workers provided
6 with employer housing, including H-2A guest workers, are provided with a safe place to
7 live and work. The H-2A program requires, as a condition of the grant of a work visa,
8 employers are able to secure safe and habitable living quarters for every guest worker.
9 Such housing must be in place before an employer even applies for visas. The compliance
10 standards under this program are rigorous, comprehensive, and detailed, as are the
11 guidelines for worker housing promulgated by the CDHCD and EDD. Any departure from
12 the requirements imposed by state and federal agencies or a finding of non-compliance
13 could jeopardize an employer's ability to secure critically needed guest workers through
14 the H-2A program. Because these requirements mandate that each worker is provided with
15 100 square feet of living space, crowding conditions, such as those seen in unregulated
16 housing arrangements (where many workers may cram into one apartment), is avoided.

17 **D. Cal/OSHA's Enforcement Response to the COVID-19 Pandemic**

18 75. Prior to the onset of COVID-19, Cal/OSHA had the ability to regulate
19 "Control of Harmful Exposure to Employees" and "Aerosol Transmissible Diseases"
20 ("ATD") in workplaces where employees are exposed to infectious diseases that spread by
21 inhalable particles and droplets. (Cal. Code Regs., tit. 8, §§ 5141, 5199 & 5199.1)
22 Employees protected by the ATD regulations include health care workers and first
23 responders, as well as those who work in certain agricultural sectors, such as animal and
24 poultry farms, slaughterhouses, meat packing plants, and transportation of livestock. (*Id.*,
25 § 5199.1(a)(1)(A)(4)-(5).)

26
27
28 ³⁶ Ventura County Recovers, *County of Ventura, COVID-19 Information*
<<https://www.venturacountyrecovers.org/>> [updated as of December 30, 2020].

1 76. Cal/OSHA had, in addition to the ATD standard, a number of other
2 standards, including the IIPP standard under section 3203 of Cal/OSHA’s Title 8
3 regulations, to regulate COVID-19 compliance.

4 77. Cal/OSHA has authority to ensure that employers have an up-to-date,
5 written, and comprehensive COVID-19 compliance and prevention plan, and may
6 investigate and enforce any violation of the IIPP requirements under section 3203. On
7 May 14, 2020, Cal/OSHA explicitly required employers “to determine if COVID-19
8 infection is a hazard in their workplace . . . For most California workplaces, adopting
9 changes to their IIPP is mandatory since COVID-19 is widespread in the community.”³⁷
10 This guidance details COVID-19 prevention information that should be included in every
11 employer’s IIPP to maintain compliance. (*Id.*)

12 78. On July 16, 2020, the Deputy Chief of Health for Cal/OSHA, Eric Berg,
13 briefed the Board on Cal/OSHA’s current enforcement of employers’ requirements to
14 establish, implement, update, and monitor compliance with COVID-19 prevention and
15 mitigation protocols under their IIPPs. Deputy Chief Berg stated that “the Division is
16 doing many investigations and issuing citations under the ATD standard where it applies,
17 and for situations where it does not apply, the Division is citing under Sections 3203 and
18 5141.” (Exh. 4, pp. 5-6.)

19 79. During that same Board meeting, Katie Hagen, Director of the DIR,
20 informed the Board as to its efforts to ensure that employers are acting on agency COVID-
21 19 related guidance:

22 The Division is doing workplace visits and inspections, issuing
23 citations after the investigation is complete, and conducting
24 follow-up visits as needed, in addition to providing guidance,
25 consultation, and education. The Division of Labor Standards
26 Enforcement (DLSE) is assisting with these things as well. The
27 Division is providing outreach to employers via mass email to
28 various industries, and has also set up a call center that reaches
1,200 callers per day to provide assistance.

37 DIR, *Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19*
(May 14, 2020) <<https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>> [as of
December 30, 2020].

1 (Exh. 4, p. 6.)

2 80. AB 2043 directs Cal/OSHA to routinely compile and report the subject
3 matter, findings, and results of any investigation “relating to practices or conditions
4 prescribed in the Guidance Documents or a COVID-19 illness or injury at a workplace of
5 agricultural employees.” (Lab. Code, § 6725(d).) Although AB 2043’s reporting
6 requirements went into effect on or about September 28, 2020, Cal/OSHA had already
7 been investigating and citing employers for failure to comply with their IPPs.

8 81. For example, on September 4, 2020, Cal/OSHA Chief Douglas L. Parker
9 issued a press release where he reported Cal/OSHA “has cited 11 employers for not
10 protecting employees from COVID-19 exposure during inspections of industries where
11 workers have an elevated risk of exposure. The industries include food processing,
12 meatpacking, health care, agriculture and retail.”³⁸ Chief Parker also stated that
13 Cal/OSHA has “identified these industries as priorities in our strategic enforcement efforts
14 to make sure employers have adequate COVID-19 infection prevention procedures in
15 place,” and that “[t]hese are industries where workers have been disproportionately
16 affected, and these citations are the first of many to be issued in the coming weeks and
17 months.”

18 82. Six of the eleven companies cited were in the “Agriculture” sector. Each
19 involved outdoor workplace activities. Five of the six companies were cited for “failure to
20 provide sufficient shade to enable employees using the shade during breaks/means to
21 maintain a physical distance from co-workers of at least six feet in all directions.” One
22 company was cited for failing to ensure workers wore face coverings “while weeding
23 strawberries in close proximity to one another,” while another was cited for “failure to
24 provide handwashing facilities within five minutes of a crew working in a field roguing
25

26 _____
27 ³⁸ DIR, *Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations*
28 (September 4, 2020) <<https://www.dir.ca.gov/DIRNews/2020/2020-76.html>> [as of
December 30, 2020].

1 [i.e., removing plants with undesirable characteristics] sunflowers.” The fines ranged from
2 \$4,050 to \$11,700.³⁹

3 83. Cal/OSHA updates on a weekly basis its webpage reporting citations for
4 COVID-19 related violations. As of December 22, 2020, Cal/OSHA reported a total of
5 ninety-two (92) COVID-19 related citations—none of these citations is based on a
6 violation of the newly-promulgated ETS. Fourteen of the COVID-19 citations related to
7 employers in the agriculture—planting, cultivating, harvesting, postharvest crop activities,
8 cattle ranching, poultry processing, and animal slaughtering.⁴⁰ The majority of proposed
9 penalties against these agricultural employers were for under \$10,000.00.⁴¹

10 84. Five of the ninety-two citations related to food processors, including frozen
11 specialty food manufacturing and perishable prepared food manufacturing.⁴² Of the
12 thirteen COVID-19 citations with substantial proposed penalties (over \$50,000), six were
13 issued to health care employers (one relating to a correctional facility), two were issued to
14 animal slaughterers, three to frozen food processors, one to a restaurant company, and one
15 to a temporary help services employer. This relatively narrow collection of employer
16
17

18 ³⁹ DIR, *Citations for COVID-19 Related Violations*
19 <<https://www.dir.ca.gov/dosh/COVID19citations.html>> [as of December 30, 2020].

20 ⁴⁰ See DIR, *Citation and Notification of Penalty, Uni-Kool Partners* (August 27, 2020)
21 <[https://www.dir.ca.gov/dosh/coronavirus/citations/08.27.2020_Uni-](https://www.dir.ca.gov/dosh/coronavirus/citations/08.27.2020_Uni-Kool%20Partners_1473209.pdf)
22 <[https://www.dir.ca.gov/dosh/coronavirus/citations/08.25.2020_Duncan-Family-](https://www.dir.ca.gov/dosh/coronavirus/citations/08.25.2020_Duncan-Family-Farms_1483358.pdf)
23 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Jobsource-North-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Jobsource-North-America-Inc._1473542%E2%80%93Plant1.pdf)
24 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)
25 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)
26 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)
27 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)
28 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)

26 ⁴¹ DIR, *Citations for COVID-19 Related Violations*
27 <<https://www.dir.ca.gov/dosh/COVID19citations.html>> [as of December 30, 2020].

27 ⁴² See DIR, *Citation and Notification of Penalty, Overhill Farms, Inc.* (September 8, 2020)
28 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)
28 <[https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-](https://www.dir.ca.gov/dosh/coronavirus/citations/09.08.2020_Overhill-Farms-Inc_1473510%E2%80%93Plant1.pdf)

1 categories does not support any inference of a compliance problems with employers in
2 general.

3 **E. Worksafe/NLG Petitions for a COVID-19 “Emergency” Standard**

4 85. The Board has the authority to initiate proceedings to consider whether
5 existing standards are inadequate to address changing or novel workplace health or safety
6 issues. At no point did the Board consider the need for a COVID-19 standard, let alone its
7 promulgation on an emergency basis and without the opportunity for public participation,
8 until September 17, 2020—four months after receiving the Workspace/NLG Petition—
9 when the Board decided, against the recommendation of the Board’s staff, that emergency
10 regulations were needed.

11 86. On May 20, 2020, WorkSafe and the National Lawyers Guild filed Petition
12 583 with the Board, requesting the Board promulgate a “temporary emergency standard”
13 governing COVID-19 related workplace safety. (Exh. 1.) The petitioners also requested
14 that, following promulgation of the standard on expedited basis, the Board conduct notice
15 and comment proceedings, pursuant to the rulemaking provisions of the APA (Gov. Code,
16 § 11340 et seq.), to adopt a permanent standard.

17 87. The standard proposed in the Worksafe/NLG Petition largely mirrored
18 existing guidance from various state agencies, including Cal/OSHA and, in fact, was
19 already an essential part of any COVID-19 related IIPP that must comply with pre-existing
20 Cal/OSHA standards under section 3203. This included the designation of a “competent
21 person” to create, implement, and maintain “effective written infection control procedures
22 to control the risk of transmission,” i.e., a “Compliance Action Plan” for COVID-19
23 prevention and mitigation.⁴³ But the Worksafe/NLG Petition said nothing about paid leave
24 for employees who test positive for COVID-19 or who have been “exposed” to COVID-

25
26 ⁴³ Citing the need to issue regulations to “protect employees in any facility, service
27 category, or operation who may be exposed to SARS-CoV-2 [Covid-19], and who are not
28 within the scope” of the aerosol transmissible diseases standards (Cal. Code Regs., tit. 8,
§§ 5199 & 5199.1), Petitioners requested that the Board promulgate COVID-19
regulations as an emergency temporary standard and ultimately permanent standard.

1 19. It was also silent as to requiring employers to conduct, at their cost, worksite-wide and
2 repeated COVID-19 testing. It did not mention restrictions on employer-provided housing
3 or transportation to reduce exposure or minimize the spread of COVID-19.

4 88. Notwithstanding the Worksafe/NLG Petition’s claim of urgency, the Board
5 did not expedite consideration of the matter. During the July 16, 2020 Board meeting, one
6 Board member made a motion “that petition 583 be heard, discussed, and voted on at the
7 August 2020 Board Meeting.”⁴⁴ The motion was not seconded, and therefore failed.
8 Although the Board agreed to bring the Worksafe/NLG Petition before the Board at the
9 August 20, 2020 Board meeting “for consideration,” no action was taken at that meeting.

10 **F. Cal/OSHA Recommends Adoption of the Worksafe/NLG Petition**

11 89. Under Labor Code section 147.1(d), Cal/OSHA was required to evaluate the
12 proposed “occupational health” standard and submit a report to the Board within 60 days
13 of the Board’s receipt of the Workplace/NLG Petition. As of the July 16, 2020 Board
14 meeting, Cal/OSHA still had not provided its report to the Board, and would not do so
15 until July 30, 2020.

16 90. On July 30, 2020, Cal/OSHA issued a Memorandum recommending the
17 Board “grant Petition 583, in part, by requesting Cal/OSHA to develop and promulgate a
18 proposed emergency temporary standard for the consideration of the Standards Board.”⁴⁵

19 91. Cal/OSHA’s analysis of the Worksafe/NLG Petition did not suggest that
20 Petition 583 was breaking new ground or proposing any material change to existing
21 workplace guidance or standards applicable to COVID-19, or that existing guidance or
22 standards were ineffective as to current needs. Cal/OSHA rationalized the need for a new,
23
24

25 ⁴⁴ Occupational Safety and Health Standards Board, *Public Meeting and Business Meeting*
26 (July 16, 2020) <<https://www.dir.ca.gov/oshsb/documents/minutesJul2020.pdf>> [as of
December 30, 2020].

27 ⁴⁵ The Memorandum is attached as Exhibit 3, and also available at
28 <<https://www.dir.ca.gov/oshsb/documents/petition-583-dosheval.pdf>> [as of December 30,
2020].

1 emergency temporary standard because it would “**complement and augment** the existing
2 rules and provide **clear guidance** to employers and workers”:

3 If COVID-19-specific protections similar to the [COVID-19-
4 specific] guidelines were spelled out in the Title 8 standards,
5 Cal/OSHA could more easily enforce requirements that would
6 be specific, detailed, and more protective of workers A
7 specific COVID-19 emergency regulation in Title 8 would
8 provide clear instructions to employers and employees on what
9 needs to be done to protect workers from COVID-19,
10 eliminating any confusion and enhancing compliance.

11 (Exh. 3, pp. 22-23.)

12 92. Cal/OSHA also stated that “it is essential that Cal/OSHA have all available
13 tools to protect workers from COVID-19 illness and death,” but did not identify what tools
14 it believed were missing, or why the tools available were inadequate to protect workers.
15 While claiming that “COVID-19 is an occupational health emergency causing more deaths
16 in less time than any other workplace crisis in the nearly fifty-year existence of
17 Cal/OSHA,” and speculating that the “COVID-19 public health crisis is exactly the type of
18 catastrophe that the legislature intended an emergency regulation to address,” Cal/OSHA
19 did not support these claims by any citation to evidence. (Exh. 3, p. 21.)

20 93. Cal/OSHA justified the need for emergency regulation by stating “[t]here is
21 no existing Title 8 regulation that comprehensively addresses an employer’s responsibility
22 to protect Non-5199 Workers from infectious diseases.” (Exh. 3, p. 22.)⁴⁶ The Division
23 does not explain why there is an urgent need for a “comprehensive” standard to address
24 infectious diseases, or why that need necessarily follows because of the current crisis
25 concerning a unique infectious disease.⁴⁷

26 ⁴⁶ Although the Worksafe/NLG Petition excluded workers covered by Title 8’s Aerosol
27 Transmissible Disease standard in sections 5199 (primarily health care and related
28 facilities) **and** 5199.1 (facilities and services involving animals), Cal/OSHA decided to
exclude only “Non-5199 Workers.”

⁴⁷ Title 17, section 2500 of the California Code of Regulations lists over 80 communicable
diseases, ranging from anthrax, lime disease, botulism, to rabies and Middle East
Respiratory Syndrome. Of these, section 5199 specifically addresses one—tuberculosis—
as it relates to *occupational exposure*, i.e., “exposure from *work activity* or *working*

1 94. Nevertheless, the Division cited numerous Cal/OSHA standards currently
2 being used by the Board to initiate investigations and enforcement proceedings. (*Id.*, pp.
3 6-20.) Cal/OSHA acknowledged “these general provisions provide Cal/OSHA a
4 regulatory basis for requiring employers to take measures to protect workers from COVID-
5 19.” (*Id.*, p. 22.).

6 **G. The Board Staff Concludes Proposed Emergency Regulations Are Not**
7 **Necessary and Recommends the Worksafe/NLG Petition Be Denied**

8 95. On August 10, 2020, the Board staff issued its evaluation of the
9 Worksafe/NLG Petition. (Exh. 2.) The Board staff concluded that the emergency request
10 was not “necessary” and recommended that the Worksafe/NLG Petition be denied. (Exh.
11 2, p. 9.) The findings and rationale upon which Board staff based its conclusion included
12 the following:

- 13 a) Board staff is unable to find evidence that the vast majority of California
14 workplaces are not already in compliance with COVID-19 requirements and
15 guidelines.
- 16 b) Board staff cautions that a new regulation would place additional regulatory
17 burden on California businesses that are already compliant with California’s
18 COVID-19 requirements and guidelines.
- 19 c) Unnecessarily creating an offshoot of the IIPP, without substantial evidence
20 of need, can harm the existing protective nature of the regulation and its
21 benefit to California workplaces by diluting its capacity to serve as the
22 primary regulation requiring employers to address newly discovered hazards.
- 23 d) Attempting to codify some of those requirements will no doubt result in
24 confusion when the updated guidelines conflict with the written regulation.
- 25 e) Relying on California’s performance-based IIPP allows employers to
26 respond to updated worker protection guidelines in a more efficient and
27 responsive manner. which translates into more-effective employee
28 protections.
- 29 f) Instead of directing limited resources to create new regulations to
30 prescriptively require what is already required by the existing IIPP
31 performance regulation, enforcement and consultative efforts could continue
32 to focus on businesses in specific parts of the state, such as Los Angeles
33 County, where about 40% of the cases and 50% of the deaths in California
34 have occurred, or on specific industries identified as having
35 disproportionately high incidents of infection. Developing an ETS and a

36 _____
37 *conditions*” in facilities where exposure is “reasonably anticipated” based on the nature of
38 the workplace itself, in this case health care facilities, services, or operations listed in the
standard. (*Id.*, sec. 5199 (a)(1)(A).)

1 follow-up permanent regulation for the entire state may not be the most
2 effective use of California’s limited Cal/OSHA and Board resources.

3 g) Board staff is not aware of any California studies or data showing that
4 employers are lacking the information necessary to provide employee
5 protections from COVID-19 hazards, nor that the vast majority of employers
6 are not already doing as much as they are able to keep their employees,
7 customers, and businesses functioning safely in accordance with federal,
8 state, and local requirements.

9 h) Board staff is of the opinion that while the risk of exposure to SARS-CoV-2
10 is significant, new regulations, whether in the form of an emergency or
11 permanent regulation, are not likely to significantly improve employee
12 outcomes, Employers have ready access to credible information to combat
13 exposure to SARS-CoV-2 and are already required to effectively address
14 such challenges in their workplace. Continued enforcement of existing
15 regulations and consultative outreach is a more efficient and likely effective
16 use of the Cal/OSHA’s limited resources.

17 (Exh. 2, pp. 5-9.)

18 96. The first time the Board had an opportunity to publicly discuss Cal/OSHA’s
19 Memorandum and Board Staff’s evaluation took place at the Board’s monthly meeting on
20 August 20, 2020. One Board member, commenting on Cal/OSHA’s evaluation of the
21 Worksafe/NLG Petition, stated: “It is important to note that the Division has recommended
22 undertaking emergency rulemaking in this case, **but they have not made it clear what
23 the gap is that needs to be addressed.**” (Exh. 5, p. 8 [emphasis added].)

24 97. Another Board member stated “several standards have been developed out of
25 need for additional regulation, such as the ATD and heat illness standards” and “[a]lthough
26 the Division has conducted many inspections pertaining to COVID-19 exposure in the
27 workplace, no citations have been issued yet.” (*Id.*, p. 7.)

28 **H. The Board Rejects the Staff Evaluation and Recommendations and
Directs the Division to Draft and Submit an Emergency COVID-19
Regulatory Proposal**

98. On September 17, 2020, four months after the Worksafe/NLG Petition was
first submitted, the Board decided that emergency COVID-19 regulations were necessary.
It based this decision largely on Cal/OSHA’s unsubstantiated claim that an emergency
regulation “would enhance worker safety,” and its “assertion that an emergency regulation
would strengthen, rather than complicate, the Division’s enforcement efforts.” At this
September 17, 2020 Board meeting, Eric Berg, Deputy Chief for Health, Cal/OSHA, was

1 asked to provide responses to questions posed by Board Member Kennedy following the
2 July 16, 2020, Board meeting, including whether, “[o]f the numerous inspections that the
3 Division has conducted, are there any situations were identified COVID-19-related
4 workplace problems could **not** be cited under Section 3203 [the IIPP standard] or the ATD
5 standard?” (Exh. 6, at p.9 [emphasis added].) ⁴⁸

6 99. According to the minutes, Deputy Chief Berg did not identify any situations
7 where a lack of regulatory standards prevented the Division from citing employers:

8 Mr. Berg stated that the Division is conducting inspections into
9 COVID-19-related hazards in response to complaints,
10 outbreaks, and clusters. The Division is focusing its inspection
11 efforts on industries that have vulnerable populations, increased
12 rates of COVID, and that are having significant outbreaks and
13 clusters.

14 Mr. Berg stated that in cases where employers do not fall under
15 the requirements of the ATD standard, **Sections 3203 and 5144**
16 **provide a regulatory basis that requires employers to protect**
17 **workers from exposure to COVID-19 in the workplace.**
18 However, the Division feels that a regulation specific to
19 COVID-19 would greatly increase their efficiency,
20 effectiveness, and success in protecting workers.

21 (*Id.* at pp. 9-10 [emphasis added].)

22 100. By unanimous vote, the Board voted to adopt the Worksafe/NLG Petition. It
23 directed Cal/OSHA to “draft and submit an emergency regulatory proposal for
24 consideration of adoption by the Board no later than the November 19, 2020 Board
25 Meeting.” The Board further instructed the Division to work with Board staff “to convene
26 an advisory committee at four-month intervals to review and recommend amendments to
27 the emergency standard,” and to consider the need for a permanent regulation “[a]fter the
28 COVID-19 pandemic subsides.” (Exh. 6., at p. 9.)

29 ⁴⁸ The September 17, 2020 minutes are attached as Exhibit 6, and also available at
30 <<https://www.dir.ca.gov/oshsb/documents/minutesSep2020.pdf>> [as of December 30,
31 2020].

1 **I. The Board Adopts the Emergency Temporary Standard on**
2 **November 19, 2020**

3 101. At least five working days before submitting an emergency regulation to
4 OAL, the Board must send notice of the proposed emergency action to every person who
5 has filed a request for notice of regulatory action. (Gov. Code, § 11346.1(a)(2).) OAL has
6 to review emergency regulations within ten calendar days after they are submitted to OAL.
7 (Gov. Code, § 11349.6(b); Cal. Code. Regs., tit. 8, § 56(a)(1).) After OAL posts
8 emergency regulations on its website, it shall allow five calendar days for written
9 comments to be submitted.

10 102. On November 12, 2020, the Board made public its “Notice of Proposed
11 Emergency Action,” which included the proposed ETS.⁴⁹ The first time for any
12 opportunity for public comment was on November 19, 2020, at the Board’s monthly
13 meeting. In other words, the Board gave the public the minimum notice required under the
14 APA, and no more.

15 103. Given the minimal notice and the complexity of the 21-page emergency
16 standard, a thoughtful, written presentation from stakeholders was out of the question. The
17 Board adopted the standard on the same day stakeholders first had a chance to comment
18 publicly on the proposed standard.

19 104. Under the APA’s non-emergency rulemaking process, the Board must do all
20 of the following:

- 21 a) prepare an extensive initial statement of reasons for the proposed regulatory
22 action setting forth the “specific purpose” and “rationale” for the
23 regulations, an “economic impact assessment” or “regulatory impact
24 analysis,” a “description of reasonable alternatives,” and “facts, evidence,
25 documents, testimony, or other evidence on which the agency relies to
26 support an initial determination that the action will not have a significant
27 adverse economic impact on business.” (Gov. Code, § 11346.2(b)(1)-(5));
28 b) provide at least 45 days-notice to allow for public comment prior to a public
 hearing on the regulation (*id.*, § 11346.4);

27 ⁴⁹ The Notice of Proposed Emergency Action is attached as Exhibit 7, and also available at
28 <[https://www.dir.ca.gov/oshsb/documents/noticeNov2020-COVID-19-Prevention-
Emergency.pdf](https://www.dir.ca.gov/oshsb/documents/noticeNov2020-COVID-19-Prevention-Emergency.pdf)> [as of December 30, 2020].

- 1 c) allow any interested party to voice their concerns through oral or written
2 statements at a public hearing requested by any interested party (*id.*,
3 § 11346.8(a));
- 4 d) provide a “final statement of reasons” to “update” the initial reasons and to
5 include a “summary of each objection or recommendation.” a “determination
6 with supporting information that no alternative considered by the agency
7 would be more effective in carrying out the purpose for which the regulation
8 is proposed. would be as effective and less burdensome to affected private
9 persons than the adopted regulation. or would be more cost effective to
10 affected private persons and equally effective in implementing the statutory
11 policy or other provision of law.” an “explanation setting forth the reasons
12 for rejecting any proposed alternatives that would lessen the adverse
13 economic impact on small businesses” (*id.*, § 11346.9(a)(1), (3)-(5)); and
- 14 e) submit an extensive rulemaking record for final review to the OAL (*id.*,
15 § 11347.3).

16 105. By invoking emergency rulemaking procedures, the Board avoided these
17 requirements. Instead, the Board was only required to provide five working days’ notice
18 of the language of the ETS before submission to OAL for approval. (Gov. Code,
19 § 11346.1(a)(2).) This allowed the Board to reveal for the first time complex and
20 controversial proposals, not included in the Worksafe/NLG Petition and never before
21 shown to or considered by the public, including regulations relating to no-cost testing, paid
22 leave, and employer-provided housing and transportation. (*See* Section V.I. *infra.*)

23 106. The Board also would have been required to comply with the requirements
24 for a “major regulation,” including providing a standardized regulatory impact analysis.
25 (Gov. Code, §§ 11346.2(b)(2)(B) & 11346.3(c).) A “major regulation” is any regulation
26 that would have an economic impact on California business enterprises or individuals in an
27 amount exceeding fifty million dollars (\$50,000,000). (*Id.*, § 11342.548.)

28 107. As reflected in the minutes of the August 20, 2020 Board meeting, the Board
was aware of this requirement when it considered the Worksafe/NLG Petition: “This
regulation will also affect every employer in the state of California, so the costs will cross
the \$50 million threshold and result in the regulation having to go through a standardized
regulatory impact analysis (SRIA).” (Exh. 5, p. 3.)

J. The Board’s Flawed and Speculative “Finding of Emergency”

1 108. Government Code section 11346.1(b)(2) requires that a “finding of
2 emergency” must:

- 3 a) describe “the specific facts demonstrating the existence of an emergency and
4 the need for immediate action”;
- 5 b) demonstrate, by substantial evidence, “the need for the proposed regulation
6 to effectuate the statute being implemented, interpreted, or made specific and
7 to address only the demonstrated emergency”;
- 8 c) “identify each technical, theoretical, and empirical study, report, or similar
9 document, if any, upon which the agency relies”; and
- 10 d) include facts explaining the failure to address the situation through the
11 normal rulemaking process where the “emergency situation” was known to
12 the agency and could have been addressed in sufficient time through
13 nonemergency regulations.

14 109. The Board’s November 19, 2020 “Finding of Emergency”⁵⁰ rests almost
15 entirely rest on conjecture, speculation, or unsubstantiated conclusions rather than
16 evidence.

17 **1. The Finding Fails to Establish the Existence of a COVID-19
18 Workplace Emergency**

19 110. The Board admits that “[d]ata for the number of cases of COVID-19
20 infection and number of deaths attributable to workplace exposure is not currently
21 available; however, the numbers are likely substantial.” (Exh. 8, p. 4.) Speculation is not
22 adequate to demonstrate the existence of an emergency. (Gov. Code. Sec. 11346.1(b)(2).)

23 111. The Finding states that the ETS is “necessary to preserve worker safety and
24 health,” “to combat the spread of COVID-19,” or “to strengthen the Division’s
25 enforcement efforts,” again without substantial evidence that the spread of COVID-19
26 remains unchecked in the workplace due to lack of enforceable or ineffective Cal/OSHA
27 guidance, that employers are not complying with their legal obligations to maintain and
28 update their IIPPs, or that there has been a breakdown in the ability of the Division to
enforce these mandates.

⁵⁰ The Finding of Emergency is attached as Exhibit 8, and also available at
<<https://www.dir.ca.gov/oshsb/documents/COVID-19-Prevention-Emergency-FOE.pdf>>
[as of December 30, 2020].

1 112. Other evidence is contradicted by Cal/OSHA’s publicly available data. For
2 example, the Board states that Cal/OSHA received over 6,937 COVID-19-related
3 complaints over a nine-month period through the end of September 2020, without
4 mentioning that, as of December 28, 2020, Cal/OSHA reported less than 100 cases which
5 resulted in enforcement citations and proposed penalties.

6 113. The only purported evidence presented by the Board relating specifically to
7 agricultural workers is taken from two news articles describing COVID-19 outbreaks in
8 farmworker housing. While the Finding asserts “that many of these workers live in
9 compact, dorm-like housing facilities provided by employers,” and attributes the
10 “overrepresentation of migrant temporary farmworkers testing positive” to these living
11 arrangements, the Finding does not actually identify what percentage of these workers live
12 in employer-provided housing, or why these two incidents—which took place six months
13 before the Board decided to promulgate the ETS—constituted substantial evidence of a
14 serious, and unremedied, problem. Although these articles were cited to justify the need
15 for regulation of employer-provided housing, the Findings do not discuss whether
16 employer-provided housing materially contributes to the spread of COVID-19 at the
17 workplace. Moreover, one of the articles reports that the number of confirmed cases for
18 H-2A employees represents a little under two percent of all guest workers in California.⁵¹

19 114. According to the EDD, the California agricultural industry employed over
20 400,000 workers, whether via direct hire or through farm labor contractors over the last
21 twelve months ending on September 30, 2020. During this same twelve-month period,
22 California employers housed a total number of 25,453 H-2A guest workers—less than
23 seven percent (7%) of all California agricultural workers.

24
25
26 ⁵¹ See The Californian, *COVID-19 rips through California motel rooms of guest workers*
27 *who pick nation’s produce*, dated August 26, 2020.
28 <<https://www.thecalifornian.com/story/news/2020/08/17/california-motel-guest-farm-workers-coronavirus-case-outbreak/5475182002/>> [as of December 30, 2020], cited in Finding of Emergency (Exh. 8), p. 5 ¶6 nn. 8 & 10, p. 43 ¶56.

1 115. Setting aside the Board’s failure to cite any empirical or technical studies or
2 reports that might support a finding of emergency, what evidence it does provide undercuts
3 the suggestion that there is any substantial nexus between **employer-provided** housing
4 and COVID-19 outbreaks. The Board states, for example, that “one California health
5 officer noted that ‘farmworkers face the greatest infection risk not at work, but at
6 home.’” (Exh. 8, p. 3.) That article goes on to note that, based on an analysis of federal
7 records, California guest workers sleep on average five to a room. The H-2A program
8 requires that each worker be provided with no less than fifty square feet of space in their
9 sleeping quarters and no less than fifty square feet of common area space. (29 C.F.R.
10 1910.142(b)(2).) Given the rigorous inspections of these facilities by CDHCD and other
11 authorities, it is unthinkable that any responsible employer would jeopardize its ability to
12 obtain H-2A guest workers by failing to comply with the occupancy restrictions.

13 116. In fact, there is no basis whatsoever to infer that employer-provided housing,
14 as opposed to communal living arrangements outside of the employer’s control, are more
15 likely to cause COVID-19 spread. For example, a large farm labor contractor (“**FLC**”)
16 providing H-2A guest workers throughout the United States, including California, has
17 performed rigorous contact tracing and found that the vast majority of new infections
18 originated from domestic workers living in their own private housing, not H-2A guest
19 workers residing in employer-provided housing. Similarly, a large grower, shipper, and
20 distributor in Salinas Valley has had only 256 positive cases in California, and has not
21 confirmed any as occurring in or arising from the workplace; rather, they have all
22 originated elsewhere, such as in personal carpool situations, in close quarter living
23 situations, or as a result of community spread activities (e.g., holiday get-togethers) outside
24 the workplace.

25 **2. The Findings Fail to Identify How the ETS Is Necessary to**
26 **Address a COVID-19 “Emergency” in the Workplace**

27 117. The Board’s claimed necessity for the ETS is “to combat the spread of
28 COVID-19 in California workers,” stating the proposed regulation would “significantly
reduce the number of COVID-19-related illnesses, disabilities and deaths in California’s

1 workforce.” (Exh. 8, p. 5.) To the extent the Board offered any evidence, it goes no
2 further than to demonstrate that the virus is a health hazard and that the spread of COVID-
3 19 in the state of California constitutes a public health emergency. It does not, however,
4 provide any substantial evidence that the ETS’s specific requirements will prevent or
5 significantly slow the spread of the virus in the workplace, or that it is necessary for
6 employees with potential exposure to be excluded from work for fourteen days, even after
7 receiving negative test results.

8 118. The Finding essentially confines itself to justifications having no connection
9 with the “demonstrated emergency,” i.e., that “[e]mployers and employees would benefit
10 from a specific set of regulations related to COVID-19 prevention in all workplaces,”
11 (Exh. 8, at. p. 5), or that its adoption would make existing regulations “specific to COVID-
12 19 and easy to understand” (*id.*). By statute, these justifications are insufficient to warrant
13 an emergency regulation. (Gov. Code § 11346.1(b)(2) [“A finding of emergency based
14 only upon expediency, convenience, best interest, general public need, or speculation, shall
15 not be adequate to demonstrate the existence of an emergency.”].)

16 119. In fact, it took less than two weeks to demonstrate that the perceived
17 “benefit” of the ETS’s prescriptive set of regulations would require its own emergency
18 modification. On December 14, 2020, the Governor suspended the ETS regulations to the
19 extent they conflicted with changes in CDC and CDPH guidelines concerning the duration
20 of quarantine periods. This underscores the extent to which Board’s hastily-contrived
21 rules caused needless confusion and placed unnecessary burdens on employers and public
22 health officials, just as the Board staff predicted.⁵²

23
24
25 _____
26 ⁵² Executive Order N-84-20, effective “immediately,” among other things, “suspended” the
27 employee “exclusion periods” in the ETS (ETS Regs., tit. 8, § 3205(c)(10), (11)) “to the
28 extent they exceed the longer of” any “applicable quarantine or isolation period
recommended” by CDPH or “recommended or ordered” by a local health officer with
jurisdiction over the workplace. (*See* Governor’s Exec. Order No. N-84-20 (December 14,
2020).) CDPH currently recommends a ten-day quarantine or isolation period.

1 120. The Finding of Emergency presented no substantial evidence to establish the
2 necessity of requiring employers to provide company-wide, repeated testing at their
3 expense, during working hours, and regardless of the ability of employers to pay for or to
4 locate enough test kits to comply with the ETS’s massive testing mandate. Although
5 California state and local health agencies offer free testing and COVID-19 screening, the
6 Board offered no substantial evidence that there presently exists an urgent need to shift
7 testing allocation decisions and costs onto private employers, or one that could justify the
8 added strain on limited public health resources in agricultural communities caused by the
9 ETS’s forced reallocation of test kits and laboratory capacity.

10 121. The Board justifies this massive shifting of costs based on the claim that
11 “[o]ffering COVID-19 testing at no cost to employees . . . will encourage these employees
12 to get tested for COVID-19 and also to not report to work following a COVID-19
13 exposure.” Under the ETS, employees must be removed from the workplace, with pay, if
14 they state they were exposed to COVID-19 while at work. This does not encourage
15 testing, since testing isn’t a requirement before an employer must remove a worker or,
16 apparently, before a worker decides to make that decision for the employer.

17 122. The Finding also states that “[m]aintaining employees’ earnings and benefits
18 when they are excluded from the workplace is important in ensuring that employees will
19 notify their employers if they test positive for COVID-19 or have an exposure to COVID-
20 19, and stay away from the workplace during the high-risk exposure period when they may
21 be infectious.” Under the ETS, an employee is not required to submit to any test, or to test
22 positive, in order to require the employer to maintain their wages and benefits. As to those
23 who do present symptoms, or who do test positive, earnings and benefits are already
24 provided under existing law. Moreover, even if regulation of wage and hour benefits were
25 within the authority of Cal/OSHA—and it is not—there is no evidence whatsoever
26 suggesting that employers are refusing to maintain pay and benefits for workers who test
27 positive, or any evidence suggesting under what circumstances workers would get tested,
28 or report results to their employers.

1 123. In fact, the ETS’s per se rule actually cuts against the Findings. The
2 regulation requires removal of any worker who had “COVID-19 exposure,” whether or not
3 that exposure took place at work. Those employees who were exposed **outside** of work
4 are **not** eligible for 10-days’ paid leave and benefits. For many farmworkers, the ETS’s
5 exclusion rule presents real financial hardship, and therefore a reason **not** to report
6 COVID-19 exposure outside of work, or to be tested, since a negative test result would not
7 alter the employer’s legal obligation under the ETS to send that worker home, albeit
8 without requiring pay. In fact, the ETS would encourage employees to overreport
9 workplace exposure, in order to qualify for paid leave, even if the exposure took place
10 outside the workplace.

11 **3. The Board’s After-the-Fact Attempt to Cure its Inability to**
12 **Justify an Emergency Standard Nine Months After the COVID-**
13 **19 Pandemic Disrupted All California Employers**

14 124. Since the March 4, 2020 declaration of a State of Emergency, Cal/OSHA
15 was issuing and updating guidance, enforcing compliance, and publicly reporting on their
16 successes in bringing enforcement proceedings, with substantial penalties against
17 employers in essential industries, including agriculture. The Board makes no effort to
18 avoid the undeniable fact that the COVID-19 pandemic, and its implications for workplace
19 safety, was not a new, unforeseen, or unforeseeable eventuality. In fact, the Board says
20 nothing that could reconcile its claimed need for immediate action months after employers
21 had fully implemented COVID-19 compliance and mitigation as part of their IPPs.

22 125. On the evening of November 30, 2020, OAL approved the proposed ETS, to
23 be effective “immediately.”⁵³ The most recent statement on Cal/OSHA’s website states
24 that employers “must” comply as of November 30, 2020, “the day the Office of
25
26

27 ⁵³ See DIR, *Cal/OSHA Emergency Regulations to Protect Workers from COVID-19 in*
28 *Effect* (December 1, 2020) <<https://www.dir.ca.gov/DIRNews/2020/2020-99.html>> [as of
December 30, 2020].

1 Administrative Law approved the ETS.”⁵⁴ According to the DIR website, the ETS remain
2 in effect until October 2, 2021.⁵⁵

3 126. Sometime after November 19, 2020, the date the Finding of Emergency was
4 issued and the date on which the Board adopted the ETS, Cal/OSHA published on its
5 website “Addendum #1 to the Finding of Emergency.”⁵⁶ The metadata of Addendum #1,
6 as published on the Cal/OSHA website, reveals the document was not created until
7 **December 3, 2020**, several days **after** the ETS became effective, and two weeks after it
8 was adopted.

9 127. There is no public record as to the circumstances relating to the promulgation
10 of these “addended findings.” There was no notice of a public hearing, no notice of the
11 publication of these new findings, and no indication that the Board approved or voted on
12 them, or that it had reopened the record, after OAL signed off on the Finding of
13 Emergency, to augment its decision.

14 128. This was a significant breach of a basic due process safeguard under the
15 APA. Section 11346.1 of the APA requires that, no less than five days before submitting
16 an emergency regulation to the OAL, the Board must provide notice of the intent to adopt
17 the proposed emergency action, and the finding of emergency. The reason for this is
18 particularly important where the process invoked by the Board largely dispenses with any
19 opportunity for public participation or notice and comment.

20 129. Addendum #1 purports to add additional justification for the ETS, stating:
21 “Guidance is not sufficient to address the present increase in cases and the risk of
22

23
24 ⁵⁴ See DIR, *COVID-19 Emergency Temporary Standards Frequently Asked Questions*
25 (December 1, 2020) <<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>> [as
of December 30, 2020].

26 ⁵⁵ See DIR, *COVID-19 Prevention* <<https://www.dir.ca.gov/OSHSB/COVID-19-Prevention-Emergency.html>> [as of December 30, 2020].

27 ⁵⁶ Addendum #1 is attached as Exhibit 9, and also available at
28 <<https://www.dir.ca.gov/OSHSB/documents/COVID-19-Prevention-Emergency-addendum.pdf>> [as of December 30, 2020].

1 occupational spread.” (Exh. 9, p. 2.) But it also attempts to back into an explanation as to
2 why the Board delayed so long in promulgating these regulations, or why it could not have
3 done so through non-emergency rulemaking. The Addendum #1 suggests that, while
4 COVID-19 was understood from the outset to be an emergency and public health crisis of
5 unparalleled dimension, the urgency associated with regulating COVID-19 related
6 workplace safety somehow abated during the summer, but took on new immediacy in
7 October or November, when the rate of COVID-19 positivity began to rise.

8 130. This post hoc rationalization was pretextual. There was no articulable basis
9 that justifies issuing the ETS as an emergency regulation, and no legal or good faith basis
10 that would permit the Board to use an *ultra vires*, backdated document to manufacture
11 such a justification.

12 **K. The ETS Provisions**

13 **1. Section 3205 Written COVID-19 Prevention Program**

14 131. Section 3205, entitled “COVID-19 Prevention,” has three subdivisions.
15 Subdivision (a) states the scope, excluding employees covered by the Aerosol
16 Transmissible Disease standard (Cal. Code Regs., tit. 8, § 5199), one-person places of
17 employment, and employees working from home. Subdivision (b) contains definitions.
18 Subdivision (c) sets forth eleven mandatory elements for a COVID-19 Prevention Program
19 (“Prevention Program”): (1) “[s]ystem for communicating”; (2) “[i]dentification and
20 evaluation of COVID-19 hazards”; (3) “[i]nvestigating and responding to COVID-19 cases
21 in the workplace”; (4) “[c]orrection of COVID-19 hazards”; (5) “[t]raining and
22 instruction”; (6) “[p]hysical distancing”; (7) “[f]ace coverings”; (8) “[o]ther engineering
23 controls, administrative controls, and personal protective equipment”; (9) “[r]eporting,
24 recordkeeping, and access”; (10) “[e]xclusion of COVID-19 cases”; and (11) “[r]eturn to
25 work criteria.”

26 132. Many of these requirements are largely duplicative of (and in some cases
27 word-for-word identical to) pre-existing guidance. As the attached “Comparison of
28 Emergency Temporary Standards with Cal/OSHA Guidance” chart illustrates, the ETS

1 does not “clarify” the guidance, as the Finding of Emergency claims. (Exh. 10.) It
2 **codifies** what was intended to be flexible guidance intended to be tailored to the specific
3 considerations of each employer’s individual IIPP into rigid, prescriptive regulations.

4 133. This is contrary to what the Legislature had in mind when it created section
5 3203 (governing IIPPs) to be performance-based standards. More particularly, the ETS
6 flies in the face of the Legislature’s decision this session not to codify Cal/OSHA guidance
7 documents. As originally proposed, AB 2043 would have required that a designated
8 collection of “Guidance Documents” be incorporated by reference into the Labor Code as
9 enforceable OSHA standards. This provision was removed based on the same concerns
10 articulated by the Board staff when it recommended that the Board deny the
11 Worksafe/NLG Petition.

12 134. The Board, in effect, did what the Legislature expressly chose not to do, and
13 did so via a process that made public scrutiny next to impossible.

14 135. There are significant new obligations imposed on employers discussed
15 below.

16 **a. No-Cost Testing**

17 136. The Prevention Program requires that employers offer testing “at no cost to
18 employees during their working hours **to all employees who had potential COVID-19**
19 **exposure in the workplace.”** (ETS Regs., § 3205(c)(3)(B)(4.) [emphasis added].) While
20 the ETS defines “COVID-19 exposure” as “being within six feet of a COVID-19 case for a
21 cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with
22 the ‘high-risk’ exposure period” (*id.*, § 3205(b)(3)),⁵⁷ the standard does not define what is
23 a “potential” COVID-19 exposure.

24 **b. Employee Exclusion and Paid Leave**

25 137. The “[e]xclusion of COVID-19 cases” element provides:
26

27 ⁵⁷ The “‘high-risk’ exposure period” varies depending on whether a person has developed
28 COVID-19 symptoms or tests positive but never develops symptoms. (ETS Regs., §
3205(b)(9)(A) & (B).)

1 (A) Employers **shall ensure that COVID-19 cases are**
2 **excluded from the workplace** until the return to work
requirements of subsection (c)(11) are met.

3 (B) Employers **shall exclude employees with COVID-19**
4 **exposure from the workplace for 14 days** after the last known
COVID-19 exposure to a COVID-19 case.

5 (C) **For employees excluded from work** under subsection
6 (c)(10) and otherwise able and available to work, **employers**
7 **shall continue and maintain an employee’s earnings,**
seniority, and all other employee rights and benefits, including
8 the employee’s right to their former job status, as if the employee
had not been removed from their job....

9 (ETS Regs., § 3205(c)(10)(A)-(C) [emphasis added].)⁵⁸

10 138. Although the fourteen-day exclusion period was modified by Governor
11 Newsom to conform with the latest CDC guidance, the Governor’s order does nothing to
12 bring the ETS into line with other, critically important CDC guidance, which does **not**
13 impose a per se exclusionary rule for COVID-19 exposure, but rather adopted a fact-
14 specific analysis, taking into account the nature of the interaction and when it occurred.
15 Moreover, the ETS does not comply with CDC guidance concerning COVID-19 exposure
16 in critical infrastructure industries, and thus fails to reflect the reality that it is not
17 practicable to impose rigid exclusion rules, especially where essential workers are
18 concerned.

19 139. There are two exceptions to the paid leave requirement: (1) where the
20 employee is unable to work for reasons other than COVID-19; and (2) “where the
21 employer demonstrates that the COVID-19 exposure is not work related.” (§
22 3205(c)(10)(C).)

23 140. The “[r]eturn to work criteria” element provides:
24
25

26 ⁵⁸ A COVID-19 “case” is a person who has a “positive ‘COVID-19 test,’” is subject to a
27 COVID-19-related order to isolate issued by a local or state health official, or who has died
28 “due to COVID-19.” (ETS Regs., § 3205(b)(2)(A)].) A person is no longer a “case”
“when a licensed health care professional determines that the person does not have
COVID-19.” (*Id.*, § 3205(b)(2)(B)].)

1 (A) COVID-19 cases with COVID-19 symptoms shall not return
2 to work until:

3 1. At least 24 hours have passed since a fever of
4 100.4 or higher has resolved without the use of fever-reducing
5 medications;

6 2. COVID-19 symptoms have improved; and

7 3. At least 10 days have passed since COVID-19
8 symptoms first appeared.

9 (B) COVID-19 cases who tested positive but never developed
10 COVID-19 symptoms shall not return to work until a minimum
11 of 10 days have passed since the date of specimen collection of
12 their first positive COVID-19 test.

13 (C) **A negative COVID-19 test shall not be required for an
14 employee to return to work.**

15 (ETS Regs., § 3205(c)(11)(A)-(C) [emphasis added].)

16 141. Requiring employers to provide no-cost testing and paid leave for employees
17 excluded from the workplace who are not sick is not authorized by the statutory authority
18 cited for these regulations — Labor Code sections 142.3 and 144.6 have nothing to do with
19 employee benefits. Other regulatory schemes cover worker benefits. (*See* paragraphs 234-
20 237 *infra.*)

21 142. The exclusion requirement contains two presumptions: (1) a de jure
22 irrebuttable presumption that an “exposed” worker is infectious, since an exposed worker
23 must be excluded from the workplace regardless of whether they tested negative or
24 positive or were tested at all; and (2) a de facto irrebuttable presumption that an excluded
25 worker is entitled to paid leave, since, as a practical matter, it would be virtually
26 impossible for an employer to show that “COVID-19 exposure is not work related.”

27 143. Even if an employer could show that exposure was not work-related, the
28 exclusion of persons “exposed” fails to take into account the labor shortages and supply
chain disruptions that would result, especially in time-sensitive industries with perishable
products like agriculture. (*See* paragraphs 160-182 *infra.*)

144. The return to work criteria, by not requiring a negative COVID-19 test, does
not seem designed to prevent COVID-19 transmission. The ETS also sets up a conflict

1 with other agricultural employers (farms producing animals and slaughterhouses) regulated
2 by a different Cal/OSHA standard, the Aerosol Transmissible Standard in section 5199.1
3 of Title 8.

4 **2. Multiple COVID-19 Infections and COVID-19 Outbreaks**

5 145. Section 3205.1 imposes obligations on employers when the place of
6 employment has been identified by a local health department as the “location of a COVID-
7 19 outbreak or when there are three or more COVID-19 cases in an exposed workplace
8 within a 14-day period,” which apply “until there are no new COVID-19 cases detected in
9 a workplace for a 14-day period.” (ETS Regs., § 3205.1(a)(1) & (2).) Among other things,
10 extensive, continuous no-cost COVID-19 testing is required (*id.*, § 3205.1(b)) and “cases”
11 and “exposed” employees must be excluded from the workplace in accordance with the
12 Prevention Program’s exclusion period and any applicable local health officer orders (*Id.*,
13 § 3205.1(c)). Defining an “outbreak” based on “three or more COVID-19 cases”
14 regardless of the size of the workplace is arbitrary.

15 **3. Major COVID-19 Outbreaks**

16 146. Section 3205.2 imposes obligations on employers when “there are 20 or
17 more COVID-19 cases in an exposed workplace within a 30-day period,” and applies
18 “until there are no new COVID-19 cases detected in a workplace for a 14-day period.”
19 (ETS Regs., § 3205.2(a)(1), (2).) Among other things, extensive no-cost COVID-19
20 testing is required (*id.*, § 3205.1(b)) and “cases” and “exposed” employees must be
21 excluded from the workplace in accordance with the Prevention Program’s exclusion
22 period and any applicable local health officer orders (*id.*, § 3205.1(c)). Defining an
23 “outbreak” based on the number of “cases” regardless of the size of the workplace is
24 arbitrary. Employers are required to “evaluate whether to halt some or all operations at the
25 workplace until COVID-19 hazards have been corrected.” (*Id.*, § 3205.2(e)(3).) But the
26 ETS is vague regarding what an employer must do to satisfy this requirement.

27 **4. COVID-19 Related Regulation of Employer-Provided** 28 **Housing**

1 147. Section 3205.3 applies to “employer-provided housing”—“housing that is
2 arranged for or provided by an employer,” which includes a “labor camp” and housing
3 maintained in “hotels and motels,” but excludes housing provided for “emergency
4 response,” where the employer is a “government entity,” or where persons “maintained a
5 household together prior to residing in employer-provided housing.” (ETS Regs.,
6 § 3205.3(a)(1) & (2).) Subdivision (c) requires employers to:

7 (1) Ensure the premises are of sufficient size and layout to
8 permit at least six feet of physical distancing between residents
in housing units, common areas, and other areas of the premises.

9 (2) Ensure beds are spaced at least six feet apart in all directions
10 and positioned to maximize the distance between sleepers’
11 heads. For beds positions next to each other, i.e., side by side,
12 the beds shall be arranged so that the head of one bed is next to
the foot of the next bed. For beds positioned across from each
13 other, i.e., end to end, the beds shall not be arranged so that the
foot of one bed is closest to the foot of the next bed. Bunk beds
shall not be used.

14 (3) In housing units, maximize the quantity and supply of
15 outdoor air and increase filtration efficiency to the highest level
compatible with the existing ventilation system.

16 (*Id.*, § 3205.3(c)(1)-(3).)

17 148. Other provisions address assignment of housing, face coverings, cleaning
18 and disinfecting, “screening” (i.e., “encourag[ing] residents to report COVID-19
19 symptoms to the employer”), and testing. (ETS Regs., § 3205.3(b) & (d)-(g).)

20 149. Subdivision (h) addresses “[i]solation of COVID-19 cases and persons with
21 COVID-19 exposure”:

22 (1) Employers shall effectively **isolate** COVID-19 exposed
23 residents from all other occupants. Effective **isolation** shall
include providing COVID-19 exposed residents with a private
bathroom, sleeping area, and cooking and eating facility.

24 (2) Employers shall effectively **isolate** COVID-19 cases from
25 all occupants who are not COVID-19 cases. Effective **isolation**
26 shall include housing COVID-19 cases only with other COVID-
19 cases, and providing COVID-19 case occupants with a
sleeping area, bathroom, and cooking and eating facility that is
27 not shared by non-COVID-19 case occupants.

28 * * *

1 (4) Employers shall end **isolation** in accordance with
2 subsections 3205(c)(10) and (c)(11) and any applicable local or
state health officers orders.

3 (ETS Regs., § 3205.3(h)(1), (2) & (4) [emphasis added].)

4 150. Labor Code sections 142.3 and 144.6 say nothing about the authority of the
5 Board to regulate employer-provided housing; other agencies, such as the CDHCD, have
6 jurisdiction in this area. Isolation of persons infected or exposed to infected persons is
7 within the purview of state and local public health officers, and not the Board or
8 Cal/OSHA. (*See* paragraphs 254-256 *infra.*) And as a practical matter, ETS section
9 3205.3 does not account for the housing shortages the physical distancing and isolation
10 requirements would cause, particularly in rural and remote areas. (*See* paragraphs 183-185
11 *infra.*)

12 5. COVID-19 Related Regulation of Employer-Provided 13 Transportation

14 151. Section 3205.4 applies to “employer-provided motor vehicle transportation
15 to and from work,” with exceptions where the driver and all passengers are from the same
16 household, and the transportation is necessary for emergency response. (ETS Regs., §
17 3205.4 (a)(1) & (2).) Provisions address assignment of transportation, physical distancing
18 and face coverings, screening, cleaning and disinfecting, ventilation, and hand hygiene.
19 (*Id.*, § 3205.4(b)-(f).) The physical distancing provision requires the “vehicle operator and
20 any passengers are separated by at least three feet in all directions during the operation of
21 the vehicle, regardless of the vehicle’s normal capacity.” (*Id.*, § 3205.4(c)(2).)

22 152. Labor Code sections 142.3 and 144.6 do not authorize regulation of worker
23 transportation; other regulatory schemes do cover worker transportation. (*See* paragraphs
24 242-253 *infra.*). The physical distancing requirement fails to take into account the
25 impracticality of “three feet in all directions” for most vehicles.

26 L. The ETS Presents Unique, Grave and Immediate Risks of Irreparable 27 Harm to All Critical Infrastructure Sectors, and in Particular to Agricultural Employers

28 1. The ETS Imposes One Set of Rules for All Employers Regardless of Vastly Different Circumstances

1 153. The ETS places all employers in all sectors at risk, but its failure to even take
2 into account significant differences between hardware stores or factories and orange
3 groves or dairy farms has devastating consequences for agriculture. While the arbitrary
4 and rigid requirements of the ETS also harm employers in other industries, perhaps no
5 industry is more vulnerable than agriculture to labor shortages, transportation strikes, and
6 even weather. Unlike a factory where production can be shut down, put on hold, and then
7 started up again, animals, fields, and orchards must be continually managed, crops are
8 perishable (often with very short windows of harvest), and produce cannot be stored
9 indefinitely.

10 154. Even within the agriculture industry, the ETS treats all employers the same,
11 regardless of (a) variations in geography, season, product, perishability of product, or how
12 product is harvested, (b) whether workers work outdoors (e.g., crop care workers or
13 harvesters) or indoors (e.g., cold room packers or food processors), (c) the availability of
14 local or employer-provided housing, or (d) whether a particular employer is already
15 complying with all other public health and safety requirements in an effort to keep workers
16 safe and healthy.

17 2. **Effect of Testing Rules**

18 155. The ETS requires an employer to “offer” free testing “during working hours”
19 to “all employees who had potential COVID-19 exposure in the workplace” and requires
20 mandatory testing when there is an “outbreak.” Both requirements fail to grasp the
21 realities of agriculture.

22 156. Under the ETS, an “outbreak” is arbitrarily defined as three positive COVID-
23 19 cases within a rolling two week period without regard to the size of the workforce (e.g.,
24 three cases in a workforce of twenty versus 1,000 employees) or location (e.g., in one
25 building or in a 200-acre field). In the event of an “outbreak,” all employees in the same
26 “workplace” — as of January 21, 2021 “the building, store, facility, **agricultural field**, or
27 other location where a worker worked during the infectious period” (Lab. Code §
28 6409.6(d)(5) [emphasis added]) must be “immediately” tested. (ETS Regs., §

1 3205.1(b)(2)(A).) As a result, growers will be required to provide COVID-19 testing to all
2 employees in an agricultural field — regardless of size — when there are three or more
3 COVID-19 cases within a 14-day period. Testing is mandatory regardless of whether an
4 employee was anywhere near an employee who tested positive or those who worked in
5 close proximity to the person who tested positive. The ETS seems to presume that the
6 workplace is static. This is untrue in agriculture. Farm labor crews move from one facility
7 or agricultural field to another, hugely expanding what constitutes the “exposed
8 workplace.”

9 157. It is also uncertain that employers will be able to secure sufficient tests for
10 large workplaces given the shortages of tests in some rural communities, especially when
11 all employers are under an obligation to test large numbers of employees. Further, it is
12 unclear how those tests can be “immediately” provided to employees who are in fields,
13 which are sometimes hours away from the employer’s offices. It is also unclear whether
14 qualified personnel would be available to administer tests, and whether field tests are even
15 possible.

16 158. Dairy farms are located in rural areas of the State. These areas have limited
17 access to COVID-19 testing services, which causes delays in receiving test results and
18 limit the number of available tests. Receiving test results in these rural areas can take up to
19 fourteen days. In addition, it is impracticable for dairy farms to gain access to provide
20 enough tests for all of their employees on a weekly basis in the event of a COVID-19
21 “outbreak” or “potential exposure” to a COVID-19 case. These restraints on the
22 availability of COVID-19 tests in rural areas make it impossible for dairy farmers to
23 comply with the ETS.

24 159. Logistics and scarcity issues aside, employers must bear the costs of testing.
25 For example, an employer with 80 employees, seeking to provide tests at \$127 per test
26 would incur \$11,600 the first week, and then a similar cost per week until there are no
27 additional positive cases. Such costs would repeat anytime there is an “outbreak” of three
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1 or more within the workforce, which is statistically likely to recur, depending on the
2 workforce size and pervasiveness of COVID-19 in surrounding communities.

3 **3. Effect of Exclusion Rules**

4 160. While both the ETS and the CDC use the same metric for their definitions of
5 “exposure” (the CDC uses the term “close contact”) — fifteen cumulative minutes of
6 exposure at a distance of six feet or less over a 24-hour period — the CDC uses this as an
7 “operational definition for contact investigation.” In contrast, the ETS uses it as a per se
8 rule, regardless of environmental factors, such as whether exposure was indoors or
9 outdoors, the duration and proximity of exposure, whether the infected person was
10 coughing, singing, or shouting, or whether the infected person displayed symptoms.

11 161. The CDC recommends testing be among the first tools in preventing or
12 containing the spread of COVID-19. The ETS does not require a positive test to be
13 excluded from the workplace or a negative test to return to work. In fact, the ETS does not
14 permit employers to consider the results of testing or medical examination at all. Once
15 “exposed” and thus excluded, the ETS creates a conclusive (or irrebuttable) presumption
16 that the employee cannot return to work for ten days.⁵⁹

17 162. Based on guidance promulgated by federal, state, and local authorities
18 (including Cal/OSHA agricultural-specific guidelines first issued on May 14, 2020), many
19 growers have conducted contact tracing whenever an employee tests positive, in addition
20 to reporting the case to county health officers. The ETS presumes that anyone “exposed”
21 may be presumed to be infected and therefore must be excluded from the workplace, thus
22 raising the question as to why it is necessary to do contact tracing in the first place. This
23 mandatory exclusion is not consistent with contact tracing procedures, and may in fact

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25 ⁵⁹ As previously noted, this aspect of the ETS is not consistent with CDC guidance
26 regarding non-symptomatic persons in critical infrastructure jobs. Such workers are not
27 required to be per se excluded from the workplace. (See CDC, *Interim Guidance for*
28 *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had*
Exposure to a Person with Suspected or Confirmed COVID-19
<https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf> [as of December 30, 2020].)

1 contradict directives of local public health officers, who have the legal authority to order
2 isolation and quarantine based on their definition of “close contact” with an infected
3 person.

4 163. The ETS, by prescribing exclusion and return to work criteria, regardless of
5 individual circumstances, puts employers in a no-win situation. Because testing expressly
6 cannot be required for an employee to return to work, co-workers will reasonably ask their
7 employer for assurances that it is safe to readmit an “exposed” employee to the worksite.
8 Because the employer cannot know whether the returning worker may have actually
9 contracted COVID-19 after being “exposed” to a COVID-19 case in the workplace or after
10 being excluded from the workplace and cannot know whether the worker may still be
11 contagious, it will be impossible for the employer to give employees any assurances.

12 164. The ETS requirement that “exposed” employees be “excluded,” as a result of
13 not only an “outbreak,” but even a single positive “case,” coupled with employer-paid
14 testing and paid leave, triggers a cascade of events that can have devastating financial and
15 operational consequences for employers in the agricultural industry. These consequences
16 arise from the direct costs to implement testing requirements and paid leave and the loss of
17 income, crops, and produce caused by labor shortages.

18 165. The costs of testing are compounded by the costs of paid leave for all
19 “exposed” employees, who must per se be “excluded” for ten days. For example, an
20 employer with 80 employees who has an “outbreak” of three cases in the “workplace”
21 must pay excluded employees at a minimum rate of \$12 for ten days, for a total of \$76,800
22 per each such “outbreak,” which is statistically likely to recur given the workforce size and
23 pervasiveness of COVID-19 in surrounding communities.⁶⁰

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26 ⁶⁰ Many employers in the agricultural industry already have robust programs to identify,
27 manage, and trace positive COVID-19 cases. Not surprisingly, given the pervasiveness of
28 COVID-19 in communities, employers have repeatedly traced positive cases to employees’
activities outside the workplace, when employees are not within the employer’s control,
such as gatherings during holidays, parties, and shared meals.

1 166. In addition to direct costs of testing and paid leave, agricultural employers
2 will likely experience crop and produce losses, which in turn results in financial losses.
3 Because crops are perishable, and often have short windows for harvesting and require
4 continuous management, they cannot simply be ignored while crews are excluded from the
5 workplace. When harvesting, packing, processing, cooling, shipping and distribution are
6 delayed, crops and produce must be ploughed under or otherwise destroyed, which means
7 financial losses for employers. This disruption to the food supply chain is especially
8 worrying during a pandemic.

9 167. Strawberry harvesting provides one example of the consequences of the ETS
10 conclusive presumption requiring exclusion of employees. Growers are currently
11 harvesting strawberries in the Santa Maria Valley in Santa Barbara and San Luis Obispo
12 Counties. Compared to other crops, strawberries are very labor intensive. Workers
13 examine every plant and pick only the ripe berries, leaving non-ripe berries on the plant to
14 be picked later. The pickers go back every three days to pick newly ripened berries. If this
15 process gets disrupted, the results can be catastrophic for the plants. If ripe berries are left
16 on the plant, they quickly become overripe and spoil. Fungi and spoilage organisms can
17 then infect and insects infest the plant. The whole plant can be lost. Leaving berries
18 unpicked can also condition the plant into “believing” its production cycle is ending,
19 potentially making the plant significantly less productive going forward. Thus, an inability
20 to manage large numbers of plants due to sidelined crews can lead to loss of entire crops
21 for the 16-month life cycle of strawberry plants.

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168. As the above photograph illustrates, strawberries are grown in rows, typically four feet apart. As crews go through the fields, it is impracticable to stagger them in a way that ensures they will remain more than six feet apart at all times. Should one member of a strawberry crew of 20 workers test positive, there is a strong likelihood that, under the ETS definition of “COVID-19 exposure,” the entire crew may have to be excluded for ten days. The loss of crews that size could have consequences well beyond the cost of paid leave, including long-term harm to plants and operations, as well as supply chain disruption.

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169. Seasonal crops, such as strawberries, present unique challenges, including conditions beyond the grower’s control, such as heat wave, rainstorm, frost, or hailstorm, all with the potential to ruins crops. These weather conditions require immediate action – workers must quickly salvage as much of the undamaged fruit and remove as much of the damaged fruit as possible. A labor shortage caused by the ETS mandatory employee exclusion, even if employees test negative, would have devastating consequences.

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170. The unavailability of certain employees, such as those involved in plant management, can affect the long-term production of crops. For example, one grower of

1 various commodities, including lettuce, spinach, broccoli, carrots, onions, and
2 strawberries, in Salinas Valley, hires crews of eighteen to thirty workers to manage crops,
3 including by thinning and weeding. The majority are domestic workers who have their
4 own housing and transportation, outside the company's control, but who also visit outside
5 the workplace and share rides to work. If any of them contracted COVID-19, the ETS
6 would require the company to exclude them from work with paid leave. Their
7 unavailability to perform critical work in managing crops could reduce yield by up to thirty
8 to forty percent.

9 171. The California dairy industry could also face detrimental consequences from
10 compliance with the ETS. The dairy industry is highly interconnected, and depends on the
11 timely functioning of various components to operate properly. Delays in any part of the
12 dairy supply chain could lead to spoilage and waste of milk and milk products.

13 172. Dairy farming requires the work of laborers who cannot be replaced on short
14 notice. For example, workers milking cows are highly skilled and work in small teams,
15 usually of three to four workers at a time. Each of the workers plays a critical role in the
16 milking process. If even a single worker is exposed to COVID-19, the ETS requires that
17 worker to be excluded from the dairy farm even if they test negative or show no symptoms
18 of COVID-19. Mission critical employees, such as dairy truck drivers, who cannot be
19 easily replaced would have to be removed from the workplace should they have any
20 "COVID-19 exposure," thus creating a bottleneck preventing milk from being delivered.
21 Loss of a single worker will cause delays in the milking process, which could have a
22 catastrophic impact on the health and productivity of the cows, which must be milked on a
23 strict schedule. Dairy farmers in this situation who must milk their cows will face the
24 terrible choice of either violating the ETS to allow the exposed worker to continue working
25 or violating other labor laws by requiring the other workers to work overtime to
26 compensate for the excluded worker's lost labor.

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1 173. As with other row crops, picking lettuces, cabbage, cauliflower, bok choy,
2 and other leafy produce requires a crew to move systematically through the agricultural
3 field.



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12 174. As the above photograph illustrates, farmworkers necessarily work in
13 relatively close quarters when they pick lettuce. It is not practical or economically feasible
14 to separate workers by leaving every other row unharvested for a variety number of
15 reasons that go beyond cost and inefficiency. In fact, one grower of leafy greens tried
16 alternate row harvesting to maintain social distancing. The experiment concluded when
17 the grower determined, based on contact tracing and crew monitoring, that physically
18 separating crews in this manner did not have any appreciable impact on the spread of
19 COVID-19 within these crews.

20 175. As the photograph below illustrates, other growers have used plastic barriers
21 on their harvesting equipment as an alternative to social distancing.

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176. These barriers may or may not slow the spread of COVID-19. For purposes of the ETS’s per se rules, it would not matter, because the workers likely would be deemed to have been “exposed” because they were working within six feet of one another, even though they are working outdoors and wearing masks. The barriers simply are not part of that calculus, just as other safety measures or environmental factors are also deemed irrelevant under the ETS.

177. Because agricultural fields are large and spread out over miles, growers must transport workers to the “workplace,” in trucks, vans, or other farm labor personnel carriers. This means that, for at least the duration of that trip, workers will be in close proximity while being moved from field to field, even if those workers were not on the same crew picking lettuce with the COVID-19 case.

178. In other words, the ETS’s mandatory removal provisions could result in losing not only an entire crew, but other workers “exposed” in the agricultural field, break room, bathroom, or parking lot to a positive case, including drivers, crew bosses,

1 inspectors, and other critical workers. This mandatory rule is not consistent with the CDC
2 guidance for essential workers potentially exposed to a COVID-19 case. It is also
3 completely irrational, given the realities of how perishable crops must be picked.

4 179. These losses are not limited to farmers and growers. Cooling facilities are
5 used to store produce, such as leafy greens, prior to shipment. It is a critical link in the
6 food supply chain. Should a worker in a cooling facility test positive, it is possible that
7 others who work around that employee could be “exposed,” as that term is defined in the
8 ETS. In that event, it is possible, if not likely, that due to the loss of trained cooling
9 facility employees, the entire facility may have to close. But even the temporary removal
10 of some of these critical workers would have the effect of reducing the capacity of the
11 cooling facility for lack of manpower. This will have a domino effect on both sides of the
12 supply chain.

13 180. First, it will mean that fewer pallets of produce can be brought into the
14 facility. Thus, the operator of the cooling facility will have to ration the amount of
15 produce each grower may be able to store in the facility. Second, it means that less
16 produce will be available to go to customers when needed, thus limiting supply to
17 wholesalers, institutional food suppliers, and grocery stores.

18 181. A loss of crops due to a shortage of available workers caused by exclusion
19 under the ETS can have even more of a ripple effect. For example, if a grower cannot
20 meet contractual commitments to those downstream in the supply chain such as food
21 wholesalers, wholesalers will have to buy products on the open market, potentially at
22 higher prices to satisfy their own contractual obligations to grocery stores and restaurants,
23 causing even more financial losses.

24 182. For most agricultural employers –whether growers, shippers, farm labor
25 contractors, processors or distributors – the lack of labor that would necessarily be caused
26 by the per se exclusion rules of the ETS could be devastating, even if they are not required
27 to remove workers under the regulation’s per se exclusion rule. If other employer “links”
28 in the food supply chain suffer a major disruption due to a labor shortage – especially in a

1 region with especially acute shortages – there will be inevitable ripple effects. While some
2 employers may be able to pass on cost increases, such as farm labor contractors, others
3 may not be able to pass on price increases. Some growers may be contractually locked into
4 pricing. Some purchasers may have options to buy seasonal vegetables elsewhere if faced
5 with higher prices. In combination with other, additional direct expenses imposed by the
6 ETS, such as testing, paid leave, transportation and housing (assuming housing or
7 transportation may be had), this could prove financially ruinous to many employers.

8 **4. Effect of Employer-Provided Housing Rules**

9 **a. The Farm Labor Housing Shortage**

10 183. There is a historic shortage of available housing for agricultural workers.
11 This is especially true in coastal counties with high populations of agricultural workers,
12 such as Monterey County, Santa Barbara County, and Ventura County. Even before
13 COVID-19, agricultural growers all struggled to find adequate housing for their
14 employees, and some even opted to construct employee housing to provide housing that
15 was otherwise unavailable to their employees. Employers have also opted to use a wide
16 variety of housing, including dormitories, motels, hotels, and apartments. It is very
17 difficult to find additional housing on a short term basis, because there is simply not
18 enough housing or real estate to house all agricultural workers, especially in coastal areas.

19 184. There are also housing shortages in rural communities in California. For
20 example, in the Santa Maria Valley there is a severe housing shortage. Growers have
21 encountered push-back about housing guest workers in homes in various neighborhoods.
22 The City of Santa Maria has therefore asked them to house guest workers in hotels and
23 motels; however, there are not enough hotels and motels in the area to accommodate all
24 guest workers. The additional housing restrictions imposed by the ETS have only
25 compounded the problem, leaving growers scrambling to find and competing for a
26 shrinking pool of additional replacement housing to comply with the ETS. Even if
27 available, costs will be significantly increased for one-third more units at likely higher
28 rates.

1 185. Employers in the agricultural industry often use employer-provided housing,
2 either as an optional benefit or a mandatory requirement for foreign national “guest”
3 workers, in order to secure sufficient labor to meet their needs. This is often true of FLCs,
4 who recruit, hire, furnish and supervise seasonal or temporary agricultural laborers for a
5 fee. They most often enter into contracts with growers to provide a labor workforce to
6 harvest and pack crops. FLCs can have laborers numbering in the hundreds or thousands,
7 contractually committing their workers year- round, moving from one grower and field to
8 another, based on crop, season, and other factors.

9 **b. H-2A Guest Worker Housing**

10 186. FLCs frequently rely on the H-2A visa program to obtain guest workers and,
11 as a result, are required by law to provide housing (though they may also provide housing
12 as a benefit to some domestic workers). Growers may also offer employer-provided
13 housing, either as a benefit for domestic workers or as a legal requirement when they
14 directly hire guest workers.

15 187. Given the well-recognized, chronic labor shortage for agricultural workers,
16 including laborers who work in the field, FLCs and growers must often resort to using the
17 H-2A guest worker program, bringing in foreign nationals on temporary visas, to satisfy
18 their labor needs. The need for such labor has continually increased over the years. This
19 year presented a particular shortage of domestic workers. There are a limited number of
20 people in the domestic labor force willing to do field work, and increasing wages only ends
21 up taking employees from other growers, who will then suffer their own labor shortages.

22 188. The H-2A visa program allows a foreign national worker into the United
23 States for temporary agricultural work. The employer must apply for visas to bring in
24 enough guest workers to meet their temporary labor needs. The employer also has to have
25 in place, before the application, certified, housing for the guest workers. To demonstrate
26 this, the employer must first submit an application to EDD for job orders, at least 60 to 75
27 days before date of need, identifying the specific housing intended to be used for the guest
28 workers. Then EDD (or, alternatively, DCHCD and the appropriate county agency) will

1 initiate inspection of the housing to determine whether it satisfies strict and specific state
2 and federal standards. Concurrently, and at least 45 days before date of need, the employer
3 must also file an application with the federal Department of Labor (“**U.S. DOL**”),
4 incorporating the EDD application and job order, which identifies the specific housing to
5 be used. If the application is incomplete, for example if the EDD does not certify the
6 number of people in the housing that the employer requested, the U.S. DOL’s certification
7 will be delayed until all issues are resolved. Once the U.S. DOL application is complete,
8 the U.S. DOL will provide certification – historically at least 30 days ahead of need.
9 Finally, the certification will be provided to U.S. Citizenship and Immigration Services for
10 visa approvals, and the employer will go to the consulate for issuance of the visas. The
11 process usually takes two to three months.

12 189. Employer-provided housing may take various forms, from permanent
13 apartment-style housing built by the employer, to leased properties to hotel and motel
14 rooms. Regardless of the type of housing, H-2A regulations impose various requirements
15 on housing for guest workers. If three workers are housed together, each has to have fifty
16 square feet of sleeping space. (29 C.F.R. 1910.142(b)(2).) Employers have necessarily
17 contracted for housing meeting that standard. The ETS upends this. Under the ETS, no
18 occupant or bed can be within six feet of another, which results in no more than two
19 persons per room. This new, diminished capacity forces employers to either find local
20 housing for the third person or lose that person for the season.

21 190. Grape growers in Northern California must begin winter pruning in January
22 2021. Due to a shortage of domestic farm labor (particularly in Sonoma and Napa
23 Counties), employers rely on the H-2A program to meet their labor
24 requirements. Northern California growers submitted their applications to the H-2A
25 program well before the Board disclosed the ETS mandated restrictions on occupancy for
26 employer-provided housing.

27 191. EDD has recently declined to certify employers’ requests for H-2A workers
28 because the housing obtained based on the number of workers requested does not comply

1 with ETS capacity restrictions, largely due to the ETS prohibition on the use of bunkbeds
2 and the requirement of six-foot distance from bed-corner-to-bed-corner.⁶¹

3 192. Because U.S. DOL certification of H-2A worker applications hinges on
4 prior EDD approval, the U.S. DOL has delayed certification pending resolution of this
5 issue with the EDD. Due to this uncertainty, some employers have agreed to accept a
6 smaller number of workers just to get their U.S. DOL certification.

7 193. Pruning must take place during a specific time window – generally speaking,
8 roughly four months after harvest but before budbreak. The timing as to when pruning
9 should occur depends on the grape varietal, as well as factors not within the control of
10 growers, such as frost, spring rains, and variations in local weather. If there is not a
11 sufficient number of H-2A workers available at the time when pruning must occur, crop
12 yield and quality will be impacted.

13 **c. Agricultural Employers Have Implemented Effective**
14 **Protocols to Mitigate or Prevent the Spread of the Virus in**
Employer-Provided Housing

15 194. A large grower, shipper, and distributor who employs 2,800 employees at
16 any given time, with California operations in Monterey and Imperial Counties, is also
17 facing housing obstacles created by the ETS. This company has spent millions of dollars
18 to build permanent housing for 800 of its workers. The housing is primarily designed to
19 accommodate eight people per unit, divided into two rooms and common space (including
20 a living room, television, WiFi and kitchen). The units are provided to guest workers at no
21 cost, but also to domestic workers at a modest cost (\$125/month) as a benefit. At the start
22 of the COVID-19 pandemic, the company drastically cut down the occupancy of its units
23 in an effort to protect workers. However, the new ETS rules, which categorically prohibit
24 bunkbeds (regardless of space or engineering controls) and require six-foot distance from
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26

27 ⁶¹ In fact, on December 29, 2020, EDD advised H-2A employers that it “will be following
28 the new Emergency Temporary Standards with an emphasis on the Housing Inspections to
ensure compliance within the H-2A Program.” (See Exh. 12.)

1 bed corner to bed corner (as a practical matter often resulting in nine or more feet between
2 occupants), will require the company to cut housing capacity by half or more.

3 195. Similar housing obstacles are faced by FLCs. One midsize FLC in business
4 since 1950 provides labor to growers eight months of the year in California, largely to
5 harvest leafy greens and vegetables. It hires 6,500 workers per year, with 900 to 1,200
6 workers available at any given time, and has increasingly relied on the H-2A program as
7 domestic labor has become less and less available. This FLC has spent millions to build an
8 apartment-style housing complex for its workers, consisting of two units (each with four
9 beds and a dedicated bathroom) connected by a common area (living room, television, and
10 kitchen). The units are largely provided to H-2A guest workers, but also as a benefit to a
11 small percentage of domestic workers. In light of the new ETS restrictions, this FLC will
12 have to cut its housing capacity by at least half.

13 196. The ETS housing restrictions will also have negative effects on larger FLCs.
14 One FLC has provided H-2A guest workers in several states, including California,
15 Arizona, Nevada, Oregon, Texas, Colorado, and Florida, for almost forty years. This FLC
16 serves most of the major brands in the produce section of local grocery stores that feed the
17 nation its leafy greens, berries, citrus, garlic, pears, tomatoes, and various other
18 commodities.

19 197. Throughout the year, this FLC employs approximately 5,000 to 6,000
20 workers. Because agricultural work is seasonal, the company hires workers for varying
21 lengths of time to fit the seasonal labor needs of the commodity being handled. At any
22 given moment, the company employs approximately 2,000 workers, with fluctuation
23 depending on demand for domestic labor, which takes priority over H-2A workers for
24 available job opportunities. Approximately 90% of the workforce are on H-2A visas. The
25 other 10% are domestic workers who live in the areas near worksites.

26 198. In May 2020, this FLC adopted a rigorous COVID-19 prevention protocol in
27 order to minimize the spread of COVID-19 in its workplaces. This included strict
28 protocols for monitoring employee symptoms, sanitizing work and living areas,

1 engineering controls for minimizing employee exposure, and education for workers. The
2 company has spent approximately \$3 million on these protocols since May.

3 199. One of this FLC’s most successful protocols was adopting a three-pronged
4 system of monitoring, quarantining, and isolating employees with potential exposure to
5 COVID-19. Employees who show symptoms of COVID-19 or have been exposed to
6 someone with COVID-19 are given a questionnaire that asks about various factors,
7 including their symptoms, how long they have had symptoms, who they have been in
8 contact with, who their roommates are, what medical care—if any—they have received,
9 and more. If the employee shows at least 3 symptoms of COVID-19, they are placed in
10 “quarantine housing,” single-occupant rooms specifically set aside for workers with
11 COVID-19 to stay away from coworkers. These quarantine housing units are provided in
12 addition to the housing units generally provided to other employees. Quarantined
13 employees are not allowed to work for the first three days to confirm whether symptoms
14 develop. Workers in quarantine housing are monitored for symptoms based on
15 temperature checks and their responses to questions about their symptoms. If symptoms
16 develop, they are tested for COVID-19.

17 200. Workers who test positive for COVID-19 are placed in “isolation housing.”
18 Like quarantine housing, isolation housing is separate from the general housing provided
19 to employees. Unlike quarantine housing, isolation housing includes “wrap around care,”
20 including nursing visits, food delivery, laundry delivery, and other services. Workers
21 providing wrap around care are given PPE. These wrap around care protocols minimize
22 contact between the employee and other workers. After isolation, employees are allowed
23 to return to work if they test negative for COVID-19, or if they are symptom-free for ten
24 days, have gone at least 24 hours without a fever without fever-reducing medication, and
25 other symptoms of COVID-19 are improving.

26 201. This FLC’s COVID-19 prevention protocol has been highly effective. On
27 average, between May and December 2020, **less than 0.57% of its total workforce tested**
28 **positive for COVID-19.** The rate of infection was highest when the protocol was first

1 adopted in May and June, with positivity rates of 1.65% and 1.02%, respectively. The
2 positivity rate quickly declined to 0.88% in July, 0.30% in August, and 0.00% in
3 September. Only one employee has tested positive for COVID-19 in December to date,
4 accounting for 0.06% of the current total workforce.

5 202. This FLC also performs rigorous contact tracing. As a result, it has found
6 that the vast majority of infections originated with domestic workers living in their own
7 private housing, not H-2A guest workers residing in employer-provided housing.

8 **d. The ETS Housing Requirements Will Severely Harm**
9 **Agricultural Employers and Employees**

10 203. The effect of cutting housing capacity for agricultural employers by half has
11 a devastating ripple effect.

12 204. Since H-2A workers cannot be brought to the United States unless free
13 employer-provided housing is in place, the ETS puts employers in a dilemma. Employers
14 are forced either to secure more housing for guest workers – substantially increasing their
15 costs (as much as doubling) if additional housing is even available – or bring in far fewer
16 workers, causing a labor shortage. A labor shortage, in turn, leads to the negative
17 consequences discussed above, including rotting and loss of perishable crops, costs of
18 destroying crops, inability to store and ship produce, lost income, potential long-term
19 productivity decreases, liability for failure to meet contractual obligations, etc. Labor
20 shortages are particularly devastating because the process for obtaining guest workers
21 takes 60 to 90 days.

22 205. Even where employers are inclined or able to absorb a doubling of their
23 housing costs, such housing cannot always be found. For example, in Monterey where
24 these employers have operations, there is well-known housing shortage. Many individuals,
25 including those working in agriculture, are already not living in secure and safe places,
26 e.g., in overcrowded houses sleeping in closets, on couches, or on the floor. There are not
27 enough apartments or hotel and motel rooms to accommodate the drastically increased
28 need for housing, especially if all agricultural employers suddenly need more housing to
comply with the ETS in communities with existing shortages.

1 206. If employers must suddenly cut their housing capacity by half, they will have
2 to provide all available housing to H-2A workers, who must by law be provided employer-
3 arranged housing. This means that domestic workers who currently enjoy housing benefits
4 will lose their housing, and be forced to seek housing in a market experiencing a shortage.
5 Domestic workers would thus need to seek housing with no employer oversight, and may
6 be left with no alternative but to share overcrowded units. It is inexcusable to create rules
7 that oust workers from well-maintained and regulated housing into uncertain or insecure
8 housing in the midst of a pandemic.

9 207. Forcing employers to cut their housing capacity by half will also undermine
10 existing COVID-19 prevention protocols adopted by employers who have established
11 separate housing units to allow workers to quarantine or isolate without contact with other
12 employees. If these employers are forced to find additional housing units to comply with
13 the ETS, they will be forced to convert their quarantine and isolation housing into general
14 housing for their employees. Employers will have no available housing for employees
15 infected with COVID-19, forcing them to 1) isolate in the same general housing units as
16 other employees, potentially infecting other employees; 2) find housing outside of the
17 employer-provided housing units, which may be impossible in light of housing scarcities;
18 or 3) return to their homes, risking infection to others they travel with and their families.

19 208. The ETS is having an immediate and irreparable effect on employers with H-
20 2A workers in the country when the ETS went into effect. Those guest workers would
21 either have to be removed from their housing to comply with the ETS, which would violate
22 the employer's obligation to the U.S. DOL, or the employer would have to let those guest
23 workers remain in their housing, which would violate the ETS. It is a cruel choice
24 imposed on both the employer and worker. And even if an employer is inclined to send the
25 guest worker back to his or her home country, the employer is still obligated to pay that
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27
28

1 guest worker 75% of his or her remaining contract, under what is commonly known as the
2 “three-quarter guarantee.”⁶²

3 209. The ETS housing regulations do not allow for alternatives, such as installing
4 plexiglass or other barriers between existing worker sleeping spaces, to address social
5 distancing guidelines. They also do not allow employers to calculate six feet between
6 occupants (as opposed to bed-corner-to-bed-corner), or to arrange occupants such that they
7 can measure six feet from head-to-toe, as other regulations – such as those enforced by the
8 Los Angeles County Public Health Officer permit. The ETS’s strict and unyielding
9 requirements effectively guarantee that **all** existing housing certified under the H-2A
10 program is inadequate, regardless of any other measures agricultural employers take to
11 mitigate COVID-19 exposure.

12 210. The strict rules of the ETS are irrational as well as harmful. For example, the
13 regulations require but do not explain how employers are supposed to comply with the
14 requirement that they “ensure that unwashed dishes, drinking glasses, cups, eating utensils,
15 and similar items are not shared.” (ETS Regs., § 3205.3(e)(2).) Nor do they explain how
16 employers are required to guarantee the cleanliness of common spaces **inside** residential
17 units in which workers reside (as opposed to cleaning common areas outside of such units,
18 e.g., shared laundry space). Though employers provide cleaning supplies, this does not
19 “guarantee” cleanliness. The only way to do so would be to hire cleaning crews to enter
20 workers’ residences, which itself raises a host of issues including (a) the cost of hiring
21 crews, (b) violation of privacy rights of residents, and (c) perhaps most important, putting
22 in danger both cleaning crews and residents by introducing new people into the living
23 environment and creating new contacts, especially when most workers are “cohorts”
24 living, transporting and working in COVID-19 bubbles. The Board never explains how
25

26 ⁶² As a requirement of the H-2A program, employers must enter into written contracts with
27 each guest worker, and each such contract guarantees a certain amount of work per week
28 and number of weeks. If an employer is unable to satisfy that requirement, the guest
worker must be paid 75% of any remaining obligation at the minimum hourly rate of
\$14.77 per hour.

1 these strict requirements of the ETS protect employees in the workplace when they do not
2 in any way regulate domestic employees' housing situations. Domestic employees live in
3 their own housing, often overcrowded, and often travel together. Employers cannot
4 control and the ETS does not regulate any of this. Such employees can have more
5 significant exposure to COVID-19, bringing COVID-19 "cases" into the workplace
6 regardless of employer compliance with costly ETS strictures on employer-provided
7 housing.

8 **5. Effect of Employer-Provided Transportation Rules**

9 211. Transporting employees from their residence to the fields is an important
10 though not mandatory benefit for employees. While it is a legal requirement for H-2A
11 guest workers, it is not otherwise a condition of employment. Employers who have built
12 permanent H-2A-compliant permanent housing for their H-2A guest workers must offer
13 transport for workers from their residences to the fields. Many workers still choose to
14 carpool.

15 212. To transport guest workers, employers use private vans or buses, or a limited
16 number of public carpooling systems that charge employers on a per mile basis.

17 213. Many growers have purchased buses to transport workers, which have
18 limited seating capacity. These buses are often custom-made by manufacturers in order to
19 comply with California vehicle emissions standards. In response to COVID-19, growers
20 have taken measures to reduce COVID-19 transmission, e.g., making sure windows are left
21 open and everyone on board wears a mask, installing hand cleaning stations, and cleaning
22 between each use.

23 214. Notwithstanding the numerous safety measures and engineering controls
24 already put in place by employers, the ETS mandates at least three feet between each
25 person in a vehicle, which can reduce capacity by two-thirds in a bus with a seventy-two
26 person capacity and by half in a bus with a forty person capacity. Thus, complying with the
27 ETS requires employers to acquire more vehicles. If they cannot afford to do so, they will
28

1 need to make multiple trips, and stagger crews, which is disruptive to operations,
2 especially since round trips (from housing to fields and back) can sometimes take hours.

3 215. Initially, double or more trips will cost double or more to transport H-2A
4 workers from their housing or pick-up point to the field or other work location. Similarly,
5 if the employer uses a public carpooling system, double the trips means double the per-
6 mile fee.

7 216. Even if employers were able to absorb this additional cost, it is unlikely that
8 sufficient transportation would be available. There is a shortage of qualified bus drivers
9 for such work. Bus drivers for farm labor transportation must have a class B driver's
10 license and certified qualification for farm labor transportation from the California
11 Highway Patrol ("CHP"). The tests for these bus driver qualifications are difficult to pass,
12 and drivers must be recertified periodically. These qualification requirements limit the
13 number of available drivers, which were already scarce before COVID-19 and the ETS.
14 Buses that comply with California emissions requirements are also scarce. To avoid
15 staggering of transportation schedules, employers would be forced to purchase additional
16 buses, but buses may take up to two years after being ordered to be manufactured and
17 delivered. The most prevalent third party carpooling system available, Cal Vans, has
18 already stated its capacity is quickly filling up, advising employers to reserve spaces well
19 in advance. This capacity problem is only exacerbated by agricultural employers required
20 to double their transportation requirements to comply with the ETS. If unable to secure
21 sufficient transportation, employers will face daily labor shortages.

22 217. Even where transportation can be arranged and costs absorbed, the
23 staggering of workers during multiple trips, starting at different times, will lead to other
24 negative consequences. For example, employers would need to have some workers taken
25 to the field, while others await the bus; and those waiting in the fields would wait for those
26 who come on the next bus so they can complete a crew and start working. This is
27 problematic as some round trips can take hours, and some crews, such as broccoli
28 harvesters, cannot start working until the whole team is there, given the nature of the team,

1 equipment, and work. Meanwhile, all the waiting time would be compensable, adding to
2 the ever increasing costs for the employer; and the delays would likely require overtime
3 work, which would further increase costs. This can also lead to a stressed and overworked
4 workforce, which can actually result in a less safe workplace.

5 218. Staggering workers could also run afoul of H-2A requirements, since H-2A
6 workers have written contracts with certain guaranteed hours per week, and weeks per
7 season. To avoid giving H-2A less hours than contractually promised, employers would
8 have to take guest workers out to the fields first, while domestic workers waited for the
9 next bus. But that would result in domestic employees being disfavored by receiving
10 fewer hours than H-2A workers, which the law does not permit. (8 U.S.C. § 1188(a)(1).)

11 **FIRST CAUSE OF ACTION**

12 **DECLARATORY RELIEF**

13 **(Against All Defendants)**

14 219. Plaintiffs incorporate by reference and reallege each allegation set forth
15 above.

16 220. Code of Civil Procedure section 1060 authorizes this Court to render a
17 declaratory judgment in cases of actual controversy relating to the legal rights and duties of
18 the respective parties.

19 221. Government Code section 11350(a) authorizes this Court to render a
20 declaratory judgment as to the validity of the ETS based on its “substantial failure to
21 comply” with the requirements of the APA, or “upon the ground that the facts recited in
22 the finding of emergency . . . do not constitute an emergency” under Government Code
23 section 11346.1.

24 222. Defendants have promulgated and are enforcing standards in a manner that
25 interferes with Plaintiffs’ and their members’ rights and violates California statutory law
26 and the California and U.S. Constitutions.

27 223. An actual and substantial controversy exists between Plaintiffs and
28 Defendants as to the parties’ respective rights and responsibilities. A judicial determination

1 of the parties’ rights and the constitutionality of the ETS, as applied to Plaintiffs and their
2 members, will give relief from the uncertainty and insecurity giving rise to this
3 controversy.

4 224. Plaintiffs seek a declaration as to whether the ETS was promulgated in
5 violation of the APA, exceeds the Defendants’ statutory authority, violates the California
6 Constitution, and/or violates the U.S. Constitution.

7 **SECOND CAUSE OF ACTION**
8 **WRIT OF TRADITIONAL MANDATE**
9 **(Against All Defendants)**

10 225. Plaintiffs incorporate by reference and reallege each allegation set forth
11 above.

12 226. Plaintiffs seek a writ of traditional mandamus under Code of Civil Procedure
13 section 1085, which provides that a writ of traditional mandamus is available to compel
14 public agencies to perform acts required by law, for failure to perform a mandatory duty,
15 or for review of quasi-legislative action by a local agency. A writ of traditional mandamus
16 “may be issued by any court to any inferior tribunal, corporation, board, or person, to
17 compel the performance of an act which the law specially enjoins, as a duty resulting from
18 an office, trust, or station, or to compel the admission of a party to the use and enjoyment
19 of a right or office to which the party is entitled, and from which the party is unlawfully
20 precluded by that inferior tribunal, corporation, board, or person.” (Code Civ. Pro.,
21 § 1085(a).) The procedure set forth in section 1085 is used to review adjudicatory
22 decisions when the agency is not required by law to hold an evidentiary hearing. (*Scott B.*
23 *v. Bd. Of Trustees of Orange Cty. High Sch. Of the Arts* (2013) 217 Cal.App.4th 117, 122-
24 23 [158 Cal.Rptr.3d 173].) A decision that was “arbitrary, capricious, or entirely lacking
25 in evidentiary support” will not be upheld. (*Ibid.*)

26 227. Plaintiffs have a clear, present, and direct beneficial interest in, and right to,
27 Defendants’ performance of their legal duty to find legitimate means of addressing
28 COVID-19 in the workplace, which includes a duty not to exceed the authority delegated

1 to Cal/OSHA by the Legislature, a duty to find an emergency and the need to promulgate
2 emergency regulations to address an emergency based only on satisfying the legal
3 requirements for doing so, and a duty to rely on science and experience and to act
4 reasonably when promulgating regulations.

5 228. At all times relevant to this action, Defendants have had the ability to
6 perform the duties set forth herein, and have failed and refused to do so. Defendants have
7 acted arbitrarily, capriciously, and without legal basis in refusing to carry out or discharge
8 their mandatory duties as set forth herein.

9 229. Unless compelled by this Court to perform those acts and duties and to
10 refrain from acts as required by law, Defendants will continue to refuse to perform said
11 duties and continue to violate the law, and Plaintiffs and their members will be injured as a
12 result.

13 THIRD CAUSE OF ACTION

14 **VIOLATION OF THE CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH** 15 **ACT**

16 **(Lab. Code § 6300, et seq.)**

17 **(Against All Defendants)**

18 **(No Statutory Authority)**

19 230. Plaintiffs incorporate by reference and reallege each allegation set forth
20 above.

21 231. The Legislature’s “intent” is that “the occupational safety and health
22 standards and orders promulgated under [the Labor Code],” are applicable to “**employers**
23 **for the exclusive purpose of maintaining and enforcing employee safety.**” (Lab. Code,
24 § 6304.5 [emphasis added].) The Board’s authority to set standards is limited by
25 Cal/OSHA’s jurisdiction. (*United Air Lines, Inc. v. Occupational Safety and Health*
26 *Appeals Bd.* (1982) 32 Cal.3d 762, 768 [654 P.2d 157, 187 Cal.Rptr. 387].) Cal/OSHA
27 “has the power, jurisdiction, and supervision over every **employment and place of**
28 **employment** in this state, which is necessary adequately to enforce and administer all laws

1 and lawful standards and orders, or special orders **requiring such employment and**
2 **palace of employment to be safe**, and requiring the protection of the life, safety, and
3 health of every employee **in such employment or place of employment.**” (Lab. Code, §
4 6307 [emphasis added].)⁶³ Cal/OSHA’s jurisdiction, however, does not extend to “a place
5 where the health and safety jurisdiction is **vested by law in, and actively exercised by**,
6 any state or federal agency other than the division.” (Lab. Code, § 6303(a) [emphasis
7 added].)

8 232. The Board is “the only agency in the state authorized to adopt occupational
9 safety and health standards.” (Lab. Code, § 142.3(a)(1).) The Board is only authorized to
10 adopt occupational safety and health standards enforced by Cal/OSHA. (Lab. Code, §§ 142
11 & 142.3(a)(1).)

12 233. The Legislature’s intent is for the Board and Cal/OSHA to regulate hazards
13 created by the nature of the workplace. The ETS, however, improperly seeks to regulate
14 outside the area of workplace safety and with respect to a hazard that does not originate in
15 the workplace and is not caused by employers, but that exists outside and may be brought
16 into the workplace. The Board has not established any nexus between COVID-19 and
17 workplaces generally, and merely concluded, without supporting scientific data or studies,
18 that COVID-19 presented a workplace emergency that employers were failing to address.

19 234. Defendants’ overreach disregards the statutory structure of the Labor Code,
20 the Legislature’s intent, and the jurisdiction of other agencies, including the Division of
21 Labor Standards Enforcement (“**DLSE**”), DHCD, CHP, Public Utilities Commission
22 (“**PUC**”), CDPH, and U.S. DOL.

24 ⁶³ “‘Place of employment’ means any place, and the premises appurtenant thereto, **where**
25 **employment is carried on**, except a place where the health and safety jurisdiction is
26 vested by law in, and actively exercised by, any state or federal agency other than the
27 division.” (Lab. Code, § 6303(a) [emphasis added].) “‘Employment’ includes the carrying
28 on of any trade, enterprise, project, industry, business, occupation, or work, including all
excavation, demolition, and construction work, or any process or operation in any way
related thereto, in which any person is engaged or permitted to work for hire, except
household domestic service.” (Lab. Code, § 6303(b).)

1 235. The Board had no authority to adopt and Cal/OSHA has no authority to
2 enforce the following regulations:

- 3 • ETS section 3205(c)(10)(C) (paid leave for “exposed” workers and “cases”)
4 (Cal. Code Regs., tit. 8, § 3205(c)(10)(C));
- 5 • ETS section 3205.3 (distancing and other mandates for employer-provided
6 housing) (Cal. Code Regs., tit. 8, § 3205.3);
- 7 • ETS section 3205.4 (distancing and other mandates for employer-provided
8 transportation to and from work) (Cal. Code Regs., tit. 8, § 3205.4);
- 9 • ETS section 3205.3(h)(1)-(3) (requiring employers to “isolate” “exposed
10 residents” and “cases” in employer-provided housing) (Cal. Code Regs., tit.
11 8, § 3205(h)(1)-(3));
- 12 • ETS section 3205(c)(3)(B)(4.) (“no cost” testing of workers with “potential”
13 “exposure”) (Cal. Code Regs., tit. 8, § 3205(c)(3)(B)(4)).

14 **ETS sections 3205(c)(10)(C), 3205.1(c), 3205.2(c) (paid leave for**
15 **“exposed” workers and “cases”)**

16 236. The structure of the Labor Code demonstrates the Board’s legislatively-
17 delegated authority over occupational safety and health does not extend to job security and
18 employment benefits, including the circumstances under which an employee may be
19 entitled to paid leave due to safety and health concerns. The DIR has separate divisions,
20 including the Division of Occupational Safety and Health (i.e., Cal/OSHA) and the
21 Division of Labor Standards Enforcement (i.e., DLSE). (Lab. Code, § 56.) Cal/OSHA
22 administers and enforces Part 1 (Occupational Safety and Health) of Division 5 (Safety in
23 Employment) of the Labor Code. (Lab. Code, § 60.5.) DLSE administers and enforces
24 Chapter 1 (Wages, Hours, and Working Conditions), of Part 4 of Division 2 (Employment
25 Regulation and Supervision) of the Labor Code. (Lab. Code, § 61.) The Board is only
26 authorized to adopt occupational safety and health standards enforced by Cal/OSHA.
27 (Lab. Code, §§ 142 & 142.3(a)(1)).

28 237. The Legislature has directly exercised its authority with respect to paid leave,
for example, through the “Healthy Workplaces, Healthy Families Act of 2014.” (Lab.

1 Code, §§ 245 – 249.) In response to COVID-19, the Legislature expanded the rights of
2 workers to obtain supplemental paid leave. (*Id.*, § 248.1.) The Labor Commissioner (not
3 Cal/OSHA) enforces these provisions. (*Id.*, § 248.5.)

4 238. There is no statutory authority for the ETS provision that workers be
5 removed from the workplace with paid leave. No statute expressly authorizes the Board to
6 enact paid leave laws with respect to COVID-19. The only authority for removing
7 workers from the workplace with paid leave is based on the express statutory requirement
8 that the Board promulgate regulations based on federal regulations concerning
9 occupational exposure to lead. (*See* Cal. Code Regs., tit. 8, §§ 1532.1 & 5198; 29
10 C.F.R. § 1910.1025(k); *see also* Lab. Code, § 142.3(a)(2) (“The board shall adopt standards
11 at least as effective as the federal standards for all issues for which federal standards have
12 been promulgated”).)

13 239. Since the ETS paid leave provision applies regardless of whether a worker
14 has a positive or negative COVID-19 test (Cal. Code Regs., tit. 8, § 3205(c)(11)(C), it is
15 not even tailored to its purported “purpose” of “limit[ing] transmission of COVID-19 in
16 the workplace.” (Cal. Code Regs., tit. 8, § 3205(c)(10).)

17 240. Defendants’ actions in exceeding their authority create confusion regarding
18 the interaction of the ETS and various state and federal mandates regarding paid leave.

19 241. Based on the above, the Board lacked authority to adopt the ETS paid leave
20 regulations, which renders them invalid.

21 **ETS sections 3205.3 and 3205.4 (distancing and other mandates for**
22 **employer-provided housing and transportation to and from work)**

23 242. Under Labor Code sections 6303 and 6307, the Board has jurisdiction over
24 the health and safety conditions in any “place of employment” except where the health and
25 safety jurisdiction over that place of employment is “vested by law in, and actively
26 exercised by” any other state or federal agency.

27 243. Health and safety jurisdiction over a place of employment is “vested by law”
28 in a federal or state agency when the agency has been specifically mandated to protect

1 worker safety. (*United Air Lines, Inc. v. Occupational Safety and Health Appeals Bd.*
2 (1982) 32 Cal.3d 762, 768 [187 Cal.Rptr. 387].)

3 244. Section 6303’s “actively exercised” element requires “at least some degree
4 of enforcement by another agency in order to divest [Cal/OSHA] of jurisdiction,” which is
5 determined by analyzing whether the agency has promulgated a body of rules directly
6 addressing the health and safety of the place of employment, and whether the agency has
7 undertaken systematic enforcement of those safety measures. (*United Air Lines, supra*, 32
8 Cal.3d at 777.)

9 245. State agencies other than Cal/OSHA regulate worker housing and
10 transportation pursuant to express statutory authority.

11 246. Vehicle Code section 31401 grants the CHP authority to adopt regulations
12 designed to promote the safe operation of farm labor vehicles, including, but not limited to,
13 vehicular design, equipment, passenger safety, and seating, and authorizes the CHP to
14 inspect farm labor vehicles to ensure compliance. The definition of farm labor vehicle
15 exempts vehicles carrying only members of the driver’s immediate family, or vehicles
16 regulated by the PUC. (Veh. Code, § 322.)

17 247. The CHP actively exercises jurisdiction by requiring that farm labor vehicles
18 be inspected and certified annually “to ensure their safe operation” and encourages the
19 public to report farm labor vehicles “being operated without certification or in an unsafe
20 condition.”⁶⁴

21 248. The PUC has authority to prescribe health and safety rules for common
22 carriers, including charter buses and similar services commonly relied upon by agricultural
23 employers. (*See* Pub. Util. Code, §§ 701 et seq., 1033 & 5381.) The PUC has issued a
24 resolution requiring carriers under its jurisdiction to follow CDC and CDPH guidance to
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27 ⁶⁴ See CHP, *Farm Labor Vehicle Program* <[https://www.chp.ca.gov/programs-
services/programs/commercial-vehicle-section/farm-labor-vehicle-program](https://www.chp.ca.gov/programs-services/programs/commercial-vehicle-section/farm-labor-vehicle-program)> [as of
28 December 30, 2020].

1 protect “the safety of carriers’ employees, their passengers and anyone they come in
2 contact with.”⁶⁵

3 249. Labor Code section 1682.7 expressly authorizes the Labor Commissioner to
4 regulate farm labor contractors, and specifically applies to “day haulers,” defined as any
5 person employed or contracted by a farm labor contractor to provide transportation
6 services to workers.

7 250. The federal Migrant and Seasonal Agricultural Worker Protection Act
8 (“MSPA”) (29 U.S.C. § 1801, *et seq.*) grants the U.S. DOL authority to regulate health and
9 safety conditions related to the transportation and housing of agricultural employees. The
10 MSPA requires that all persons providing employee housing and transportation to migrant
11 agricultural workers register with the U.S. DOL and obtain specific authorization from the
12 U.S. DOL before providing housing or transportation.⁶⁶

13 251. California’s Employee Housing Act specifically authorizes the CDHCD to
14 promulgate and enforce health and safety regulations governing employee housing. (*See*
15 *Health & Saf. Code, § 17050.*) The CDHCD has promulgated regulations governing
16 employee housing, issues permits related to employee housing, and enforces its regulations
17 through inspections and investigations.⁶⁷

18 252. The CDHCD also maintains an Office of Migrant Services which has issued
19 and revised health and safety guidance specific to migrant farmworker contractors since
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22 ⁶⁵ P.U.C. Res. TL-19131 (August 6, 2020)
23 <<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M344/K842/344842850.PDF>>
24 [as of December 30, 2020].

25 ⁶⁶ *See* U.S. Dept. of Lab., *Fact Sheet #49: The Migrant and Seasonal Agricultural Worker*
26 *Protection Act* (July 2008)
27 <<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs49.pdf>> [as of December
28 30, 2020].

29 ⁶⁷ *See* Dept. of Housing and Community Development, *Employee Housing Program*
30 <[https://www.hcd.ca.gov/building-standards/employee-housing/index.shtml#employee-](https://www.hcd.ca.gov/building-standards/employee-housing/index.shtml#employee-housing-enforcement)
31 [housing-enforcement](https://www.hcd.ca.gov/building-standards/employee-housing/index.shtml#employee-housing-enforcement)> [as of December 30, 2020].

1 the onset of the COVID-19 pandemic.⁶⁸ The only reference to employer provided housing
2 in Cal/OSHA regulations prior to the enactment of the ETS recognizes the authority of
3 CDHCD to regulate employee housing:

4 Every employer operating a labor camp under the provisions of
5 the California Employee Housing Act shall obtain a valid
6 permit issued by the Department of Housing and Community
7 Development or by a local governmental agency authorized to
8 issue such permits by the Department. The employer shall
9 either post or have available a valid and current permit.

10 (Cal. Code Regs., tit. 8, § 3350 (“Labor Camp Permits”).)

11 253. The U.S. DOL also regulates the health and safety of migrant agricultural
12 workers under the H-2A visa program. Section 218 of the Immigration and Nationality
13 Act authorizes the lawful admission into the United States of temporary, nonimmigrant
14 workers, defined as H-2A workers, to perform agricultural labor or services of a temporary
15 or seasonal nature. The H-2A visa program establishes standards related to housing and
16 transportation for employers of H-2A workers.⁶⁹

17 **ETS section 3205.3(h) (requiring employers to “isolate” “exposed
18 residents” and “cases” in employer-provided housing)**

19 254. The ETS provision addressing housing, entitled COVID-19 Prevention in
20 Employer-Provided Housing, provides that employers “effectively isolate COVID-19
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28 ⁶⁸ See Dept. of Housing and Community Development, *COVID-19 Guidance on Social
Distancing* (April 27, 2020) <<https://www.hcd.ca.gov/coronavirus19/docs/oms-memo-covid-19-guidance-on-social-distancing.pdf>> [as of December 30, 2020]; Dept. of Housing
and Community Development, *Attachment A – Social Distancing Protocols and
Enforcement* <[https://www.hcd.ca.gov/coronavirus19/docs/attachment-a-social-distancing-
protocols-and-enforcement.pdf](https://www.hcd.ca.gov/coronavirus19/docs/attachment-a-social-distancing-protocols-and-enforcement.pdf)> [as of December 30, 2020]; Dept. of Housing and
Community Development, *Attachment B – State of Emergency Addendum*
<[https://www.hcd.ca.gov/coronavirus19/docs/attachment-b-state-of-emergency-
addendum.pdf](https://www.hcd.ca.gov/coronavirus19/docs/attachment-b-state-of-emergency-addendum.pdf)> [as of December 30, 2020]; Dept. of Housing and Community
Development, *Guidance on Cleaning and Disinfecting Procedures for COVID-19* (May
15, 2020) <[https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms%20covid-
19%20guidance%20for%20cleaning%20and%20disinfecting%20ada.pdf](https://www.hcd.ca.gov/grants-funding/active-no-funding/docs/oms%20covid-19%20guidance%20for%20cleaning%20and%20disinfecting%20ada.pdf)> [as of
December 30, 2020].

⁶⁹ U.S. Department of Labor, *Agricultural Employment*
<<https://www.dol.gov/agencies/whd/agriculture>> [as of December 30, 2020].

1 exposed residents” and “cases.” (ETS Regs., § 3205.3(h) [emphasis added].) To the
2 extent the ETS address quarantine and isolation standards outside the workplace, that is
3 clearly within the province of the CDPH.

4 255. The California Legislature has granted CDPH **specific authority** to respond
5 to public health threats, including epidemiological events. The Health and Safety Code
6 confers authority on the CDPH to “quarantine, isolate, inspect, and disinfect persons ...
7 [and] places ... [if] the action is necessary to protect or preserve the public health.” (Health
8 & Saf. Code, § 120145; *see also* Health & Saf. Code, § 120130(d).)

9 256. The Health and Safety Code confers authority for CDPH to promulgate
10 regulations concerning isolation or quarantine procedures. (Health & Saf. Code,
11 § 120130(c).) And CDPH may establish “places for quarantine or **isolation.**” (Health &
12 Saf. Code, § 120135.) The Health and Safety Code confers authority for CDPH to destroy
13 property if it cannot be disinfected. (Health & Saf. Code, § 120150.) The Health and
14 Safety Code confers authority for CDPH to “take measures as are necessary to ascertain
15 the nature of the disease and prevent its spread” such as taking control of “the body of any
16 living person, or the corpse of any deceased person.” (Health & Saf. Code, § 120140.)

17 **ETS sections 3205(c)(3)(B)(4.), 3205.1(b) and 3205.2(b) (“no cost” testing**
18 **of potentially exposed and exposed workers)**

19 257. The ETS requires employers to “[o]ffer COVID-19 testing at no cost to
20 employees during working hours to all employees who had potential COVID-19 exposure
21 in the workplace.” (ETS Regs., § 3205(c)(3)(B)(4).) And if there is an “outbreak”
22 repeated rounds of “no cost” testing are required. (*Id.*, §§ 3205.1(b) & 3205.2(b).) These
23 provisions are related to the paid leave and housing and transportation provisions, as the
24 requirements of those provisions would be triggered upon a positive test, or even a
25 negative test if the employee had “exposure.” Since the Board has no authority to regulate
26 paid leave and housing and transportation, it has no authority to enact the derivative no
27 cost testing provision. Moreover, the no cost testing provisions are not tethered to
28 workplace safety and health at all. There is no requirement an employee take a COVID-19

1 test, much less test negative, to remain at or return to the workplace. (ETS Regs.,
2 § 3205(c)(11)(C).) Therefore, this provision of the ETS is invalid.

3 258. Defendants’ actions in excess of their authority are “void.” (*See American*
4 *Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042 [56
5 Cal.Rptr.2d 109]) (“An administrative agency must act within the powers conferred upon it
6 by law and may not act in excess of those powers. Actions exceeding those powers are
7 void, and administrative mandate will lie to nullify the void acts.”.)

8 259. Plaintiffs request declaratory and injunctive relief to nullify California Code
9 of Regulations, Title 8, sections 3205(c)(3)(B)(4), 3205(c)(10)-(11), 3205.1(b) & (c),
10 3205.2(b) & (c), and 3205.3, and 3205.4, and to enjoin Defendants from attempting to
11 enforce them.

12 **FOURTH CAUSE OF ACTION**
13 **VIOLATION OF THE CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH**
14 **ACT**
15 **(Lab. Code § 6300, et seq.)**
16 **(Against All Defendants)**
17 **(Unlawful Irrebuttable Presumption)**

18 260. Plaintiffs incorporate by reference and reallege each allegation set forth
19 above.

20 261. ETS section 3205(c)(10)(C) EXCEPTION 2 states that the paid leave
21 requirement does not apply where the employer “demonstrates that the COVID-19
22 exposure is not work related.”

23 262. The Labor Code does not permit the Board or Cal/OSHA to shift the burden
24 to the employer to prove exposure was **not** work-related. Defendants’ grant of legislative
25 authority does not permit them to, in effect, pronounce that COVID-19 exposure is a prima
26 facie occupational hazard. The Legislature has the authority to create and has created
27 rebuttable presumptions regarding workplace exposure. (*See, e.g.,* Lab. Code, § 77.8
28 (amending existing law “creat[ing] a disputable presumption that specified injuries

1 sustained in the course of employment of a specified member of law enforcement or a
2 specified first responder arose out of and in the course of the employment” to include
3 “illness or death resulting from” COVID-19 “under specified circumstances”). The
4 Legislature did not extend this rebuttable presumption to other types of workers.

5 263. The exclusion requirement contains two presumptions: (1) a de jure
6 irrebuttable presumption that an “exposed” worker is infectious, since an exposed worker
7 must be excluded from the workplace regardless of whether they test negative or positive
8 or at all; and (2) a de facto irrebuttable presumption that an excluded worker is entitled to
9 paid leave, since, as a practical matter, it would be virtually impossible for an employer to
10 show that “COVID-19 exposure is not work related.”

11 264. These presumptions are also irrational, arbitrary, and unreasonable. First,
12 given how widespread COVID-19 now is in the community, any presumption it is an
13 occupational hazard is not grounded in reality. With respect to employees generally,
14 COVID-19 also does not fit within the Labor Code’s definition of “exposure.” (Lab. Code,
15 § 6370 defining “exposure” as “any situation **arising from work operation** where an
16 employee may ingest, inhale, absorb through the skin or eyes, or otherwise come into
17 contact with a hazardous substance”) [emphasis added].)

18 265. Second, there is no basis to conclude an employee who is “exposed” (but
19 never tested positive) must still be removed from the workplace, no matter how many
20 times he takes a COVID-19 test and receives a negative diagnosis. Under the ETS, it is
21 conclusively presumed this employee may pose a risk to workers, whether or not he
22 contracted the virus in the first place.

23 266. Third, there is no reason why a conclusive presumption should attach after
24 10 days of exclusion from the workplace that he may safely return without endangering
25 workers. Under either scenario, no public health purpose can be served by treating a
26 healthy person as unsafe to return, whether or not that person obtains a negative test. At
27 the same time, confidence in the integrity of the employer’s COVID-19 safety protocols
28

1 will be called into question by other employees, who want (but may not receive) any
2 objective assurance that a worker isolated for 10 days is safe to return.

3 267. Defendants’ actions in excess of their authority are “void.” (*See generally*
4 *American Federation of Labor, supra*, 13 Cal.4th at 1042 (“An administrative agency must
5 act within the powers conferred upon it by law and may not act in excess of those powers.
6 Actions exceeding those powers are void, and administrative mandate will lie to nullify the
7 void acts.”).)

8 268. Plaintiffs request declaratory and injunctive relief to nullify California Code
9 of Regulations, Title 8, section 3205(c)(10)(C), and to enjoin Defendants from attempting
10 to enforce it.

11 **FIFTH CAUSE OF ACTION**

12 **VIOLATION OF THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT**

13 **(Gov. Code § 11340, et seq.)**

14 **(Against All Defendants)**

15 **(Invalid Emergency Rulemaking)**

16 269. Plaintiffs incorporate by reference and reallege each allegation set forth
17 above.

18 270. “‘Emergency’ means a situation that calls for immediate action to avoid
19 serious harm to the public peace, health, safety, or general welfare.” (Gov. Code,
20 § 11342.545.) This is a revised definition added in 2006 by Assembly Bill 1302. (Stats.
21 2006, ch. 713.) The prior definition allowed emergency adoption of regulations whenever
22 the agency found that the regulations were “necessary for the immediate preservation of
23 the public peace, health and safety or general welfare.” (*Ibid.*)

24 271. Legislative history confirms that the amendment was intended to tighten the
25 emergency standard. In an August 30, 2006 letter, Assembly Member Jerome E. Horton,
26 lead author of the bill, stated: “AB 1302 modifies language that determines when a state
27 agency may adopt emergency regulations. **Because emergency regulations restrict**
28 **public notice and participation, they should be permitted only in limited**

1 **circumstances. ... This standard clarifies and augments the demonstration that a**
2 **state agency must make to justify the use of emergency regulations.”** (Assem. J.
3 (2005–2006 Reg. Sess.) pp. 7634–7635 [emphasis added]; *see also* 1 Michael Asimow, et
4 al., California Practice Guide: Administrative Law ¶ 26:155 (2020).)

5 272. Case law prior to the revised definition recognized that, in the context of
6 emergency regulations:

7 [A]n emergency must have a substantial likelihood that serious
8 harm will be experienced unless immediate action is taken. The
9 anticipation that harm will occur if such action is not taken
10 must have a basis firmer than simple speculation. Emergency is
11 not synonymous with expediency, convenience, or best
12 interests, and it imports more than merely a general public
13 need. Emergency comprehends a situation of grave character
14 and serious moment.

15 (*Sonoma County Organization of Public/Private Employees v. County of Sonoma* (1991) 1
16 Cal.App.4th 267, 270, 277-78 [1 Cal.Rptr.2d 850].)

17 273. The APA imposes procedural requirements on agencies adopting emergency
18 regulations.

19 274. The Finding of Emergency published with the proposed ETS failed to satisfy
20 the requirements of the APA. (Gov. Code, § 11346.1(b)(2).)

21 275. The Finding of Emergency stated: “The objective of the proposed emergency
22 standard is to reduce employee exposure to the virus that causes COVID-19 and therefore
23 reduce COVID-19 illness and transmission.” (Exh. 8, p. 1.) However, a close reading of
24 the Finding of Emergency reveals that the specific issue addressed by the ETS is not
25 simply employee exposure to COVID-19, but rather, the purported lack of adequate
26 regulatory protections against the spread of COVID-19 in the workplace.

27 276. The Finding of Emergency failed to demonstrate that the existing guidance
28 and regulations of various federal and state agencies were inadequate to address the spread
of COVID-19 in California workplaces.

29 277. The Finding of Emergency also failed to cite actual evidence, e.g., scientific
data or research, demonstrating the extent to which COVID-19 spreads in the workplace.
Without any such evidence in support, the Finding of Emergency simply makes the claim

1 that “[c]lusters and outbreaks of COVID-19 have occurred in workplaces throughout
2 California, including in food manufacturing, agricultural operations, and warehouses.”
3 (Exh. 8, p. 4, ¶8.)

4 278. The Finding of Emergency does not explain the Board’s delay in adopting
5 the ETS. It does not explain, as required by the APA (Gov. Code, §11346.1(b)(2)), why
6 the Board failed to address the spread of COVID-19 in the workplace through
7 nonemergency regulations.

8 279. While COVID-19 is a public emergency, the Board has failed to
9 demonstrate, as it must, why its draconian prescriptions are necessary to address an
10 emergency purportedly arising from working conditions.

11 280. The ETS were enacted despite evidence that Cal/OSHA’s more general
12 regulations and guidance were already successful in securing employer compliance. The
13 ETS are either duplicative of those general regulations and guidance, or not based on
14 statutorily mandated criteria.

15 281. The Board is required to promulgate standards based on the following
16 criteria:

17 In promulgating standards dealing with toxic materials or
18 harmful physical agents, the board shall adopt that standard
19 which most adequately assures, to the extent feasible, that no
20 employee will suffer material impairment of health or
21 functional capacity even if such employee has regular exposure
22 to a hazard regulated by such standard for the period of his
23 working life. Development of standards under this section **shall**
24 **be based upon research, demonstrations, experiments, and**
25 **such other information as may be appropriate.** In addition
26 to the attainment of the highest degree of health and safety
27 protection for the employee, **other considerations shall be the**
28 **latest available scientific data in the field, the**
reasonableness of the standards, and experience gained
under this and other health and safety laws. Whenever
practicable, the standard promulgated shall be expressed in
terms of objection criteria and of the performance desired.

(Lab. Code, § 144.6 [emphasis added].)

28 282. Labor Code section 144.6’s requirement that the Board consider scientific
data, experience, and reasonableness of the standards means: (1) objective criteria and
performance-based standards, as opposed to prescriptive mandates; (2) experience

1 obtained through consultation with experts and stakeholders; and (3) reasonableness
2 demonstrated by performing cost-benefit analysis or trade-offs. There is no indication in
3 the record the Board considered any of this. And particularly with respect to the four
4 challenged provisions, there is no science, experience, or reasonableness to support their
5 enactment.

6 283. The Board justifies its emergency action by claiming existing enforceable
7 guidance (including its own) “varies between federal and state agencies and contains some
8 contradictory information.” (Exh. 8, p.5.) Assuming the ETS could resolve these
9 variances or harmonize these contradictions (and it cannot), a general public need to
10 reconcile state and federal regulations calls for a meeting among the regulators, not a set of
11 cramdown prescriptions which impose substantial burdens on **all** California employers,
12 and unique, substantial burdens on the agricultural industry.

13 **SIXTH CAUSE OF ACTION**

14 **VIOLATION OF THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT**

15 **(Gov. Code, § 11340, et seq.)**

16 **(Against All Defendants)**

17 **(Underground Rulemaking)**

18 284. Plaintiffs incorporate by reference and reallege each allegation set forth
19 above.

20 285. The Board published Addendum #1 at some point on or after December 3,
21 2020 without a public meeting.

22 286. The Board did not provide notice of any public meeting concerning the
23 issuance of Addendum #1.

24 287. By failing to provide notice of the of a meeting to publish Addendum #1, the
25 Board denied plaintiffs and other interested parties the opportunity to provide input on the
26 content of Addendum #1.

27
28

1 288. The APA requires the agency make a finding the regulatory action is
2 “necessary to address an emergency.” (Gov. Code, § 11346.1(b)(1).) That finding must be
3 made before the agency acts to adopt the proposed emergency regulation.

4 289. The finding of emergency must contain “a description of the **specific facts**
5 demonstrating the existence of an emergency and the need for immediate action, and
6 demonstrating, by **substantial evidence**, the need for the proposed regulation to effectuate
7 the statute being implemented, interpreted, or made specific and to address only the
8 demonstrated emergency.” (Gov. Code, § 11346.1(b)(2) [emphasis added].) The APA
9 requires, at least five working days before submitting an emergency regulation to OAL, an
10 agency must send notice of the proposed emergency action to every person who has filed a
11 request or notice of regulatory action with the agency. The notice must contain the
12 specific language to be adopted and the required finding of emergency. (Gov. Code,
13 § 11346.1(a)(2).)

14 290. Under the APA, the Board is required to provide notice and an opportunity to
15 comment on all Findings of Emergency before the Board acts to adopt an emergency
16 regulation based on those findings. The Board failed to do these things, leading to one of
17 two conclusions, neither of which are mutually exclusive: Either the Board approved the
18 Addendum #1, via “serial communications” with other Board members, in violation of the
19 Bagley-Keene Act (Gov. Code, § 11122.5.) and the APA’s prohibition against
20 “underground regulations,” or the Board contrived to add Addendum #1 to the record after
21 the close of rulemaking proceedings, because it concluded (correctly) that the November
22 19, 2020 Finding of Emergency failed to meet the statutory requirements to demonstrate
23 the existence of an emergency.

24 291. Under either scenario, the Board violated its duties under the APA.

25 292. Under the APA, any challenge to a regulation adopted by a state agency on
26 procedural or substantial grounds is through a declaratory judgment action. (Gov. Code,
27 § 11350(a).) In such an action, the record is “closed,” meaning the rulemaking file is
28 treated as the exclusive record for purposes of judicial review. (Gov. Code,

1 § 11350(d)(1).) The agency may not add any material to a rulemaking proceeding after the
2 public hearing or comment period closes, unless the agency complies with the APA
3 provisions or adding material to the rulemaking file.

4 293. The rulemaking file is treated as the exclusive record for purposes of OAL
5 review. (Gov. Code, § 11349.1(a).) While an agency may add items inadvertently omitted
6 from the file (Gov. Code, § 11349.2), it cannot create documents after the fact, and then
7 claim they were inadvertently omitted. There is no exception under the APA that would
8 permit an agency to insert a finding of fact, after the fact, and without disclosing it to the
9 Office of Administrative Law.

10 294. Addendum #1 is an essential part of the emergency rulemaking process
11 because it purports to supplement and justify the Board’s decision to adopt the ETS.
12 Accordingly, the Board was required to provide Plaintiffs (as well as the OAL) the
13 opportunity to comment on this addendum before the Board voted to adopt the ETS. (Gov.
14 Code, § 11346(a)(2).) Thus, publishing any portion of the Finding of Emergency—
15 including Addendum #1—without a public hearing requires the Court to declare the ETS
16 null and void.

17 **SEVENTH CAUSE OF ACTION**

18 **VIOLATION OF THE BAGLEY-KEENE OPEN MEETING ACT**

19 **(Gov. Code, § 11120, et seq.)**

20 **(Against Board Defendants)**

21 295. Plaintiffs incorporate by reference and reallege each allegation set forth
22 above.

23 296. The California Constitution provides that “[t]he people have the right of
24 access to information concerning the conduct of the people’s business, and, therefore, the
25 meetings of public bodies and the writings of public officials and agencies shall be open to
26 public scrutiny.” (Cal. Const., art. I, § 3(b)(1).) The Bagley-Keene Act requires that all
27 meetings of a state body “be open and public and all persons shall be permitted to attend
28 any meeting of a state body except as otherwise provided in this article.” (Gov. Code,

1 § 11123.) Its purpose is to facilitate accountability and transparency of government
2 activities and to protect the rights of citizens to participate in state government
3 deliberations. These constitutional and statutory safeguards require that state agencies,
4 such as the board, comply with the rigorous open meeting requirements. The state body
5 must also provide notice of a meeting on the Internet at least 10 days in advance of the
6 meeting. (Gov. Code, § 11125.) As a multimember state body, the Board is subject to the
7 public meeting requirements of the Bagley-Keene Act. (Gov. Code, § 11121.)

8 297. Any interested party can commence an action by mandamus, injunction or
9 declaratory relief to obtain a judicial determination that an action taken by a state body was
10 in violation of Government Code sections 11123 or 11125. (Gov. Code, § 11130.3(a).)
11 Plaintiffs are “interested parties,” as that term is broadly construed. (*See McKee v. Orange*
12 *Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1316 [2 Cal.Rptr.3d 774] (taxpayer, as
13 citizen of State, was “interested person” under the Ralph M. Brown Act and thus had
14 standing to sue school district for violations of Act even though taxpayer was not resident
15 or taxpayer of school district).)⁷⁰

16 298. The challenged action by the Board which Plaintiffs are seeking to declare
17 null and void occurred on or about November 19, 2020, November 30, 2020, and
18 December 3, 2020. (Gov. Code, § 11130.3(a).) By these actions, Plaintiffs were denied
19 access to a Finding of Emergency, or access to any meeting of a public body where
20 Addendum # 1 was discussed, and/or where, on information and belief, it was discussed
21 and voted on in a meeting subject to Government Code section 1112. (*See North Pacifica*
22

23
24 ⁷⁰ Because both the Bagley-Keene and Brown Acts address the common topic of open and
25 public meetings for state and local bodies, respectively, courts frequently rely on cases
26 decided under the Brown Act to construe similar provisions of Bagley-Keene and vice
27 versa. (*See, e.g., Southern Calif. Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 798-99 [3
28 Cal.Rptr.3d 703] (relying on Brown Act precedent to construe closed-session provisions of
Bagley-Keene); *Travis v. Board of Trustees of Calif. State Univ.* (2008) 161 Cal.App.4th
335, 342 [73 Cal.Rptr.3d 854] (Bagley-Keene and Brown Acts employ “a virtually
identical open meeting scheme,” making cases construing Brown Act’s personnel
exception applicable to Bagley-Keene as well).)

1 *LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1433-1435 [83 Cal.Rptr.3d
2 636].) Pursuant to Government Code section 11130.3(b)(3), the Board failed to
3 substantially comply with its obligation to ensure that state actions taken and deliberations
4 made at such meetings are open to the public. (*North Pacifica LLC, supra*, 166
5 Cal.App.4th at 1432.)

6 299. The Finding of Emergency was approved by the Board in a public meeting
7 when the Board voted to adopt the ETS. That vote took place on November 19, 2020.
8 Addendum #1 is a Finding of Emergency by the Board. Although Addendum #1 is dated
9 November 19, 2020, no notice of the Finding of Emergency contained in Addendum #1
10 was given so as to advise the public and the OAL of the existence of this document.

11 300. The Board violated the Bagley-Keene Act by promulgating Addendum #1
12 without a public meeting. Addendum #1 was published on the DIR website at some date
13 on or after December 3, 2020, as shown by the metadata of the document showing that the
14 document was created on December 3, 2020. No other document in the ETS rulemaking
15 record, including any Board meeting minutes, discusses Addendum #1.⁷¹

16 301. Pursuant to Government Code section 11130.5, a court may award court
17 costs and reasonable attorney's fees to the plaintiff in an action brought pursuant to section
18 11130 or 11130.3 where it is found that a state body has violated the provisions of the
19 Bagley-Keene Act.

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26 ⁷¹ As of December 30, the Board had not posted Addendum # 1 with its electronic packet
27 of documents, including its 57-page Finding of Emergency, as part of the monthly meeting
28 *2020 Meeting Schedule* <<https://www.dir.ca.gov/oshsb/mtgsch2020.html>> [as of
December 30, 2020].

1 **EIGHTH CAUSE OF ACTION**

2 **VIOLATION OF DUE PROCESS CLAUSE OF THE FOURTEENTH**
3 **AMENDMENT**

4 **(U.S. Const. amend. XIV, §2)**

5 **(Against All Defendants)**

6 302. Plaintiffs incorporate by reference and reallege each allegation set forth
7 above.

8 303. Under the Due Process Clause of the Fourteenth Amendment, no State shall
9 “deprive any person of life, liberty, or property, without due process of law.”

10 304. Under *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165 [130 Cal.
11 Rptr. 465, 550 P.2d 1001], “a regulation may be invalid on its face when its terms will not
12 permit those who administer it to avoid confiscatory results in its application to the
13 complaining parties.”

14 305. The ETS threatens ruinous consequences for employers. For example, the
15 mandatory exclusion rules of the ETS could force some employers to lose a significant
16 portion of their workforce, forcing them to close critical portion of their businesses. If
17 agricultural growers are forced to exclude a significant portion of their workforce, they risk
18 significant delays in harvesting crops. Delaying harvests by even a few days could cause a
19 loss of crops, which would be financially devastating to growers. Other requirements of
20 the ETS threaten similar economic devastation to employers.

21 306. The ETS applies to “all employees and places of employment,” except for
22 places of employment with only one employee, employees working from home, and
23 employees covered by § 5199. (*See* ETS Regs., § 3205(a)(1).) The ETS does not provide
24 for any means of obtaining variances or exceptions from strict compliance.

25 307. Cal/OSHA’s procedures for requesting variances to regulations are
26 inadequate to provide timely relief from confiscatory results of the ETS. The Board is
27 empowered to grant a permanent variance to employers (Lab. Code, § 143(a)), and
28 Cal/OSHA is empowered to grant temporary variances to employers (Lab. Code, § 6450).

1 However, obtaining a permanent or temporary variance takes at least several months.
2 Neither of these procedures are realistic or viable to avoid the immediate consequences of
3 the ETS.

4 308. Plaintiffs request declaratory and injunctive relief to nullify California Code
5 of Regulations, Title 8, sections 3205(c)(3)(B)(4), 3205(c)(10)-(11), 3205.1(b) & (c),
6 3205.2(b) & (c), and 3205.3, and 3205.4, and to enjoin Defendants from attempting to
7 enforce them.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs pray:

10 1. For a declaration that the ETS is invalid because it violates the Board’s
11 statutory authority, the APA, the Bagley-Keene Act, the California Constitution, and/or the
12 U.S. Constitution;

13 2. That a peremptory writ of mandate issue commanding Defendants to rescind
14 and immediately cease all enforcement of the ETS, or, in the alternative, at least the
15 provisions relating to “no cost” testing “during working hours” for employees with
16 “potential COVID-19 exposure” or who were at an “exposed workplace” regardless of the
17 size or location of the workforce (Cal. Code Regs., tit. 8, §§ 3205(c)(3)(B)(4), 3205.1(b),
18 3205.2(b)), mandatory paid leave for workers “exposed” to COVID-19 (Cal. Code Regs.,
19 tit. 8, §§ 3205(c)(10)-(11), 3205.1(c), 3205.2(c)), and COVID-19 related regulation of
20 employer-provided housing (Cal. Code Regs., tit. 8, § 3205.3) and transportation (Cal.
21 Code Regs., tit. 8, § 3205.4);

22 4. For a temporary and permanent injunction restraining Defendants from
23 unconstitutionally enforcing the ETS, or, in the alternative, at least the provisions relating
24 to “no cost” testing “during working hours” for employees with “potential COVID-19
25 exposure” or who were at an “exposed workplace” regardless of the size or location of the
26 workforce (Cal. Code Regs., tit. 8, §§ 3205(c)(3)(B)(4), 3205.1(b), 3205.2(b)), mandatory
27 paid leave for workers “exposed” to COVID-19 (Cal. Code Regs., tit. 8, §§ 3205(c)(10)-
28 (11), 3205.1(c), 3205.2(c)), and COVID-19 related regulation of employer-provided

1 housing (Cal. Code Regs., tit. 8, § 3205.3) and transportation (Cal. Code Regs., tit. 8, §
2 3205.4);

3 5. For costs and attorney fees, under Code of Civil Procedure section 1021.5
4 and Government Code section 11120 et seq., incurred herein; and

5 6. For such other and further relief as this Court deems just and proper.

6 Dated: December 30, 2020

7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

8 By


DAVID A. SCHWARZ

9
10 *Attorneys for Plaintiffs/Petitioners*
11 Western Growers Association, California Farm
12 Bureau Federation, California Business
13 Roundtable, Grower-Shipper Association of
14 Central California, California Association of
15 Winegrape Growers, and Ventura County
16 Agricultural Association
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VERIFICATION

I, David Puglia, am President and Chief Executive Officer of Western Growers Association, one of the Plaintiffs and Petitioners herein. I have read the foregoing Verified Petition and Complaint and know the contents thereof. The facts alleged therein are true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of December 2020, in Newport Beach, California.





May 20, 2020

Occupational Safety and Health Standards Board
1017 L Street, PMB #254
Sacramento, CA 95814-3805
Attention: Executive Officer, Christina Shupe
By email:

Re: **Petition for an emergency temporary standard** to protect workers from Covid-19
Petition for a permanent standard to protect workers from infectious diseases
including novel pathogens

Dear Members of the OSH Standards Board:

On behalf of all workers not currently protected by the Aerosolized Transmissible Disease (ATD) standard, 8 CCR 5199, and in consultation with labor and community organizations throughout California, this petition for two standards is submitted by the Labor & Employment Committee of National Lawyers Guild and Worksafe. We are seeking regulatory protection for those currently working as "essential" workers; those who are working although not deemed essential workers; those working because they must work to support their families; those working because if they refuse unsafe work they will suffer retaliation – permanently lose their jobs and may not be eligible for unemployment insurance; and those who will fearfully be returning to work as the economy opens up.

Since 1937 the National Lawyers Guild has provided legal support to movements for social change, principally on a volunteer basis. The Labor & Employment Committee (L&EC) focuses on struggles for economic and social justice. In the 1930s the Guild focused on workers' rights supporting New Deal legislation to assist working people and the unemployed; in the 1950s the Guild defended labor leaders and others attacked for their progressive political views. Then and now, the Guild L&EC actively supports progressive labor and employment law struggles. The L&EC is comprised of close to 1,000 labor and employment attorneys across the country.

Worksafe is California's only statewide nonprofit focused on ensuring the occupational safety and health (OSH) rights of vulnerable workers through policy advocacy, capacity and coalition building, and impact litigation. We are a leader in engaging and convening worker advocates, legal aid organizations, academic institutions, and government agencies to prevent workplace injury, illness, and death by bringing justice to the workplace. We achieve this by focusing our efforts on the low-income, immigrant, and workers of color who bear a disproportionate burden of exposure to workplace hazards.

With respect to the request for an emergency temporary standard to protect employees in any facility, service category, or operation who may be exposed to SARS-CoV-2 [Covid-19], and who are not within the scope of 8 CCR 5199 or 5199.1, time is of the essence. An emergency temporary standard is necessary for the immediate protection of the public peace, health, or safety within the meaning of Article IV of the California Constitution and as such, must be issued as soon as possible and take immediate effect. Such will protect the lives not only of employees who in the course of their employment may be exposed to Covid-19, a deadly infectious pathogen, but also protect the lives of their families and those in the communities in which they live.

Without specific occupational health and safety measures to protect essential workers, to protect workers currently working but not necessarily deemed essential workers, and to protect those who will in the future return to work to revitalize the economy of the State of California, **Californians will die unnecessarily.**

With respect to the request for a permanent standard to protect workers from infectious diseases including novel pathogens, this petition is submitted pursuant to Labor Code Section 142.2. Petitioners also reference Labor Code Section 142.3(c) which requires standards to include specific warnings to ensure that employees are apprised of all hazards to which they are exposed. It also requires suitable protective equipment and procedures necessary to control those hazards. Medical monitoring is also prescribed where appropriate.

With respect to the request for both the emergency regulation to protect workers from Covid-19 and the permanent regulation to protect workers from infectious diseases, Labor Code Section 144.6 requires that in promulgating standards dealing with toxic materials or harmful physical agents, which petitioners contend applies to Covid-19 and infectious diseases:

the board shall adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life. Development of standards under this section shall be based upon research, demonstrations,

experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the reasonableness of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

We respectfully ask the Board to consider the enclosed draft of an emergency temporary standard as guidance. We understand that the Board will apply its expertise in developing the emergency temporary standard and this is offered simply as a compilation of best practices that have been developed by a number of different worker representatives. We hope this draft will be of assistance in moving forward with the temporary standard with all deliberate speed given the ongoing pandemic conditions impacting the state's workers, employers, and economy.

The Covid-19 pandemic is not going away anytime soon. And other novel pathogens may threaten this state and the world in the future. As more and more workers are brought back, their lives and livelihoods are pitted against each other. In order to protect the lives and health of workers and their families, in the face of this public health emergency, clarity is required.

The draft we share is a hybrid of a performance-based and specification-based standard. The performance-based dictates of 8 CCR 3203 combined with a small number of more specific standards have not been adequate. Lives are being lost and will continue to be lost without consistent rules as a starting point for our state's workplaces that allow employers some flexibility with respect to individual needs in their places of employment.

In brief, the proposed regulation is divided into subsections that parallel the framework of the Injury and Illness Prevention Program (8 CCR 3203), and add specifics that are helpful:

- a. Requires minimizing the risk of transmission of Covid-19 to employees from other employees or from the public. Requires:
 1. Identification of a competent employer representative to develop and administer a written Compliance Action Plan to protect employees (sets timelines and requires employer to share with workers / unions)
 2. Procedures to identify and evaluate Covid-19 workplace hazards
 3. Procedures to control the hazard (engineering controls, work practices, PPE, etc.)
 4. Identification of job categories, tasks, procedures where employees exposed
 5. Procedures to respond to three categories of employees
 - A. Employee who has been diagnosed with Covid-19
 - B. Employee who has symptoms of Covid-19

- C. Employee who has been exposed to a person who has been diagnosed with Covid-19
 - b. Job Hazard Analysis to identify modes of transmission and adopt and implement feasible preventive measures to minimize transmission risk, including but not limited to:
 - 1. Specific measures to assure social distancing
 - 2. Ventilation systems to reduce airborne exposure to Covid-19
 - 3. Personal hygiene and workplace maintenance measures to reduce exposure to Covid-19
 - 4. PPE, including appropriate respirators with appropriate training and fit testing
 - c. Employee training
 - d. Recordkeeping per 8 CCR 3203(b)

Thank you in advance for your prompt attention to our request for an emergency temporary standard, and for a timely response to our request for a permanent standard to protect workers from infectious disease including novel pathogens. We look forward to continuing to work with the Board on this matter in order to protect the health and safety of all Californians during the Covid-19 pandemic and in anticipation of future pandemics.

Sincerely,

/s

Frances C. Schreiber
Labor & Employment Committee of the
National Lawyers Guild
franceschreiber@gmail.com (510) 333-9907



Stephen Knight
Executive Director
Worksafe
sknight@worksafe.org (510) 922-8075

DRAFT of Emergency Temporary Standard to Protect Workers from Covid-19

(a) Every employer shall minimize the risk of transmission of Covid-19 during work among employees who may be exposed to other employees or the public with Covid-19 or who may expose other employees. The procedures shall include the following elements:

(1) Identification of a person or persons as a “competent person” with authority and responsibility for the establishment, implementation and maintenance of effective written infection control procedures to control the risk of transmission of Covid-19, to wit, a **Compliance Action Plan**. The **Compliance Action Plan** shall be prepared or updated within 10 business days of any new state or local law, regulation or order, including any guidance document issued by DOSH or CDPH. A competent person shall have the authority to perform this function and shall be knowledgeable in infection control principles as they apply specifically to the facility, service or operation. When a competent person is not on site, there shall be a designated competent site representative with full authority to act on his or her behalf. The name, position, and contact information for the competent person and any competent site representative shall be posted at the site of each work operation covered by this subsection. The written **Compliance Action Plan** shall be made available for inspection and copying by any employee or employee representative within five business days of a written request, at no cost to the employee or representative.

(2) Procedures for identifying and evaluating workplace hazards that may expose any employee to Covid-19. Procedures shall include, but not be limited to, scheduled periodic inspections to identify and evaluate hazards.

(3) Methods and/or procedures for controlling employee exposure and correcting unsafe or unhealthy conditions. These shall include engineering controls, work practices and procedures, and personal protective equipment [PPE], including respiratory protection, as required by Title 8 California Code of Regulations.

(4) Procedures to respond to:

(A) an employee report that he or she has been diagnosed by a physician with Covid-19.

Such procedures shall include, but not be limited to:

(i) immediately sending employee home or instructing the employee who is already at home to stay home, until a medical provider authorized return to work;

(ii) implementing work policies that do not penalize workers for missing work as a result of being diagnosed by a physician with Covid-19;

(iii) written notice within 24 hours to all employees who may have been exposed to the employee with a physician confirmed diagnosis of Covid-19. Employees to be notified shall include those who may have worked during the same shift or on an adjacent shift in the same or adjacent work areas of, or may have shared equipment with, the diagnosed employee. Employees to be notified shall also include individuals who may have been close contacts: to wit, have been within 6 feet of the diagnosed employee for more than 10 minutes during the period when the employee was potentially contagious, which is from 48 hours before symptoms first appeared, or from the date of their positive lab test if they did not have symptoms.

(iv) filing a report with the Division of Occupational Safety and Health by telephone, email, or via a specified online mechanism, within one business day of the

employer obtaining knowledge of the diagnosis, whether or not it is work-related as defined in 8 CCR 14300.5. Each report of diagnosis shall indicate the social security number of the diagnosed employee.

(v) filing a report or amended report with the Division of Occupational Safety and Health by telephone, email, or via a specified online mechanism, immediately upon the employer obtaining knowledge of the hospitalization or death of an employee, whether or not it is work-related as defined in 8 CCR 14300.5. Each report of hospitalization or death shall indicate the social security number of the diagnosed employee.

(vi) filing a report with the local county, and where applicable city, health authorities, within one business day of the employer obtaining knowledge of the diagnosis. Each report of diagnosis shall indicate the social security number of the diagnosed employee; the employer name and address, EIN, and Contractors' State License Board number if applicable; the diagnosed employee's work assignments, actual work locations and job sites, and actual work periods beginning two weeks prior to the date of the physician's diagnosis; and

(vii) procedures immediately to close and deep clean all areas, surfaces and equipment that may have been in contact with the diagnosed employee.

(B) an employee report of symptoms of Covid-19. Such procedures shall include, but not be limited to:

(i) encouraging sick workers to go or stay home by implementing work policies that do not penalize workers for missing work; and

(ii) immediately sending employees with acute respiratory illness symptoms home or to medical care.

(C) an employee report that he or she has been exposed to a person who has been diagnosed by a physician with Covid-19 or has learned from his or her employer pursuant to subsection (A) that he or she has been exposed to an employee who has been diagnosed by a physician with Covid-19. Such procedures shall include, but not be limited to,

(i) immediately sending such employee to home quarantine, and

(ii) implementing work policies that do not penalize workers for missing work as a result of being quarantined.

(b) Employers shall conduct a Job Hazard Analysis to identify any potential modes of Covid-19 transmissions and adopt and implement feasible preventive measures to eliminate or minimize the risk of transmission. The competent person shall provide a written list of these measures to each employee. These measures shall include, but not be limited to, the following:

(1) Identification in writing of the job categories, tasks or procedures in which employees may have occupational exposure to Covid-19.

(2) Implementing measures to assure social distancing including but not limited to:

(A) changing work stations, work area arrangements, and work flow or pace of work to ensure physical distancing of 6 feet, at a minimum, at all times:

(i) among employees at all work stations,

(ii) among employees in all other work areas,

- (iii) among employees in areas not utilized for work such as areas for breaks and meals, and
 - (iv) between employees and the public, including but not limited to:
 - (a) use of barriers between employees and the public;
 - (b) limiting the number of the public in the facility, marking distances in areas where the public may congregate;
 - (c) ensuring that where employees interact with customers at less than 6 feet, employees are provided with access to N-95 respirators (or filtering facepieces) and face shields;
 - (B) ensuring seating in areas where employees may take a break or eat meals face forward so that employees are not facing each other;
 - (C) ensuring limits are set for employees to occupy common areas such as locker or break rooms, dining facilities, training or conference rooms, so that all present can maintain a social distance of 6 feet;
 - (D) scheduling shifts and breaks to assure distancing in non-work areas;
- (3) Installing ventilation systems designed to reduce employee exposure to the airborne virus;
- (4) Implementing measures to assure personal hygiene including but not limited to:
 - (A) providing hand sanitizer that is at least 60% alcohol in multiple locations,
 - (B) providing time and materials and accessible locations for regular hand washing,
 - (C) adjusting operating procedures such as pace of work to assure that work assignments and requirements do not interfere with hygiene measures;
- (5) Immediate cleaning of all shared materials before another employee handles that material, and regularly scheduled frequent cleaning and disinfection of areas and surfaces that may become contaminated and pose an infection risk to employees, including but not limited to:
 - (A) work areas accessible surfaces, vehicles, equipment and tools,
 - (B) shared non-work areas where employees congregate, including but not limited to: break, lunch, locker and rest rooms,
 - (C) high-touch surfaces throughout the workplace including but not limited to: doorknobs, stair railings, access keypads, light switches, shared items such as common water sources, microwaves, etc.,
- (6) implementing other procedures to minimize the likelihood the public may contaminate workers, such as providing employees with personal protective equipment, including but not limited to:
 - (A) hand protection so employees do not handle items already handled by the public;
 - (B) requiring members of the public to cover their nose and mouth with face coverings while in the facility to minimize the transmission of airborne pathogens to employees.

(c) Employers shall provide employees with the tools, operating equipment and PPE necessary to comply fully with public health orders, regulations and laws. These shall be provided by the employer to employees at no cost. PPE shall be assessed and certified as required by 8 CCR 3380.f.1 and f.2 for the hazard of exposure to Covid-19 risk, and employees shall be trained on the proper use of PPE required for potential exposure to Covid-19. Employees who provide their own PPE that meets or exceeds the PPE required by the Division shall not suffer any adverse action by the employer. All employees who are directed by their employer to wear compliant PPE shall be provided with a medical evaluation to assure

compliance with 5144.e. Employee respiratory protection designed to protect employees exposed to airborne pathogen hazards shall comply with 8 CCR 5144, including but not limited to subsections 5144.a.2, b, c, d, e, h, k, l and m, including filtering facepieces as defined in 5144.b.

(d) Employers shall train employees regarding and assure compliance with the **Compliance Action Plan**, and provide each employee with a copy of the Plan and the full list of compliance measures which apply to the employee's specific operations, jobs and tasks, including the names of and how to contact persons responsible for implementation of the plan. Training shall occur upon initial assignment, when site conditions change, and when hazards are newly introduced or newly recognized. Training shall be appropriate in content and vocabulary for the educational level, literacy, and language of employees.

(e) In addition to any specific recordkeeping or reporting requirements set forth in this regulation or state and local laws, regulations and orders, employers shall maintain records of the **Compliance Action Plan** according to the recordkeeping requirements in 8 CCR 3203 (b).

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD
(Board)

PETITION FILE NO. 583

BOARD STAFF EVALUATION

Submitted by: David Kernazitskas, MSPH, CIH, CSP

Senior Safety Engineer

August 10, 2020

INTRODUCTION

Petition File No. 583 (Petition) was submitted by the Labor and Employment Committee of National Lawyers Guild and Worksafe (Petitioners) on May 20, 2020. The Petition seeks two Board actions to minimize the exposure of employees to SARS-CoV-2, the virus that causes COVID-19.

REQUESTED ACTION

The Petitioners' first request is for an emergency temporary standard (ETS) to immediately place into effect protections from COVID-19 for employees, who are not covered by Title 8 CCR 5199 or 5199.1 (Aerosol Transmissible Diseases and Aerosol Transmissible Diseases – Zoonotic, respectively). The second request is for a permanent standard to protect all workers from current and future infectious diseases, including novel pathogens.

PETITIONER'S ASSERTIONS

The Petitioners assert:

- “With respect to the request for an emergency temporary standard...time is of the essence.”
- The emergency temporary standard “will protect the lives not only of employees...[but also] of their families [and communities].”
- “Without specific occupational health and safety measures...Californians will die unnecessarily.”
- COVID-19 and infectious diseases are “toxic materials or harmful physical agents” covered by Labor Code 144.6, which requires the Board to: “*adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.*”
- “The COVID-19 pandemic is not going away anytime soon. And other novel pathogens may threaten this state and the world in the future. As more and more workers are brought back, their lives and livelihoods are pitted against each other. In order to protect the lives and health of workers and their families, in the face of this public health emergency, clarity is required.”
- With regard to protecting employees from COVID-19, Title 8 Section 3203 (Injury and Illness Prevention Program (IIPP)) and “a small number of more specific standards have not been adequate. Lives are being lost and will continue to be lost without consistent rules as a starting point.”

STAFF EVALUATION

In support of their request, the Petitioners provide draft language for a proposed ETS, which follows the general outline of the existing IIPP standard (i.e. identify a person responsible for

implementing the plan, develop procedures for identifying and evaluating COVID-19 workplace hazards, develop procedures to control the hazard using hierarchy of controls, etc.). They propose some additional specific requirements to be included with the IIPP-like requirements, which they deem helpful to employers seeking to protect employees from exposure to COVID-19.

The proposed temporary standard aims to require employers to minimize the risk of COVID-19 transmission to employees from coworkers and the public. The suggested text requires employers to identify “a competent employer representative to develop and administer a written Compliance Action Plan [CAP] to protect employees.” The text proposes timelines for updating the CAP and requires the employer to share the information with workers and labor representatives.

Further, the text includes requirements for procedures to identify, evaluate, and control COVID-19 workplace hazards. The proposal also requires identification of job categories and tasks where employees can be exposed to COVID-19, as well as procedures to respond to employees exposed to, exhibiting symptoms of, or diagnosed with the illness. Finally, the proposal outlines requirements for performing job hazard analyses, social distancing, employee training and recordkeeping.

Relevant Standards

Federal Standards

Federal OSHA regulations do not specifically address employee protections against COVID-19. Generally applicable standards that apply to controlling employee exposures to the virus include OSHA’s PPE standards (29 CFR 1910 Subpart I), which require gloves, eye and face protection, and respiratory protection. 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, applies to the presence of SARS-CoV-2 in the workplace. Finally, OSHA’s Bloodborne Pathogens standard (29 CFR 1910.1030) may be helpful in providing a framework for controlling potential virus exposure from bodily fluids expressed via respiratory secretions¹.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) brought suit against federal OSHA in the United States Court of Appeals for the District of Columbia Circuit, attempting to compel OSHA to create an ETS to provide specific employee protections against COVID-19 risks. In the suit, the AFL-CIO alleges that the guidance documents produced by OSHA do not carry the weight of enforceable standards and are therefore insufficient to protect employees from COVID-19 hazards.

In a May 29, 2020, federal OSHA response to the action, OSHA claims:

¹ “Guidance on Preparing Workplaces for COVID-19.” U.S. Department of Labor, Occupational Safety and Health Administration. <https://www.osha.gov/Publications/OSHA3990.pdf>. Accessed 7/24/20.

Petitioner [AFL-CIO] fails to demonstrate that any employer has or would forgo compliance with any of the potential standards to which Petitioner alludes, simply because they are not set forth in an ETS. Nor could Petitioner do so, because the standards Petitioner seeks are largely already mandatory and enforceable either through existing OSHA requirements or the veritable gamut of non-OSHA public safety requirements enacted by federal, state, and local officials in response to the pandemic.²

The court ruled in favor of federal OSHA, stating:

In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments..., the OSHA reasonably determined that an ETS is not necessary at this time.³

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 generally 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), Sanitation (Article 9), and Control of Harmful Exposures (Section 5141).

Additionally, Cal/OSHA recommends that employers not covered by the ATD standard comply with the recommendations from the Centers for Disease Control (CDC) "Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)." Cal/OSHA provides a number of documents with guidance for specific industry sectors, as well as model ATD plans and programs⁴. Several Cal/OSHA guidance documents point out that updating the employer's IIPP to address exposure to SARS-Cov-2 is "mandatory in most California workplaces since COVID-19 is widespread in the community."⁵

² United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT, No. 20-1158. Document #1844937. Filed 5/29/2020. Page 24 of 73. An online copy was found here on 7/24/2020:

https://www.ali.org/media/filer_public/2f/4f/2f4fcca1-8b14-4725-a6f3-4a302f3eb83d/osha_response_to_afl-cio_petition_for_writ_of_mandamus_2020.pdf

³ United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT, No. 20-1158. Document #1846700. Filed 6/11/2020. Page 1 of 2. An online copy was found here on 7/24/2020:

<https://environblog.jenner.com/files/order-no-20-1158-1.pdf>

⁴ "Cal/OSHA Guidance on Requirements to Protect Workers from Coronavirus." State of California, Department of Industrial Relations. <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>. Accessed 4/29/2020.

⁵ "Safety & Health Guidance." Cal/OSHA Publications. <https://www.dir.ca.gov/dosh/puborder.asp>. Accessed 4/30/2020.

Consensus and Other 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 California Department of Public Health are examples of the many organizations that provide such information.

The state of Virginia, which has a state-run OSHA program (VOSH), adopted an ETS on July 15, 2020, “designed to establish requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2.”⁶ The standard is the first of its kind in the nation and is “designed to supplement and enhance existing VOSH laws, rules, regulations, and standards applicable [to COVID-19].” The standard allows businesses to comply with CDC guidelines, instead of VOSH regulations, where the CDC guidelines are more protective. In general, the VOSH program mandates compliance with many of the recommended practices found in guidelines from a variety of credible occupational safety and health organizations.

The state of Oregon has also started the process of developing regulations to protect employees in healthcare settings and in general industry. A timeline for such actions anticipates emergency regulations to be in place by September 1, 2020, and permanent regulations to be in place, at least in part, by March 1, 2021⁷.

Position of Division (Cal/OSHA)

In its July 30, 2020, evaluation of Petition 583, Cal/OSHA recommends that the Standards Board grant the petition, in part, by requesting Cal/OSHA to develop a proposed emergency temporary standard for the consideration of the Standards Board. Cal/OSHA also recommends that the Board request Cal/OSHA to convene a future advisory committee to determine whether a permanent regulation should be promulgated to protect Non-5199 Workers from infectious diseases, including novel pathogens.

In support of the recommendation, the evaluation states,

If COVID-19-specific protections similar to the [COVID-19-specific] guidelines were spelled out in the Title 8 standards, Cal/OSHA could more easily enforce requirements that would be specific, detailed, and more protective of workers...A specific COVID19 emergency regulation in Title 8 would provide clear instructions to employers and

⁶ Virginia Department of Labor and Industry. “16VAC25-220 Emergency Temporary Standard, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19.” Safety and Health Codes Board. July 15, 2020. <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf>. Accessed 7/24/2020.

⁷ Potential Oregon OSHA Rulemaking Timeline COVID-19/Infectious Diseases. Rev. July 13, 2020. <https://osha.oregon.gov/rules/advisory/infectiousdisease/Documents/Infectious-Disease-Public-Timeline.pdf>. Accessed 7/28/2020.

employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance.

Analysis

As the Board is aware, the WHO declared the COVID-19 outbreak a pandemic on March 11, 2020.⁸ On March 19, 2020, Governor Newsom signed Executive Order N-33-20⁹, requiring all residents of California to shelter in place, except as needed to maintain critical infrastructure sectors.

The Petitioners assert that employees not covered by one of California's ATD standards, which would include the majority of California workers, are not sufficiently protected by existing regulations and are at risk of death from COVID-19 without their proposed ETS or another enforceable standard. They state:

Lives are being lost and will continue to be lost without consistent rules as a starting point for our state's workplaces that allow employers some flexibility with respect to individual needs in their places of employment.

Cal/OSHA's webpage for COVID-19 guidance to employers contains the following statement:

Workplace safety and health regulations in California require employers to take steps to protect workers exposed to infectious diseases like the Novel Coronavirus (COVID-19), which is widespread in the community. Cal/OSHA has posted guidance to help employers comply with these requirements and to provide workers information on how to protect themselves and prevent the spread of the disease. (Emphasis added.)¹⁰

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 to employers with exposed employees. Board staff is unable to find evidence that the vast majority of California workplaces are not already in compliance with COVID-19 requirements and guidelines.

A Nevada OSHA press release on July 17, 2020 reported that an average of 80%-90% of Nevada businesses from a variety of sectors are in compliance with the state's guidelines for employee COVID-19 protections. The release states:

Follow up visits have been conducted at 192 businesses where Nevada OSHA officials found that 93 percent of those locations are now in compliance.

⁸ "WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020."

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>. Accessed 4/28/20.

⁹ "Executive Order N-33-20." Executive Department, State of California. <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>. Accessed 4/30/2020.

¹⁰ Cal/OSHA and Statewide Industry Guidance on COVID-19. <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>. Accessed 7/27/2020.

Since initial observations to determine compliance with mandated health and safety measures began, Division of Industrial Relations officials have visited 2,257 business establishments in northern and southern Nevada. As of July 15, the overall compliance rate for all business sectors statewide stood at 82 percent, with an 86 percent compliance rate in northern Nevada, and 80 percent in the south.¹¹

Board staff cautions that a new regulation would place additional regulatory burden on California businesses that are already compliant with California's COVID-19 requirements and guidelines. Some employers exhibit a lack of regard for Cal/OSHA regulations and continue to do so despite robust efforts on the part of regulatory agencies and employer and labor groups. It is the opinion of Board staff that during the pandemic crisis, Cal/OSHA's limited resources should continue to be focused on enforcement and consultation outreach specifically targeted at employers and sectors of the economy with deficient COVID-19 protections, as this is more likely to be effective at ensuring employee protections.

The Petitioners' effort to prescribe specific requirements in conjunction with an IIPP-like framework may contradict the legislative intent described in Government Code Section 11340.1(a):

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. (Emphasis added.)

California's IIPP regulation is a performance standard that has been used successfully since its effective date in 1991 to require employers to identify and address workplace hazards in accordance with the referenced legislative intent. Unnecessarily creating an offshoot of the IIPP, without substantial evidence of need, can harm the existing protective nature of the regulation and its benefit to California workplaces by diluting its capacity to serve as the primary regulation requiring employers to address newly discovered hazards.

Because of the novel nature of the COVID-19 virus, guidelines for employers to reference for assistance in protecting employees frequently change. Attempting to codify some of those requirements will no doubt result in confusion when the updated guidelines conflict with the written regulation. Although the Petitioners suggest a requirement for employers to update their programs within 10 days of new information, current regulations require employers address hazards "in a timely manner based on the severity of the hazard". As it would be

¹¹ "DIVISION OF INDUSTRIAL RELATIONS ANNOUNCES CITATIONS, INDUSTRY-LEVEL COMPLIANCE RATES WITH COVID-19 HEALTH AND SAFETY REQUIREMENTS." Division of Business and Industry. Las Vegas, NV. July 17, 2020. http://business.nv.gov/News_Media/Press_Releases/2020/Industrial_Relations_COVID-19/Division_of_Industrial_Relations_announces_citations,_industry-level_compliance_rates_with_COVID-19_health_and_safety_requirements/. Accessed 7/27/2020.

improper for employers to delay 10 days prior to addressing some hazards, the Petitioners' proposal would be less protective than current regulations. It is already the responsibility of employers to be aware of new information, and regulations setting specific prescriptive requirements are likely to become quickly outdated in the rapidly evolving crisis, creating a potential for wasteful enforcement actions.

For example, the state of Virginia's recently adopted ETS would encounter conflicts with the Petitioners' proposal for updating the program. VOSH allows employers to follow CDC guidance instead of state law where the CDC guidance is more protective, without providing information for determining the effectiveness of the protective measures. VOSH also requires employers to screen employees for signs or symptoms of COVID-19 before each shift. Updated guidance now recommends employees self-screen at home before coming to work¹². Relying on California's performance-based IIPP allows employers to respond to updated worker protection guidelines in a more efficient and responsive manner, which translates into more-effective employee protections.

As of July 26, 2020, at 11:00am, the <https://covid19.ca.gov/> website for California's COVID-19 data, says that there are 453,659 cases in the state and that 8,416 people have died from the illness. As pointed out by several observers, the Latino population in California has been disproportionately affected by the virus. The following figures are reproduced from the COVID-19.ca.gov website:

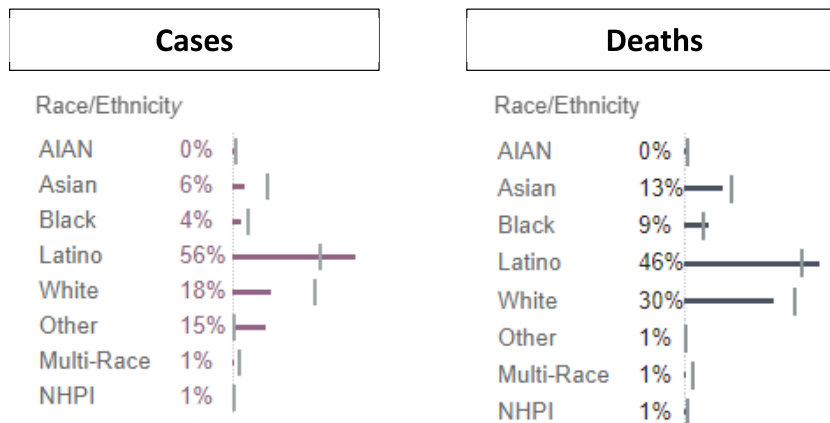


Figure 1. California data indicating that 56% of the identified COVID-19 cases and 46% of the deaths have occurred in the Latino population. The vertical gray lines indicate the percentage of the population for each Race/Ethnicity.

¹² Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#more-changes>. Accessed 8/5/2020.

The same website also provides the number of cases and deaths by county:

Positive Cases by County (Updated 7/25/2020)			Deaths by County (Updated 7/25/2020)		
Los Angeles	172,611	38%	Los Angeles	4,351	52%
Riverside	34,921	8%	Riverside	637	8%
Orange	33,978	7%	Orange	562	7%
San Bernardino	29,265	6%	San Diego	533	6%
San Diego	26,703	6%	San Bernardino	372	4%
Kern	16,910	4%	Santa Clara	184	2%
Fresno	12,866	3%	Imperial	181	2%
Alameda	10,361	2%	Alameda	178	2%
San Joaquin	10,347	2%	Tulare	168	2%
Santa Clara	8,767	2%	Kern	123	1%

Figure 2. California data showing that Los Angeles County has more COVID-19 cases than the next seven counties combined and more deaths than the next nine counties combined.

Public health experts are at a loss for an explanation of the disproportionate impact on the Latino communities. The phenomenon has appeared in several other states, including Arizona, Florida, North Carolina, Texas, Washington, and Wisconsin. In an attempt to explain the data, a New York Times article says that contact tracers have found large spikes in the number of cases associated with large family gatherings both in the United States and in Latin American countries. The article also states that:

During the lockdown, millions of Latino workers kept a bare-bones economy running: at the cutting tables of food-processing plants, as farmhands, as hospital orderlies, food preparers, supermarket workers and in many other jobs deemed essential. And they brought the virus home to often cramped living quarters, compounding the spread.¹³

Instead of directing limited resources to create new regulations to prescriptively require what is already required by the existing IIPP performance regulation, enforcement and consultative efforts could continue to focus on businesses in specific parts of the state, such as Los Angeles County, where about 40% of the cases and 50% of the deaths in California have occurred, or on specific industries identified as having disproportionately high incidents of infection. Developing an ETS and a follow-up permanent regulation for the entire state may not be the most effective use of California’s limited Cal/OSHA and Board resources.

¹³ Shawn Hubler, Thomas Fuller, Anjali Singhvi and Juliette Love. “Many Latinos Couldn’t Stay Home. Now Virus Cases Are Soaring in Their Communities.” New York Times. Published June 26, 2020. Updated June 28, 2020. <https://www.nytimes.com/2020/06/26/us/corona-virus-latinos.html>. Accessed 7/27/2020.

The Petitioners have identified a concern in that the tragic effects of the COVID-19 pandemic disproportionately affect people of generally lower-income and socio-economic status, but they have provided no evidence that their proposed statewide ETS, which is necessarily limited to workers, will remedy this concern. Alternatively, the State's approach to date has utilized tactics learned from emergency management, focusing finite resources asymmetrically to provide containment and abatement. Crowded public places and inadequate social distancing and face-covering provide opportunities for virus transmission not limited to workplaces. Cal/OSHA's continued coordination of efforts with other State agencies, including the California Department of Public Health, is more likely to be effective in addressing the need in disproportionately impacted communities.

Board staff is not aware of any California studies or data showing that employers are lacking the information necessary to provide employee protections from COVID-19 hazards, nor that the vast majority of employers are not already doing as much as they are able to keep their employees, customers, and businesses functioning safely in accordance with federal, state, and local requirements. Cal/OSHA enforcement officers are able to cite employers who flout worker protection regulations. Employers who fail to properly address the hazard to employees presented by COVID-19 incur risks of being shut down, fined, having licenses revoked, and a damaged reputation in the public forum.

After reviewing the Petition and existing regulations governing the concerns raised by the Petitioners, Board staff is of the opinion that while the risk of exposure to SARS-CoV-2 is significant, new regulations, whether in the form of an emergency or permanent regulation, are not likely to significantly improve employee outcomes. Employers have ready access to credible information to combat exposure to SARS-CoV-2 and are already required to effectively address such challenges in their workplace. Continued enforcement of existing regulations and consultative outreach is a more efficient and likely effective use of the Cal/OSHA's limited resources.

STAFF RECOMMENDATION


Consistent with the foregoing discussion, Board staff does not believe that the Petitioners' emergency request is necessary and recommends that Petition File No. 583 be DENIED.



Memorandum

Date: July 30, 2020

To: Christina Shupe, Executive Officer
Occupational Safety and Health Standards Board

From: Douglas L. Parker, Chief 
Division of Occupational Safety and Health

Re: Evaluation of Petition 583 to Adopt an Emergency Regulation to Protect Workers from COVID-19, and a Permanent Regulation to Protect Workers from Infectious Diseases

1.0 INTRODUCTION

On May 20, 2020, the Division of Occupational Safety and Health (Cal/OSHA) received a petition from Frances C. Schreiber, National Lawyers Guild, and Stephen Knight, Worksafe (Petitioners). Petitioners propose that the Occupational Safety and Health Standards Board (Standards Board) amend the California Code of Regulations, title 8 (Title 8) as follows:

- Adopt a new emergency regulation¹ to protect employees in any facility, service category, or operation from SARS-CoV-2 (the virus that causes COVID-19) who are not covered by the Aerosol Transmissible Disease standard at Title 8, sections 5199 or 5199.1 ("Non-5199 Workers"); and
- Adopt a permanent regulation to protect employees from infectious diseases, including those caused by novel pathogens.

Labor Code section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health and requires the Occupational Safety and Health Standards Board (Standards Board) to consider such proposals and render a decision no later than six months following receipt. California Governor Gavin Newsom, in recognition of the State of Emergency that exists in California as a result of the threat of COVID-19, extended this time

¹ Petitioners use the term "emergency temporary standard" to refer to an emergency regulation.

period by 120 days in [Executive Order N-71-20](#) (modifying extension in Executive Order N-63-20).

Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Standards Board from a source other than Cal/OSHA must be referred to Cal/OSHA for evaluation. Cal/OSHA has 60 days after receipt to submit a report to the Standards Board on the proposal. The Governor has also extended this time period an additional 120 days.

For the reasons discussed below, Cal/OSHA recommends that the Standards Board grant the petition, in part, by requesting Cal/OSHA to develop a proposed emergency temporary standard for the consideration of the Standards Board. The Board should also request Cal/OSHA to convene a future advisory committee to determine whether a permanent regulation should be promulgated to protect Non-5199 Workers from infectious diseases, including novel pathogens.

2.0 REGULATORY CHANGES REQUESTED BY THE PETITIONER

Petitioners propose to amend Title 8, through the adoption of an emergency regulation to require employers to take specific steps to protect Non-5199 Workers from COVID-19.

Specifically, Petitioners request that a temporary emergency regulation be adopted that requires employers to:

- a. Minimize the risk of transmission of COVID-19 to employees from other employees or from the public, through procedures that shall include the following elements:
 1. Identification of a competent employer representative to establish, implement, and maintain an effective written Compliance Action Plan (Plan) to protect employees and requires employers to share the Plan with employees and employee representatives;
 2. Procedures to identify and evaluate workplace hazards that may expose employees to COVID-19;
 3. Methods and/or procedures to control employee exposure to COVID-19 and correcting unsafe or unhealthy conditions. These shall include engineering controls, work practices and procedures, and personal protective equipment (PPE); and

4. Procedures to respond to an employee report that:
 - A. The employee has been diagnosed with COVID-19;
 - B. The employee has symptoms of COVID-19; or
 - C. The employee has been exposed to a person who has been diagnosed with COVID-19.
- b. Conduct a Job Hazard Analysis to identify potential modes of COVID-19 transmission and adopt and implement feasible preventive measures to eliminate or minimize transmission risk. A written list of these measures shall be provided to each employee, and shall include at least the following:
 1. Identification of job categories, tasks, and procedures in which employees may have occupational exposure to COVID-19;
 2. Specific measures to ensure social distancing of at least six (6) feet between employees and other persons: measures to be used to protect employees interacting with the public include the use of barriers between employees and the public, limiting the number of members of the public in the facility, marking distances in areas where the public may congregate, and ensuring that where employees interact with the public at a distance of less than six (6) feet, employees are provided with access to N-95 or filtering facepiece respirators and face shields;
 3. Installing ventilation systems to reduce employee exposure to airborne COVID-19 virus;
 4. Implementing measures to ensure personal hygiene;
 5. Immediate cleaning of all shared materials before another employee handles that material and regularly scheduled frequent cleaning and disinfection of areas and surfaces that may become contaminated and pose an infection risk to employees; and
 6. Implementing other procedures to minimize the likelihood the public may contaminate employees, such as providing employees with PPE, *e.g.*, gloves, and requiring members of the public to cover their noses and mouths with face coverings while in the facility to minimize the transmission of airborne pathogens to employees.

- c. Provide employees with the tools, operating equipment, and PPE necessary to comply fully with public health orders, regulations, and laws, at no cost to employees. PPE shall be assessed and certified as required by Title 8, section 3380, subdivision (f) for the hazard of exposure to COVID-19, and employees shall be trained on the proper use of PPE required for potential exposure to COVID-19. Employees who provide their own PPE that meets or exceeds the PPE required by Cal/OSHA shall not suffer any adverse action by the employer. Further, all employees who are directed by their employer to wear compliant PPE shall be provided with a medical evaluation in accordance with Title 8, section 5144, subdivision (e). Employee respiratory protection, including filtering facepiece respirators, designed to protect employees exposed to airborne pathogen hazards, shall comply with Title 8, section 5144.
- d. Train employees on the Plan, ensure compliance with the Plan, and provide each employee with a copy of the Plan, along with the full list of relevant compliance measures.
- e. Maintain records of the Plan, in accordance with Title 8, section 3203, subdivision (b).

In addition, Petitioners propose to amend the California Code of Regulations, title 8, through the adoption of a permanent regulation intended to protect all workers from infectious diseases, including novel pathogens. Petitioners have not provided suggested regulatory language for a permanent regulation.

3.0 HAZARDS ASSOCIATED WITH EXPOSURE TO COVID-19

COVID-19 is widespread in the community and is transmitted easily from person to person. Routes of exposure include:

- **Airborne transmission:** An infected person (with or without symptoms) sheds virus in small particles when breathing, talking, coughing, sneezing, etc. The contaminated particles are suspended in the air. A susceptible person is infected when inhaling the contaminated particles.
- **Droplet transmission:** An infected person expels droplets containing the virus when talking, coughing, and sneezing. A susceptible person is infected when the droplets contact that person's conjunctivae or the mucous membranes of the nose, mouth, or eyes.

- **Surface transmission:** An infected person coughs or sneezes and sheds virus onto a surface or object. A susceptible person is infected when they touch the contaminated surface or object and then touch their own mouth, nose, or eyes.

The airborne transmission is the dominant route for the spread of COVID-19.² Surface transmission is believed to be less common than airborne and droplet transmission.³ Transmission can occur from an infected person who is asymptomatic or presymptomatic.⁴

Infection with COVID-19 may result in a serious illness that includes difficulty breathing, pneumonia, and hospitalization. In some cases, the disease progresses, and organ failure and death may result. Approximately 14% of COVID-19 patients are hospitalized, 2% are admitted to an intensive care unit, and 5% die based on data through May 30, 2020. Hospitalizations are six times higher and deaths are 12 times higher among patients with a reported underlying health condition (cardiovascular disease, diabetes, and chronic lung disease)

² Renyi Zhang, Yixin Li, Annie L. Zhang, Yuan Wang, Mario J. Molina. *Identifying airborne transmission as the dominant route for the spread of COVID-19*. Proceedings of the National Academy of Sciences, Jun 2020, 117 (26) 14857-14863. <https://www.pnas.org/content/117/26/14857>.

Parham Azimi, Zahra Keshavarz, Jose Guillermo Cedeno Laurent, Brent R. Stephens, Joseph G. Allen. *Mechanistic Transmission Modeling of COVID-19 on the Diamond Princess Cruise Ship Demonstrates the Importance of Aerosol Transmission*. BMJ. July 15, 2020. <https://doi.org/10.1101/2020.07.13.20153049>.

Guenther, Thomas and Czech-Sioli, Manja and Indenbirken, Daniela and Robitailles, Alexis and Tenhaken, Peter and Exner, Martin and Ottinger, Matthias and Fischer, Nicole and Grundhoff, Adam and Brinkmann, Melanie, *Investigation of a superspreading event preceding the largest meat processing plant-related SARS-Coronavirus 2 outbreak in Germany* (July 17, 2020). <http://dx.doi.org/10.2139/ssrn.3654517>

Rachael M. Jones (2020): *Relative contributions of transmission routes for COVID-19 among healthcare personnel providing patient care*, Journal of Occupational and Environmental Hygiene, DOI: 10.1080/15459624.2020.1784427. <https://www.tandfonline.com/doi/full/10.1080/15459624.2020.1784427>

Lidia Morawska, Donald K Milton, *It is Time to Address Airborne Transmission of COVID-19*, *Clinical Infectious Diseases*, ciaa939, <https://doi.org/10.1093/cid/ciaa939>

Guenther, Thomas and Czech-Sioli, Manja and Indenbirken, Daniela and Robitailles, Alexis and Tenhaken, Peter and Exner, Martin and Ottinger, Matthias and Fischer, Nicole and Grundhoff, Adam and Brinkmann, Melanie, *Investigation of a superspreading event preceding the largest meat processing plant-related SARS-Coronavirus 2 outbreak in Germany* (July 17, 2020). Available at SSRN: <https://ssrn.com/abstract=3654517>

³ Centers for Disease Control and Infection. *CDC updates COVID-19 transmission webpage to clarify information about types of spread*. May 23, 2020. Accessed July 07, 2020. <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html>

⁴ Furukawa NW, Brooks JT, Sobel J. *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*. Emerging Infectious Diseases. 2020 Jul. <https://doi.org/10.3201/eid2607.201595>

compared with those without reported underlying conditions.⁵

There are no established safe exposure limits to an infectious pathogen such as SARS-CoV-2. It is unknown how many infectious particles are needed to cause infection and disease.

4.0 APPLICABLE TITLE 8 REGULATIONS

The following are Title 8 regulations that are be applicable to protecting Non-5199 Workers from COVID-19. Section 5199 is not discussed as the petition is specific to Non-5199 Workers.

As discussed below, while the following standards require protections against COVID-19, they are not specific to this virus and generally do not identify the particular measures or controls that employers must take to prevent workplace spread of COVID-19. For these reasons, as explained in section 7.0, Cal/OSHA recommends the adoption of an emergency regulation, which would complement and augment the existing rules and provide clear guidance to employers and workers. Given the unprecedented nature of the current pandemic, it is essential that Cal/OSHA have all available tools to protect workers from COVID-19 illness and death.

4.2.1 Section 3203. Injury and Illness Prevention Program.

Title 8, section 3203 applies to nearly all California workplaces and requires employers to establish, implement, and maintain an effective written Injury and Illness Prevention Program (IIPP) to protect their employees, and to keep records of the steps taken to implement and maintain the IIPP. Its requirements are general in nature, and as such it requires employers to address all workplace hazards, including those that are not specifically addressed by other Cal/OSHA regulations.

4.2.1.1 Title 8, section 3203, subdivision (a)(4), identifying and evaluating workplace hazards

⁵ Stokes EK, Zambrano LD, Anderson KN, et al. Coronavirus Disease 2019 Case Surveillance — United States, January 22–May 30, 2020. MMWR Morb Mortal Wkly Rep 2020;69:759–765.
DOI: [http://dx.doi.org/10.15585/mmwr.mm6924e2external icon](http://dx.doi.org/10.15585/mmwr.mm6924e2external%20icon)

Section 3203, subdivision (a)(4) requires employers to implement procedures for identifying and evaluating workplace hazards. Due to the widespread transmission of COVID-19 in California, this subdivision requires employers to evaluate COVID-19-transmission hazards and risks in their workplaces.

Section 3203, subdivision (a)(4) reads, in pertinent part, as follows:

Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.

(A) When the Program is first established;

* * * *

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

4.2.1.2 Title 8, section 3203, subdivision (a)(5), investigating occupational injury or occupational illness

Section 3203, subdivision (a)(5) requires employers to implement procedures to investigate occupational illnesses. If an employer learns of an employee (or employees) who has or is suspected to have COVID-19, the employer must investigate to determine if the transmission was work related and, if it was work-related, how it was transmitted in the workplace.

Section 3203, subdivision (a)(5) reads as follows: Include a procedure to investigate occupational injury or occupational illness.

4.2.1.3 Title 8, section 3203, subdivision (a)(6), correcting unsafe or unhealthy conditions, work practices, and work procedures

Section 3203, subdivision (a)(6) requires employers to implement methods and/or procedures for correcting unsafe or unhealthy conditions, work practices, and work procedures in a timely manner. It requires employers to take measures to effectively reduce COVID-19-transmission hazards that exist in their workplaces as identified through implementation of subdivisions (a)(4) and (a)(5).

However, section 3203, subdivision (a)(6) does not specify how employers are to correct unsafe workplaces (*i.e.*, engineering controls, administrative controls, personal protective equipment (PPE)). Instead, it puts the responsibility on employers, given their intimate knowledge of the hazards at issue and the workings of the place of employment, to devise such methods or procedures.

Section 3203, subdivision (a)(6) reads as follows:

Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

- (A) When observed or discovered; and,
- (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

4.2.1.4 Title 8, section 3203, subdivision (a)(7), providing training and instruction

Subdivision (a)(7) requires employers to train their employees on workplace hazards and their prevention. Due to the widespread transmission of COVID-19 in California, employers must train employees on the transmission hazards of COVID-19 in their workplace, what measures the employer has implemented to reduce the hazard, and what actions employees need to take to help reduce transmission.

Section 3203, subdivision (a)(7) reads, in pertinent part, as follows:

Provide training and instruction:

- (A) When the program is first established;

- (B) To all new employees;
- (C) To all employees given new job assignments for which training has not previously been received;

- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

4.3 Title 8, section 5141. Control of Harmful Exposure to Employees

Section 5141 requires employers to control harmful exposures to employees. Under section 5140, harmful exposure is defined as:

An exposure to dusts, fumes, mists, vapors, or gases:

- (a) In excess of any permissible limit prescribed by Section 5155; or
- (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function.

Exposure to COVID-19 is a harmful exposure, as exposure to aerosols (in the breath of infected persons) containing SARS-CoV-2 has a probability to result in illness, disease, impairment, or loss of function.

4.3.1 Title 8 subsection 5141, subdivision (a), Engineering Controls

Section 5141, subdivision (a) requires employers to control harmful exposures using feasible engineering controls. Although section 5141 does not specify the controls that must be implemented for any particular hazard, examples of engineering controls for COVID-19 include physical barriers, ventilation, air filtration, source controls (universal masking), etc.

Subsection 5141, subdivision (a) reads, in pertinent part, as follows:

Engineering Controls. Harmful exposures shall be prevented by engineering controls whenever feasible.

4.3.2 Title 8, section 5141, subdivision (b), Administrative Controls

Section 5141, subdivision (b) requires employers to use practicable administrative controls when engineering controls are not feasible or do not fully

prevent harmful exposure. While not specified in the rule, examples of administrative controls to help prevent transmission of COVID-19 include remote work, physical distancing, changing schedules, reducing the number of persons in spaces, etc.

Section 5141, subdivision (b) reads as follows:

Administrative Controls. Whenever engineering controls are not feasible or do not achieve full compliance, administrative controls shall be implemented if practicable.

4.3.3 Title 8, section 5141, subdivision (c), Control by Respiratory Protective Equipment

Section 5141, subdivision (c) requires employers to use respiratory protective equipment to prevent harmful exposures when engineering controls and administrative controls are not sufficient to prevent harmful exposures. Given the nature of COVID-19, all California employers unable to control COVID-19 with engineering and administrative controls would need to provide respiratory protection in order to comply with section 5141, subdivision (c) during the current pandemic, but that is not possible due to current respirator supply constraints.

Section 5141, subdivision (c) reads as follows:

Control by Respiratory Protective Equipment. Respiratory protective equipment, in accordance with Section 5144, shall be used to prevent harmful exposures as follows:

- (1) During the time period necessary to install or implement feasible engineering controls;
- (2) Where feasible engineering controls and administrative controls fail to achieve full compliance; and
- (3) In emergencies.

4.4 Title 8, section 5144. Respiratory Protection

Similar to section 5141, subdivision (c), section 5144 requires respirators be used to protect the health of employees when effective engineering controls to prevent harmful atmospheres are not feasible. Again, compliance with this section for all California workplaces where there are COVID-19 transmission hazards despite

engineering and administrative controls has not been possible during the current pandemic due to respirator supply constraints.

Section 5144 reads, in pertinent part, as follows:

§ 5144. Respiratory Protection.

(a) Permissible practice.

(1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in subsection (c).

(d) Selection of respirators. This subsection requires the employer to evaluate respiratory hazard(s) in the workplace, identify relevant workplace and user factors, and base respirator selection on these factors...

(1) General requirements.

(A) The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.

(B) The employer shall select a NIOSH-certified respirator. The respirator shall be used in compliance with the conditions of its certification.

(C) The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH.

(D) The employer shall select respirators from a sufficient number of respirator models and sizes so that the respirator is acceptable to, and correctly fits, the user.

4.5 Title 8 section 3362. General Requirements (Sanitation)

Section 3362, subdivision (a) requires that workplaces be kept clean and in sanitary condition. It also requires that buildings be cleaned and maintained to prevent harmful exposures (defined in section 5140 – see part 4.3 above). Thus, under this rule, employers must perform workplace cleaning to prevent exposure to COVID-19. For example, SARS-CoV-2 can remain viable on surfaces and objects for up to seven days.⁶ There are products known to effectively disinfect surfaces from the virus. Thus, use of those products is required by this subdivision where there is a risk of surface contamination.

Section 3362, subdivision (b) requires cleaning and sweeping be done in a manner that does not create a harmful exposure to COVID-19. For example, dry sweeping of floors may aerosolize SARS-CoV-2 and thus is prohibited by this subsection where there is a likelihood of viral contamination.

⁶ Alex Chin, Julie Chu, Mahen Perera, Kenrie Hui, Hui-Ling Yen, Michael Chan, Malik Peiris, Leo Poon. Stability of SARS-CoV-2 in different environmental conditions. *The Lancet Microbe*. 2 April 2020. <https://www.thelancet.com/action/showPdf?pii=S2666-5247%2820%2930003-3>

However, like sections 3203 and 5141, section 3362 does not identify specific sanitation measures that must be taken to protect workers from COVID-19.

Section 3362, subdivisions (a) and (b) read as follows:

(a) To the extent that the nature of the work allows, workplaces, storerooms, personal service rooms and passageways shall be kept clean, orderly and in a sanitary condition. The interiors, exteriors and environs of buildings that contribute to a hazard to which these orders apply shall be cleaned and maintained in such conditions as will not give rise to harmful exposure, as defined in Section 5140.

(b) Cleaning and sweeping shall be done in such a manner as to minimize the contamination of the air and, insofar as is practicable, shall be performed at such time and in such a manner that will avoid harmful exposures as defined in Section 5140.

4.6 Title 8 section 3366. Washing Facilities

Section 3366, subdivision (a) requires that washing facilities be reasonably accessible to all employees. The section, however, does not specifically require measures to ensure that employees are able to maintain personal hygiene, such as the provision of hand sanitizer by the employer.

Section 3366, subdivision (a) reads as follows:

Washing facilities for maintaining personal cleanliness shall be provided in every place of employment. These facilities shall be reasonably accessible to all employees.

4.7 Title 8 section 3380. Personal Protective Devices

Section 3380 contains general requirements for PPE. Requirements of this section include that: PPE be labeled, be used in accordance with the manufacturer's instructions, be maintained in a safe and sanitary condition, and fit adequately. The section also requires employers to properly train employees on the use of PPE.

Section 3380, subdivision (f)(1) requires employers to assess the workplace for hazards and select the appropriate PPE. Subdivision (f)(2) requires written documentation that certifies that a workplace-hazard assessment has been performed. Subdivision (f)(4) requires the employer to provide training to employees on the proper use of required PPE.

These subdivisions, however, apply only to PPE required by sections 3381 (head protection), 3382 (eye protection), 3384 (hand protection), and 3385 (foot protection). As explained in parts 4.8 and 4.9 of this evaluation below, none of these sections require PPE to help prevent the transmission of COVID-19. Construction and mining employers are also exempt from section 3380, subdivision (f), which reads, in pertinent part, as follows:

Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(B) Communicate selection decisions to each affected employee; and,

(C) Select PPE that properly fits each affected employee.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

(4) Training. The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:

- (A) When PPE is necessary;
- (B) What PPE is necessary;
- (C) How to properly don, doff, adjust, and wear PPE;
- (D) The limitations of the PPE; and,
- (E) The proper care, maintenance, useful life and disposal of the PPE.

(8) Subsections (f)(1) and (2) and (f)(4) through (7) of this section apply only to Sections 3381, 3382, 3384 and 3385 of these Orders. Subsections (f)(1) and (2) and (f)(4) through (7) of this section do not apply to Section 5144 of these Orders and Section 2940.6 of the High Voltage Electrical Safety Orders. Subsection (f) does not apply to workplace operations regulated by the Construction Safety Orders or the Mine Safety Orders.

4.8 Title 8 section 3382. Eye and Face Protection

Section 3382 contains requirements for the provision and use of eye and face protection. Section 3382, subdivision (a) requires eye and face protection only to protect against acute eye injuries. It does not require eye protection to prevent infectious diseases. COVID-19 is believed to be transmissible through the eyes, mouth, and nose, and eye and face protection may help prevent infections.⁷

Section 3382, subdivision (a) reads as follows:

Employees working in locations where there is a risk of receiving eye injuries such as punctures, abrasions, contusions, or burns as a result of contact with flying particles, hazardous substances, projections or injurious light rays which are inherent in the work or environment, shall be safeguarded by means of face or eye protection. Suitable screens or shields isolating the hazardous

⁷ Christian J. Kähler, Rainer Hain, Fundamental protective mechanisms of face masks against droplet infections, Journal of Aerosol Science, Volume 148, 2020.
<https://www.sciencedirect.com/science/article/pii/S0140673620311429>

exposure may be considered adequate safeguarding for nearby employees.

4.9 Title 8 section 3384. Hand Protection

Section 3384 contains requirements for the provision and use of hand protection. Section 3384, subdivision (a) requires hand protection from exposures to harmful substances that absorb through the skin, cuts or lacerations, abrasions, punctures, chemical burns, thermal burns, radioactive materials, and harmful temperature extremes.

Subdivision (a) does not require hand protection when the hands of employees may contact a surface contaminated with SARS-CoV-2 because SARS-CoV-2 does not penetrate the skin, but rather infects persons after they touch their eyes, nose, or mouth with contaminated hands.

Section 3384, subdivision (a) reads as follows:

Employers shall select, provide and require employees to use appropriate hand protection when employee's hands are exposed to hazards such as those from skin absorption of harmful substances, cuts or lacerations, abrasions, punctures, chemical burns, thermal burns, radioactive materials, and harmful temperature extremes.

4.10 Title 8 section 5193. Bloodborne Pathogens

Section 5193 applies to all occupational exposure to blood or "*other potentially infectious materials*" (the construction industry is exempted). Other potentially infectious materials" is defined in the regulation as follows:

"Other Potentially Infectious Materials" is defined, in pertinent part, as follows:

The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any other body fluid that is visibly contaminated with blood such as saliva or vomitus, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids such as emergency response

Although SARS-CoV-2 is not likely transmitted through parenteral contact with blood and other potentially infectious materials,⁸ it is likely transmitted when infected blood or other potentially infectious materials are aerosolized and are inhaled or contact the eyes, nose, or mouth. This occurs most frequently in settings generally subject to section 5199, the Aerosol Transmissible Disease standard. For workplaces not covered by section 5199 where aerosolization of blood and other potentially infectious materials occurs (such as dentistry and other medical specialties that meet exemptions in 5199), section 5193 contains requirements to reduce the risk of COVID-19 transmission, including requirements for engineering controls, cleaning practices, personal hygiene practices, and personal protective equipment.

Some of the relevant requirements in section 5193 are the following:

(d)(1) ... Universal precautions shall be observed to prevent contact with blood or OPIM [*Other potentially infectious materials*]. Under circumstances in which differentiation between body fluid types is difficult or impossible, all body fluids shall be considered potentially infectious materials.

* * * *

(d)(2)(A) ... Engineering and work practice controls shall be used to eliminate or minimize employee exposure.

* * * *

(d)(3)(D) All procedures involving blood or OPIM shall be performed in such a manner as to minimize splashing, spraying, spattering, and generation of droplets of these substances.

* * * *

(d)(3)(H)(2)a. Contaminated Work Surfaces.
Contaminated work surfaces shall be cleaned and decontaminated with an appropriate disinfectant

⁸ National Institute of Environmental Health Sciences. Can SARS-CoV-2, the Virus that Causes COVID-19 Disease, Be Spread by Blood? 2020. https://tools.niehs.nih.gov/wetp/public/hasl_get_blob.cfm?ID=11981

immediately or as soon as feasible when:

- i. Surfaces become overtly contaminated;
- ii. There is a spill of blood or OPIM;
- iii. Procedures are completed; and
- iv. At the end of the work shift if the surface may have become contaminated since the last cleaning.

* * * *

(d)(3)(I) Hygiene.

1. Employers shall provide handwashing facilities which are readily accessible to employees.

2. When provision of handwashing facilities is not feasible, the employer shall provide either an appropriate antiseptic hand cleanser in conjunction with clean cloth/paper towels or antiseptic towelettes. When antiseptic hand cleansers or towelettes are used, hands shall be washed with soap and running water as soon as feasible.

3. Employers shall ensure that employees wash their hands immediately or as soon as feasible after removal of gloves or other personal protective equipment.

4. Employers shall ensure that employees wash hands and any other skin with soap and water, or flush mucous membranes with water immediately or as soon as feasible following contact of such body areas with blood or OPIM.

* * * *

(d)(4) Personal Protective Equipment.

(d)(4) (A) Provision. Where occupational exposure remains after institution of engineering and work practice controls, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or OPIM to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the

duration of time which the protective equipment will be used.

* * * *

(d)(4)(G) Gloves. Gloves shall be worn when it can be reasonably anticipated that the employee may have hand contact with blood, OPIM, mucous membranes, and non-intact skin; when performing vascular access procedures except as specified in subsection (d)(4)(G)4.; and when handling or touching contaminated items or surfaces. These requirements are in addition to the provisions of Section 3384.

1. Disposable (single use) gloves such as surgical or examination gloves, shall be replaced as soon as practical when contaminated or as soon as feasible if they are torn, punctured, or when their ability to function as a barrier is compromised.

* * * *

(d)(4)(H) Masks, Eye Protection, Face Shields, and Respirators.

1. Masks in combination with eye protection devices, such as goggles or glasses with solid side shields, or chin-length face shields, shall be worn whenever splashes, spray, spatter, or droplets of blood or OPIM may be generated and eye, nose, or mouth contamination can be reasonably anticipated. These requirements are in addition to the provisions of Section 3382.

2. Where respiratory protection is used, the provisions of Sections 5144 and 5147 are required as applicable.

* * * *

(d)(4)(I) Gowns, Aprons, and Other Protective Body Clothing.

1. Appropriate protective clothing such as, but not limited to, gowns, aprons, lab coats, clinic jackets, or similar outer garments shall be worn in occupational exposure situations. The type and characteristics will depend upon the task and degree of exposure anticipated. These requirements are in addition to the provisions of Section 3383.

5.0 FEDERAL OSHA REGULATIONS

Federal OSHA standards contain many of the same requirements as Title 8. The foremost exceptions are:

- The IIPP, required by Title 8, has no similar federal regulatory mandate.
- The definition of "harmful exposure." In Title 8, a *harmful exposure* is defined as exposure to any airborne substance that can cause injury, illness, disease, impairment, or loss of function. This includes SARS-CoV-2. The federal regulations do not have such a broad definition, and they limit regulation of harmful airborne exposures to specific substances listed in title 29 Code of Federal Regulations Subpart Z "Toxic and Hazardous Substances," which does not include SARS-CoV-2. Thus, protections against SARS-CoV-2 are not required by those federal regulations.

However, while there is no federal regulation governing airborne exposure to substances such as SARS-CoV-2, federal OSHA does have the "General Duty Clause" in section 5(a)(1) of the Occupational Safety and Health Act of 1970. The clause states the following:

Each employer shall furnish to each of his [*sic*] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

The General Duty Clause is used by federal OSHA to address conditions that are not subject to other Federal OSHA regulations. As such, it can be used by Federal OHA to require employers to protect employees from harmful airborne pathogens, such as SARS-CoV-2.

Other federal regulations such as those governing respiratory protection, sanitation, washing facilities, personal protective equipment, and bloodborne pathogens are similar to their counterpart regulations in the California Code of Regulations, title 8, discussed above.

6.0 PETITIONERS AND THEIR BASIS FOR NEW REGULATIONS

Petitioners assert that without specific occupational health and safety regulation to protect workers from COVID-19, Californians will become sick and die

unnecessarily. They request regulatory protection for workers not currently protected by the Aerosol Transmissible Disease standard, title 8 section 5199 ("Non-5199 Workers"). Petitioners seek to add both an emergency regulation to immediately protect Non-5199 Workers from COVID-19, and a permanent regulation to protect Non-5199 Workers in the long-term from infectious diseases in general, including novel pathogens such as COVID-19.

Petitioners assert that an emergency regulation to protect Non-5199 Workers from COVID-19 must be issued as soon as possible and take immediate effect. They state that the California economy is in the process of opening back up, and employees currently working, or who will be returning to work in the future, need an emergency regulation now. Many more workers will be exposed to COVID-19 as the economy opens back up. Petitioners contend an emergency regulation is necessary, not only to protect the employees' health and safety, but also the health and safety of their families and communities.

Petitioners assert that the COVID-19 pandemic is not diminishing and will persist for some time, and in the face of this public health emergency, clarity is required for both employers and employees. They state that the performance-based requirements of Title 8, section 3203, combined with a small number of other regulations, are not adequate in protecting employees from COVID-19.

Thus, Petitioners propose language for a draft emergency regulation to protect Non-5199 Workers standard from COVID-19 and ask the Standards Board to consider their draft as guidance in developing an emergency regulation. They also propose the adoption of a permanent regulation to protect employees from infectious diseases, including those caused by novel pathogens.

7.0 ANALYSIS OF THE PROPOSAL

Cal/OSHA agrees with Petitioners that COVID-19 is a workplace emergency. SARS-CoV-2 is a highly infectious, easily transmissible, and virulent pathogen. It has killed hundreds of workers in California and sickened thousands, and workers will continue to become ill and die until the pandemic subsides. COVID-19 is an occupational health emergency causing more deaths in less time than any other workplace crisis in the nearly fifty-year existence of Cal/OSHA. The COVID-19 public health crisis is exactly the type of catastrophe that the legislature intended an emergency regulation to address.

Cal/OSHA also agrees that an emergency regulation is warranted. Although section 5199 provides specific protections for novel pathogens such as COVID-19, it does not protect all workers. Many Non-5199 Workers are affected by major outbreaks of COVID-19 including workers in the following industries: meat and poultry processing, food processing, agriculture, garment manufacturing, warehousing, public transportation, and retail stores.

There is no existing Title 8 regulation that comprehensively addresses an employer's responsibility to protect Non-5199 Workers from infectious diseases. While many of the regulations discussed above require employers to take steps to protect workers against COVID-19, these standards are not specific to infectious diseases, including COVID-19 and do not necessarily identify specific measures that must be taken to fight the spread of any infectious disease. In the absence of a specific set of mandatory infection-control requirements that employers clearly must implement, there is no assurance that all Non-5199 Workers will be protected from infectious diseases like COVID-19.

Guidance exists on how employers can protect workers from COVID-19. There are a large number of COVID-19 prevention guidelines from myriad government agencies (including federal OSHA and Cal/OSHA), universities, non-profit organizations, business associations, and others. And employers should follow these guidelines to protect Non-5199 Workers from COVID-19 in order to comply with general regulations such as sections 3203, 3362, 3366, 5141, 5144, But these standards themselves do not prescribe specific steps that employers must take to protect workers from COVID-19. Thus, while these general provisions provide Cal/OSHA a regulatory basis for requiring employers to take measures to protect workers from COVID-19, Cal/OSHA's enforcement efforts could be streamlined and strengthened through regulatory mandates specific to preventing the spread of infectious diseases. In addition, the PPE regulations (sections 3380 through 3385) do not apply to infectious-disease prevention and section 5193, which contains applicable PPE requirements, only applies to a very small number of Non-5199 Workplaces.

If COVID-19-specific protections similar to the guidelines were spelled out in the Title 8 standards, Cal/OSHA could more easily enforce requirements that would be specific, detailed, and more protective of workers. Given the unprecedented nature of the COVID-19 pandemic, a new standard that will enhance Cal/OSHA's

ability to protect workers is essential to keep workplaces safe. A specific COVID-19 emergency regulation in Title 8 would provide clear instructions to employers and employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance.

8.0 CONCLUSION

Pursuant to Labor Code section 147.1, Cal/OSHA has determined there is a necessity for an emergency regulation to protect all Non-5199 Workers from COVID-19. Due to the current COVID-19 pandemic, it is important that a regulation be promulgated as soon as possible to protect employees from exposure to the virus.

Cal/OSHA recommends that the Standards Board grant petition 583, and that an emergency regulation be promulgated to protect employees from exposure to COVID-19. In addition, Cal/OSHA recommends that an advisory committee be convened by Cal/OSHA after the COVID-19 pandemic subsides to determine whether a permanent regulation should be promulgated to protect Non-5199 Workers from infectious diseases, including novel pathogens.

cc: Susan Eckhardt
Chris Kirkham
Eric Berg

**OCCUPATIONAL SAFETY
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**SUMMARY
PUBLIC MEETING AND BUSINESS MEETING
July 16, 2020
Teleconference in Sacramento, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman Dave Thomas called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., July 16, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726 and via Webex at www.webex.com.

ATTENDANCE

Board Members Present at OSHSB Office
Dave Thomas

Board Members Absent
NONE

Board Members Present via Teleconference
and/or Webex
Barbara Burgel
Dave Harrison
Nola Kennedy
Chris Laszcz-Davis
Laura Stock

Board Staff Present at OSHSB Office
Christina Shupe, Executive Officer
Michael Nelmda, Senior Safety Engineer
Sarah Money, Executive Assistant

Division of Occupational Safety and Health
Staff Present via Teleconference and/or Webex
Eric Berg, Deputy Chief of Health

Board Staff Present via Teleconference
and/or Webex
Mike Manieri, Principal Safety Engineer
Lara Paskins, Staff Services Manager
David Kernazitskas, Senior Safety Engineer
Jennifer White, Staff Services Analyst

Others Present via Teleconference and/or Webex

Michael Donlon, Construction Employers
Association
Eric Conn, Conn Maciel Carey
Mirella Deniz-Zaragoza, Warehouse
Worker Resource Center
Jennifer Wysick, Truebeck Construction
Edward Flores, University of CA, Merced

Stan Santos, Fresno Madera Tulare Kings
Central Labor Council
Eric Frumin, Change to Win
Ramón Castellblanch, CA Alliance for Retired
Americans
Stephen Knight, Worksafe
Cassie Hilaski, Nibbi Brothers General

Anne Katten, CA Rural Legal Assistance Foundation	Contractors
Robert Moutrie, CA Chamber of Commerce	Julie Rey, San Joaquin Valley Air Pollution Control District
Dan Leacox, Leacox and Associates	Frank Belio, International Union of Elevator Constructors Local 18
Raul Pickett, Central Valley Response Task Force	Elizabeth Treanor, Phylmar Regulatory Roundtable
Frances Schreiber, National Lawyers Guild - Labor & Employment Committee (NLG – L&EC)	Kevin Riley, University of CA, Los Angeles, Labor Occupational Safety and Health Program

Mr. Thomas indicated that this portion of the Board’s meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Steven Knight, Worksafe, commented in support of the petition that his organization and the National Lawyers Guild - Labor and Employment Committee (NLG L&EC) submitted in May to address COVID-19 exposure in the workplace (Petition 583). He asked when the petition will be put before the Board for consideration and vote.

Eric Conn, Conn Maciel Carey, representing the Coalition for Uniformity in COVID-19 Recordkeeping, stated that his organization is concerned about the fact that recordkeeping requirements in the Division’s COVID-19 guidance differs substantially from federal OSHA’s.

- The Division’s guidance document says that while a positive test is considered determinative of recordability, a positive test result is not necessary. This directly contradicts federal OSHA’s recordkeeping requirements for COVID-19 and guarantees that some cases will be recordable on the 300 logs in California that are not being recorded on 300 logs in other states.
- Federal OSHA requires employers to find work-relatedness for COVID-19 recordkeeping only where it is more likely than not that an illness was caused by an exposure in the workplace based on reasonably available evidence and in the absence of an equally or more likely alternative non-work explanation for the ailment. The Division’s guidance document has created a presumption of work-relatedness and provided no guidance as to whether or not non-work exposures can be considered that may have been likely to have caused the illness.

He asked the Division to reexamine its guidance and either revise it to match federal OSHA’s standards or withdraw it. **Elizabeth Treanor, Phylmar Regulatory Roundtable**, echoed Mr. Conn’s comments.

Michael Donlon, Construction Employers Association, stated that the regulations petition 583 is seeking to promulgate are duplicative of the public health orders that have already been issued and will create confusion for employers. The public health orders are able to be modified much easier and quicker than the new standard that petition 583 seeks to implement. **Robert Moutrie, CA Chamber of Commerce**, echoed Mr. Donlon’s comments.

Eric Fruman, Change to Win, commented in support of petition 583. He said that the existing regulations are inadequate, so a clearly applicable standard is needed. He also stated that COVID-19 is a workplace hazard that needs to be addressed, and the Division has the ability to deal with it better than public health authorities because the Division understands the problem from an employer/employee standpoint.

Raul Pickett, Central Valley Response Task Force, commented in support of petition 583. He also provided the following suggestions:

- Work plans need to be required at worksites and must contain specific language regarding infection control standards.
- There needs to be a central location where infection control data is collected and disseminated.
- It is important to identify and establish specific infection thresholds levels that clearly define when an outbreak has occurred.

Mr. Pickett also said that this petition is needed because many essential workers are immigrants and low-wage workers who do not have access to healthcare and have preexisting medical conditions, which puts them at greater risk of getting infections such as COVID-19. They also do not have union representation and no worksite protections. This petition will help to keep those workers healthy and will save lives.

Ramón Castellblanch, CA Alliance for Retired Americans, stated that the CDC guidelines to protect workers from exposure to COVID-19 are clearly not working. They need to be updated and turned into permanent standards. That is why petition 583 is needed right now.

Mirella Deniz-Zaragosa, Warehouse Worker Resource Center, stated that employers are not doing enough to protect workers from exposure to COVID-19. They are not doing adequate reporting and contact tracing around confirmed cases and they are not cleaning and sanitizing work areas. Proper physical distancing and regular handwashing by employees is not taking place because employees are hurrying to meet relentless quotas and production speeds that are set by their employer. **Stan Santos, Fresno Madera Tulare Kings Central Labor Council**, echoed this comment. Ms. Deniz-Zaragosa stated that the guidance protocols that the Division has issued are not the same as a mandatory standard that specifically addresses COVID-19 hazards, so an emergency standard is needed.

Elizabeth Treanor, Phylmar Regulatory Roundtable, asked the Board staff and Division to take into account the fluidity of the medical research and technological innovations and make requirements that are adaptable to changing situations, as they consider petition 583. She said that keeping the requirements simple will ensure that more employers comply. She also encouraged the Division to continue its work providing guidance documents to help employers comply.

Robert Moutrie, CA Chamber of Commerce, stated that petition 583 takes away the Division's ability to update guidance documents quickly and address new science as it comes along, and most of the issues that are being brought up are being addressed through the Governor's actions and the Division's guidance documents. Petition 583 also requires the

inclusion of a competent person, which means that employers will need to hire a person that is experienced in infectious disease control, which may not be feasible for some employers.

Cassie Hilaski, Nibbi Brothers, stated that the Division has managed to effectively develop and implement guidance documents, conduct enforcement of current regulations, and issue citations to employers who refuse to protect their workers from exposure to COVID-19 despite not having an emergency standard in place that is specific to COVID-19, so a standard for COVID-19 exposure is not needed. Additional regulation will not make bad actors comply and will not provide employees with any additional protections.

Frances Schreiber, National Lawyers Guild – Labor & Employment Committee (NLG – L&EC), stated that an emergency regulation is needed to address COVID-19 exposure because more needs to be done than just relying on the Division for enforcement action. The emergency regulation needs to have flexible aspects to it so that employers can make it fit with their workplace, but it also needs to give workers clear guidance and specifics on what their rights are. Having an emergency regulation in place will allow unions to enforce the regulation through collective bargaining agreements or by taking direct action, and it will provide direction for workers who do not have a union.

The following individuals also commented in support of petition 583:

- **Edward Flores, University of CA, Merced**
- **Kevin Riley, University of CA, Los Angeles, Labor Occupational Safety and Health**
- **Stan Santos, Fresno Madera Tulare Kings Central Labor Council**

Jennifer Wysick, Truebeck Construction, stated that additional regulation is not necessary to address COVID-19 exposure because the guidance documents that have been issued are specific to each county, and that is sufficient to address COVID-19 exposure in the workplace.

B. ADJOURNMENT

Mr. Thomas adjourned the Public Meeting at 11:20 a.m.

Mr. Thomas called for a break at 11:20 a.m. and reconvened the meeting at 11:25 a.m.

II. BUSINESS MEETING

Mr. Thomas called the Business Meeting of the Board to order at 11:25 a.m., July 16, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726, and via Webex at www.webex.com.

A. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Ms. Shupe stated that there is a minor clerical error on the consent calendar regarding item L. Item L is incorrectly listed on the consent calendar as OSHSB File No 20-V-078. The correct file number is 20-V-178. With that clerical correction, she is aware of no unresolved procedural issues regarding the items on the consent calendar, and she believes that those

items are ready for the Board's decision on the question of adoption.

MOTION

A motion was made by Ms. Laszcz-Davis and seconded by Mr. Harrison to adopt the consent calendar as modified.

A roll call was taken, and all members present voted "aye." The motion passed.

B. OTHER

1. DOSH Update

Mr. Berg provided updates on the following Division projects:

- Indoor Heat: Going through the Standardized Regulatory Impact Analysis (SRIA) process.
- Workplace Violence in General Industry: Working on an updated draft to be posted for comments. This project is on hold due to COVID-19.
- Evaluation of Petition 583: Evaluation has been completed and is undergoing review.

Mr. Berg also responded to a previous question about recordkeeping as it pertains to COVID-19 cases in the workplaces. He said that the Division has posted its guidelines for recordkeeping on its website. They are consistent with the Division's recordkeeping regulations and are the same as those of federal OSHA.

Ms. Stock stated that it is clear that the existing regulations are not sufficiently addressing COVID-19 exposure in the workplace. It is also very confusing to navigate the multitude of guidance documents available. She asked the Division and Board staff about what needs to be done to get Petition 583 on the agenda for next month's meeting, and how the Board can help accelerate it once it comes up for a vote. She also asked how each of the guidance documents intersect with each other, and how they are being enforced. **Mr. Berg** stated that the evaluation for petition 583 is complete and has been submitted to the Department of Industrial Relations (DIR) for review. He will communicate the urgency of the petition to DIR. He asked Ms. Shupe what the deadline will be by which the Division will need to get its review to the Board staff in time to put petition 583 on the August agenda. **Ms. Shupe** stated that she did not have a deadline to share at the moment, but will find out and get the deadline to him by tomorrow. She also stated that the Board staff has not seen the Division's evaluation, and once the Board staff receives it, the Board staff needs time to review it and prepare a legally defensible proposed decision before the petition can be placed on the agenda for adoption.

MOTION

A motion was made by Ms. Burgel that petition 583 be heard, discussed, and voted on at the August 2020 Board Meeting. Motion not seconded. Motion failed.

Ms. Laszcz-Davis stated that she understands the urgency, but the Division should do a brief evaluation that takes into consideration the regulations that are already in place and what it

would take to upgrade or strengthen them to provide the protection that is needed. Communication and education regarding these regulations also needs to be much better.

Ms. Stock stated that the situation regarding workplace protections from COVID-19 exposure is the same as the situation was when the aerosol transmissible disease (ATD) standard was passed for healthcare. The injury and illness prevention plan (IIPP) provides basic requirements to protect workers, but additional industry-specific regulations are needed to address COVID-19 exposure, just like the additional requirements in the ATD standard were needed for healthcare. The ATD standard only applies to healthcare workers, but there are similar situations with COVID-19 that are occurring in non-healthcare workplaces, and those workers need to be protected. If the Board votes on the petition in August and moves it forward, the evaluation that Ms. Laszcz-Davis suggested can still take place as part of the process.

Mr. Thomas asked Mr. Berg how the Division is currently citing and enforcing regulations regarding COVID-19 exposure. **Mr. Berg** stated that the Division is doing many investigations and issuing citations under the ATD standard where it applies, and for situations where it does not apply, the Division is citing under Sections 3203 and 5141. **Ms. Stock** asked Mr. Berg how many citations have been issued under standards other than the ATD standard. **Mr. Berg** stated that he is unsure. **Ms. Stock** stated that she has heard of only one or two at the most, which is concerning.

Katie Hagen, Director for the Department of Industrial Relations, stated that the Division is doing workplace visits and inspections, issuing citations after the investigation is complete, and conducting follow-up visits as needed, in addition to providing guidance, consultation, and education. The Division of Labor Standards Enforcement (DLSE) is assisting with these things as well. The Division is providing outreach to employers via mass email to various industries, and has also set up a call center that reaches 1,200 callers per day to provide assistance.

Ms. Shupe stated that the Board staff and Division both understand the urgency and unprecedented need for worker protection against COVID-19, but it is important to review and evaluate petition 583 without rushing it so as to avoid making any mistakes.

Mr. Thomas stated that petition 583 will probably not be ready for the Board until at least the September meeting. He also stated that it is important for everyone to do their part to control the spread of COVID-19. He said that workers are forced to come to work when they're sick, and employers do not properly report cases of COVID-19 to the authorities.

Ms. Kennedy had the following questions for Mr. Berg:

- How are sites for inspections determined?
 - In response to complaints?
 - In response to outbreak clusters?
 - Is the Division targeting industries with increased case rates?
 - Is the Division focusing on vulnerable populations?
- Are there any situations where a COVID-19 outbreak is due to workplace exposure where the Division cannot cite under the IIPP or ATD standards?

Mr. Berg asked Ms. Kennedy to submit her questions in writing to him, and he will look into getting answers to those questions.

MOTION

A motion was made by Ms. Burgel and seconded by Ms. Stock that the proposed decision for petition 583 be brought before the Board at the August 2020 Board Meeting for consideration.

A roll call was taken, and all members present voted “aye.” The motion passed.

2. Legislative Update

Ms. Shupe provided updates on the following bills:

- AB 2043
- AB 2092
- AB 2028
- AB 2537
- AB 3056
- SB 275
- SB 1257

3. Executive Officer’s Report

Ms. Shupe stated that on June 30, the Governor issued Executive Order N-71-20, which modifies the 60-day extension for deadlines listed in Labor Code Sections 147 and 142.2 that were provided in Executive Order N-63-20. N-71-20 replaces the 60-day extension with a 120-day extension. This order applies to petitions already in progress with the Standards Board and to any future incoming petitions until the order is lifted. The order extends the petition deadline from within 6 months of submission of the petition to within 10 months of submission.

4. Board Member Comments and Future Agenda Items

No future agenda items were mentioned.

C. CLOSED SESSION

Pursuant to Government Code Sections 11126(e)(1) and 11126(a)(1), the Board conferred with counsel regarding the pending litigation matters listed on the agenda and consideration of personnel matters. Closed Session began at 12:13 p.m.

D. RETURN TO OPEN SESSION

1. Report on any Closed Session Action

Closed Session ended at 12:36 p.m. A roll call was taken to ensure all Board Members had returned to the teleconference and Webex meeting. All Board Members were present.

No action was taken during the Closed Session.

E. ADJOURNMENT

Mr. Thomas adjourned the Business Meeting at 12:37 p.m.

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY
PUBLIC MEETING AND BUSINESS MEETING
August 20, 2020
Teleconference in Sacramento, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman Dave Thomas called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., August 20, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726 and via Webex at www.webex.com.

ATTENDANCE

Board Members Present at OSHSB Office
Dave Thomas

Board Members Absent
NONE

Board Members Present via Teleconference
and/or Webex
Barbara Burgel
Dave Harrison
Nola Kennedy
Chris Laszcz-Davis
Laura Stock

Board Staff Present at OSHSB Office
Christina Shupe, Executive Officer
Michael Nelmda, Senior Safety Engineer
Sarah Money, Executive Assistant

Division of Occupational Safety and Health
Staff Present via Teleconference and/or Webex
Eric Berg, Deputy Chief of Health

Board Staff Present via Teleconference
and/or Webex
Mike Manieri, Principal Safety Engineer
Lara Paskins, Staff Services Manager
David Kernazitskas, Senior Safety Engineer
Jennifer White, Staff Services Analyst

Others Present via Teleconference and/or Webex

Dan Leacox, Leacox & Associates
Michael Donlon, Construction Employers
Association
Mirella Deniz-Zaragosa, Warehouse
Worker Resource Center
Len Welsh, Western Steel Council
Kevin Goddard, CalTrans

Maggie Robbins, Worksafe
Ramón Castellblanch, CA Alliance for Retired
Americans
Dr. Robert Blink
Bruce Wick, CA Professional Association of
Specialty Contractors (CALPASC)
Megan Shaked, Conn Maciel Carey

Edith Aburto, Fight for \$15 and a Union	Bryan Little, CA Farm Bureau Federation
Margarita Tomas, Fight for \$15 and a Union	Michael Young, CA Federation of Teachers
Kevin Bland, Ogletree Deakins	Alice Berliner, Southern CA Coalition for Occupational Safety and Health (SoCalCOSH)
Lisa Prince, The Prince Firm	Eric McClaskey, International Union of Elevator Constructors
Anne Katten, CA Rural Legal Assistance Foundation	Michael Donlon, Construction Employers Association
Robert Moutrie, CA Chamber of Commerce	Johanna Bernal, Service Employees International Union, United Service Workers West (SEIU USWW)
Stephen Knight, Worksafe	Michael Miller, CA Association of Winegrape Growers
Lorena Perea Elox, Fight for \$15 and a Union	Katherine Hughes, Service Employees International Union Nurse Alliance of CA
Elizabeth Treanor, Phylmar Regulatory Roundtable	
Rosa Trevizo, Associated General Contractors of CA	
Cassie Hilaski, Nibbi Brothers General Contractors	

Mr. Thomas indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Mr. Thomas called for a break at 10:08 a.m. to resolve some technical issues with the meeting audio and reconvened the meeting at 10:09 a.m.

Dan Lecox, Lecox and Associates, stated that the emergency regulation that petition 583 is seeking to establish is not necessary because there are plenty of rules that the Division has successfully enforced to protect employees from exposure to COVID-19. He also stated that the process to create emergency regulations does not always include meaningful engagement with the regulated community, and without that meaningful engagement, the resulting regulation can be unrealistic, put unjustified burdens on the employer, and can result in a rule that is not fully vetted. **Cassie Hilaski, Nibbi Brothers General Contractors**, echoed this comment. Mr. Lecox stated that COVID-19 is a public health issue, and controlling it through the employment relationship can result in overreaching requirements, such as:

- The petition requires employers to collect and disseminate personal information about employees. **Cassie Hilaski, Nibbi Brothers General Contractors**, echoed this comment.
- The petition requires employers to establish, implement, and maintain an effective written compliance plan. This may result in employers being cited if just one employee gets sick.
- The petition requires the rule to include certain wage and hour provisions.

This regulation will also affect every employer in the state of California, so the costs will cross the \$50 million threshold and result in the regulation having to go through a standardized regulatory impact analysis (SRIA).

Lorena Perea Elox, Fight for \$15 and a Union, stated that her employer, McDonald's, has failed to protect workers from exposure to COVID-19. She said that McDonald's is not being honest with its employees about who has COVID-19 and who has been exposed to an employee with COVID-19. She is also not sure if her store is being properly sanitized between shifts to prevent exposure. Workers are forced to come in when they are sick because if they don't, their shifts get cut or changed. This was an issue prior to the COVID-19 pandemic. The Los Angeles County Health Department has failed to act on any complaints filed by the store employees. The current regulations are not working, so they need to be rewritten.

Maggie Robbins, Worksafe, stated that the lack of evidence of employer non-compliance with the COVID-19 guidance documents and standards does not mean that employers are complying. There is no data, such as inspections done by the Division, to support this contention. However, there are plenty of reports from the media and from workers of worksite outbreaks, workers remaining at work when they are sick, no social distancing, no handwashing access, and no worksite cleaning that indicate employers are not complying. There may be a lack of data as to how many of the COVID-19 illnesses and fatalities are due to exposure in the workplace, but no matter how big or small the percentage is of them that can be attributed to COVID-19, the illnesses and deaths from COVID-19 outnumber those caused by other means. **Anne Katten, CA Rural Legal Assistance Foundation**, echoed Ms. Robbins's comments.

Elizabeth Treanor, Phylmar Regulatory Roundtable, stated that developing an emergency regulation to address COVID-19 is not the best course of action for the Board to take, and the existing regulations sufficiently address COVID-19 exposure in the workplace. **Rosa Trevizo, Associated General Contractors of CA**, echoed this comment. Ms. Treanor stated the injury and illness prevention program (IIPP) standard encompasses all hazards, including COVID-19, and is comprehensive enough, and the other existing regulations and guidance do work. The Division's time would be better spent targeting employers who are not complying with the existing regulations through inspections and enforcement rather than on emergency rulemaking. She asked the Board to step back and assess the consequences that will come with adopting an emergency regulation, and to review the prescriptive and overreaching requirements in petition 583. **Kevin Bland, Ogletree Deakins, representing the CA Framing Contractors Association, the Residential Contractors Association, and the Western Steel Council**, echoed Ms. Treanor's comments.

Edith Aburto, Fight for \$15 and a Union, stated that her employer, McDonald's in Berkeley, has not closed for proper cleaning and sanitizing even though many of the workers have tested positive for COVID-19. McDonald's has asked the employees to do surface cleaning in the bathrooms and kitchen, but they are not the professional cleaners that are needed to properly clean the store following a COVID-19 outbreak. The employees have reported this to the city officials, but no action has been taken, and the management has retaliated against them by cutting their hours.

Michael Donlon, Construction Employers Association, stated that it is impossible for employers to comply with the wildfire smoke regulation because there are no N95 masks available and the Division has not found an adequate alternative. The Governor issued an order asking employers to give their N95 masks to healthcare workers, and now employers are being cited and fined for not having them. This is what happens when an emergency regulation is passed too quickly.

Mr. Donlon also stated that petition 583 is very duplicative of the public health orders that have been issued and will not make the workplace any safer than following the existing guidelines. A regulation to address COVID-19 exposure would also not be able to remain consistent with public health orders because public health orders are constantly changing. It will also lack consistency with the Health Insurance Portability and Accountability Act (HIPAA) laws because employers are not allowed to disclose that kind of information to other employees. The petition also requires that employers hire a competent person to implement this plan, and most employers do not have someone on staff who is qualified to do this.

Margarita Tomas, Fight for \$15 and a Union, stated that her employer, McDonald's in Oakland, told their employees to wear their disposable masks for several days and gave them gloves to wear that broke easily. There is no social distancing being implemented by her employer, and as a result, several workers have tested positive for COVID-19 and they have had to go to court to get their employer to comply.

Dr. Robert Blink stated that he supports petition 583 because Section 3203 does not apply to many industries, but it is important to address the concerns that have been raised so that employers are not unnecessarily burdened by the regulation. The new regulation will need to have a lot of built-in flexibility to accommodate the new incoming information and the rapidly changing circumstances surrounding the COVID-19 pandemic. He also recommended including a provision for getting input from local health officers in each jurisdiction.

Bryan Little, CA Farm Bureau Federation, stated that it will be difficult for most employers to find a person with the expertise needed to fulfill the "competent person" requirement that is listed in petition 583. He also said that N95 respirators are difficult to obtain because they are being given to healthcare workers to protect them against COVID-19 exposure, so employers need to have other alternatives. As a result, outdoor employers can only comply with the emergency wildfire smoke standard by implementing feasible engineering controls and practicable administrative controls, but these do not exist for many of those employers. As a result, outdoor employers are forced to either cease operations or to continue operating out of compliance. He asked the Board to consider the unintended consequences that have resulted from the emergency wildfire smoke standard because there may be unintended consequences if petition 583 is adopted.

Lisa Prince, The Prince Firm, stated that the Division is conducting many inspections related to COVID-19 exposure in the workplace, and there are regulations under which the Division can cite employers. **Rosa Trevizo, Associated General Contractors of CA**, echoed this comment. Ms. Prince said that adding an additional regulation like that mentioned in petition 583 will not help. She is concerned that some of the requirements in the petition, such as having a competent person on staff and updating an employer's written program, will take the focus away from safety and compliance. Also, the reporting requirements in the petition require employers to report positive COVID-19 cases to both the Division and the local public health department, regardless of whether or not the exposure occurred in the workplace. This is duplicative of the system that is already in place to report positive cases to the public health and contact tracing departments. The petition also creates problems when it comes to employee privacy. It will result in more fear and less communication in the employer/employee relationship.

Len Welsh, Western Steel Council, stated that it is important for the Division to focus its limited resources on where it will do the most good. The Division has been in compliance assistance mode since the beginning of this pandemic, and that has been the most helpful to employers. It has allowed the Division to reach more employers, explain what needs to be done to comply and why, and helped gain more trust from employers. It is best to allow the Division to continue to work in compliance assistance mode with employers to address COVID-19 exposure in the workplace because it gives the Division and employers the flexibility to change things quickly when new information becomes available instead of having to go through the process outlined in the Administrative Procedures Act (APA) to change a regulation. It also allows the Division to better target non-compliant employers and industries.

Bruce Wick, CA Professional Association of Specialty Contractors, stated that it would be good to find out from the Division the following:

- How have employers assessed the industry-specific guidance and used it to protect their employees from exposure to COVID-19?
- Are most of the citations being issued because employers are not following the industry guidance?

Mr. Wick also stated that employers who are not complying with the existing regulations will not comply with the new regulation, so it is better for the Division to focus its resources on enforcement and targeting non-compliant employers. **Rosa Trevizo, Associated General Contractors of CA, Cassie Hilaski, Nibbi Brothers General Contractors, and Michael Müller, CA Association of Winegrape Growers**, echoed this comment.

Mr. Thomas called for a break at 12:00 p.m. and reconvened the meeting at 12:15 p.m.

Anne Katten, CA Rural Legal Assistance Foundation, stated that it is important to find alternatives to N95 masks for workers working outdoors when wildfire smoke is present. KN95's could be used, as well as valved N95's for socially distanced work outdoors and slightly expired N95's that could provide adequate protection. Employers also have the option to limit exposure to wildfire smoke by relocating or rescheduling the outdoor work if possible. It is very important to limit exposure to wildfire smoke because it can increase the risk of a worker getting COVID-19.

Stephen Knight, Worksafe, stated that an emergency regulation is needed right away to address COVID-19 exposure in the workplace because the ATD standard is limited in scope to only apply to healthcare workplaces. The Division has also indicated in its evaluation of petition 583 that an emergency temporary standard is needed so that the Division has all of the tools that it needs to ensure that workers are protected.

Robert Moutrie, CA Chamber of Commerce, stated that employers need to know what to do to comply with the wildfire smoke regulation in light of the fact that there is a lack of N95's available and there are no alternatives allowed. It appears that the only option for outdoor employers is to shut down when they are unable to get N95's. This is not a feasible option, especially for the indoor workplaces that have had to move their operations outdoors due to COVID-19 requirements.

Mr. Moutrie also stated that moving too quickly to develop an emergency regulation to address COVID-19 is not a good idea and could result in a regulation being developed that is not feasible. The regulation could also become outdated very quickly when science changes. **Cassie Hilaski, Nibbi Brothers General Contractors, and Michael Müller, CA Association of Winegrape Growers**, echoed this comment. Mr. Moutrie also said that a rise in the number of COVID-19 cases does not indicate that the current regulations aren't working, and anecdotal stories from workers do not demonstrate that there is a need for additional regulation.

Michael Müller, CA Association of Winegrape Growers, stated that many employers gave their N95 masks to healthcare workers at the beginning of this pandemic, and as a result, they don't have any to give to their workers because there is a shortage. Many winegrape growers are afraid that they will miss the harvest because they don't have N95 masks and there is no other alternative except to shut down. He asked the Division to coordinate with other agencies as soon as possible to come up with a solution. He also asked the Board to ensure that a complete fiscal analysis is done on each regulation that comes before it so that the true costs of each regulation are known before the regulation is adopted.

Katherine Hughes, Service Employees International Union Nurse Alliance of CA, stated that when it comes to talking with employees about work-related exposure incidents to COVID-19, employers cannot claim HIPAA protections or violations as a reason not to communicate this information with them. She said that further regulation is needed to address COVID-19, and though it may take a while, all employers will eventually comply with the new regulation. She stated that some employers continue to lock up and ration out personal protective equipment (PPE) to their workers or require their workers to reuse PPE that is not designed to be reused.

The following individuals also commented in support of petition 583:

- **Johanna Bernal, Service Employees International Union, United Service Workers West**
- **Ramón Castellblanch, CA Alliance for Retired Americans**
- **Mirella Deniz-Zaragosa, Warehouse Worker Resource Center**
- **Alice Berliner, Southern CA Coalition for Occupational Safety and Health (SoCalCOSH)**
- **Alexis Perez-Nava, Koreatown Immigrant Workers Alliance** [Mr. Perez-Nava provided a written statement to Alice Berliner of SoCalCOSH, and she read his statement into the record]
- **Michael Young, CA Federation of Teachers**

B. ADJOURNMENT

Mr. Thomas adjourned the Public Meeting at 12:49 p.m.

II. BUSINESS MEETING

Mr. Thomas called the Business Meeting of the Board to order at 12:49 p.m., August 20, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726, and via Webex at www.webex.com.

A. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Ms. Shupe stated that she is aware of no unresolved procedural issues regarding the items A-P on the consent calendar, and she believes that those items are ready for the Board's consideration and vote.

MOTION

A motion was made by Ms. Laszcz-Davis and seconded by Mr. Harrison to adopt the consent calendar as proposed.

A roll call was taken, and all members present voted "aye." The motion passed.

B. OTHER

1. Legislative Update

Ms. Shupe provided updates on the following bills:

- AB 685
- AB 2092
- AB 2537
- SB 275
- SB 1257

2. Executive Officer's Report

Ms. Shupe stated that the Board staff is preparing the proposed decision for petition 583. The proposed decision for petition 583 will be voted on at the September 17th Board Meeting. It will be posted on the Board's website no later than September 10th.

Ms. Stock stated that several standards have been developed out of need for additional regulation, such as the ATD and heat illness standards. Although the Division has conducted many inspections pertaining to COVID-19 exposure in the workplace, no citations have been issued yet. She asked Mr. Berg about the value that the ATD standard has provided since it was promulgated. **Mr. Berg** stated that the ATD standard has provided very valuable protection for the workers in healthcare, but it contains specifics that would be difficult to apply to all employers through the IIPP.

Ms. Burgel asked Mr. Berg if notification requirements similar to those in the ATD standard exist somewhere in the General Industry Safety Orders or the IIPP standard and pertain to infectious disease. **Mr. Berg** stated that there aren't any notification requirements outside of Section 5199 and 5199.1 that pertain to hazard communication.

Mr. Harrison stated that the total number of COVID-19-related deaths is already more than twice the number of fatalities in agriculture and construction combined, so an emergency standard is needed. He said that several Board Members have requested information from the Division regarding how many citations have been issued regarding COVID-19 exposure in the

workplace, and under what standards the Division is citing, but the Division has yet to provide this information. He asked the Board and Division staff to move forward with petition 583 and develop an emergency standard that is COVID-19-specific.

Ms. Laszcz-Davis stated that developing rulemaking does not guarantee that employers will comply, so if an emergency regulation is developed, there needs to be enough tension between the rulemaking and the compliance that will make a difference. It is important to note that the Division has recommended undertaking emergency rulemaking in this case, but they have not made it clear what the gap is that needs to be addressed. It is also important that if emergency regulation is undertaken, the process to develop the regulation needs to be much better than it was for developing the emergency wildfire smoke regulation so that everyone is on the same page. The resulting regulation needs to be simple, clear, understandable, and easy to implement.

Ms. Stock stated that there have been some situations, such as heat illness and wildfire smoke, where an emergency regulation has been issued due to the urgent need for one, followed by a process to refine it allowing further input from stakeholders. The language in the petition is a starting point, and she hopes that if the petition is adopted, that further discussion with stakeholders will take place. It is especially important for them to discuss how the emergency regulation can be refined in light of new science that is discovered regarding COVID-19.

3. Board Member Comments and Future Agenda Items

No future agenda items were mentioned.

C. CLOSED SESSION

The need did not develop for the Board to hold a closed session at this time.

D. ADJOURNMENT

Mr. Thomas adjourned the Business Meeting at 1:11 p.m.

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SUMMARY
PUBLIC MEETING AND BUSINESS MEETING
September 17, 2020
Teleconference in Sacramento, California

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman Dave Thomas called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., September 17, 2020, via Webex/teleconference, in accordance with Executive Order N-29-20.

ATTENDANCE

Board Members Present at OSHSB Office
 Dave Thomas

Board Members Absent
 NONE

Board Members Present via Teleconference and/or Webex
 Barbara Burgel
 Dave Harrison
 Nola Kennedy
 Chris Laszcz-Davis
 Laura Stock

Board Staff Present at OSHSB Office
 Christina Shupe, Executive Officer
 Michael Nelmda, Senior Safety Engineer
 Sarah Money, Executive Assistant

Division of Occupational Safety and Health Staff Present via Teleconference and/or Webex
 Eric Berg, Deputy Chief of Health

Board Staff Present via Teleconference and/or Webex
 Mike Manieri, Principal Safety Engineer
 Lara Paskins, Staff Services Manager
 David Kernazitskas, Senior Safety Engineer
 Jennifer White, Staff Services Analyst

Others Present via Teleconference and/or Webex
 Elizabeth Treanor, Phylmar Regulatory Roundtable
 Len Welsh, Western Steel Council
 Olivia Gallegos Murillo, CLEAN Carwash Campaign
 Eric Frumin, Change to Win
 Shane Gusman, Broad & Gusman

Zenaida Perez Fuentes, Southern CA Coalition for Occupational Safety and Health
 Maggie Robbins, Worksafe
 Michael Young, CA Federation of Teachers
 Silvia Hernandez, CLEAN Carwash Campaign
 Isabel Urbano, Fight for \$15 and a Union
 Kevin Bland, Ogletree Deakins

Christian Ramirez, Service Employees International Union – United Service Workers West	Rick Nils, former Amazon and Martinez On Time Parcel worker
Stasha Lampert, Service Employees International Union Local 2015	Carmen, Líderes Campesinas, Farm Worker
Michael Donlon, Construction Employers Association	Natasha Castro, Los Angeles Alliance for a New Economy
Jonathan Vick, Atkinson, Andelson, Loya, Ruud & Romo	Mitch Steiger, CA Labor Federation
Dr. Robert Blink, Western Occupational and Environmental Medicine Association	Mirella Deniz-Zaragoza, Warehouse Worker Resource Center
Veronica Perez, Líderes Campesinas, Farmworker Packing House	Gabriel Salazar, resident of Merced County
Irene de Barraicua, Líderes Campesinas	Ramón Castellblanch, CA Alliance for Retired Americans
Bryan Little, CA Farm Bureau Federation	Fred Walter, Conn Maciel Carey
Sylvia Alvarado, Service Employees International Union	Veronica Perez, Primex Farms
Erin Guerrero, CA Attractions and Parks Association	Steve McCarthy, CA Retailers Association
Michael Miiller, CA Association of Winegrape Growers	Mishaal Gill, CA Immigrant Policy Centers
Edward Flores, UC Merced Community and Labor Center	Salvador Sandoval, Merced County Health Officer
Jovana Morales, Leadership Counsel for Justice and Accountability	Robert Moutrie, CA Chamber of Commerce
Andrew Gross Gaitan, Service Employees International Union – United Service Workers West	Bruce Wick, CA Professional Association of Specialty Contractors
	Sheng Xiong, Leadership Counsel for Justice and Accountability
	Katherine Hughes, Service Employees International Nurse Alliance of CA
	Maria Maldonado, Fight for \$15 and a Union
	Cassie Hilaski, Nibbi Brothers General Contractors
	Eric McClaskey, International Union of Elevator Constructors
	Jeff Eldridge, Chevron North America Exploration and Production

Mr. Thomas indicated that this portion of the Board’s meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Elizabeth Treanor, Phylmar Regulatory Roundtable (PRR), asked the Board to consider the alternative language that her organization submitted in response to petition 583. The alternative language is performance-based, has flexibility, and provides scientifically-based protective measures to address COVID-19 exposure in the workplace. Prescriptive measures such as those listed in petition 583 are impossible to apply to all workplaces due to the uniqueness of some jobs, tasks, and operations where they are not feasible.

Her organization is also concerned that the Board has implemented a deadline of November 19 by which to draft the text for the regulation, the Finding of Emergency, and the economic impact statement. Rushing to meet this deadline will cause errors, and it is dangerous to issue an emergency rule with the intent to fix the problems later. She asked the Board to extend the deadline one month so that outreach can occur and stakeholders can provide input to make the emergency regulation the best that it can be.

The following individuals echoed Ms. Treanor's comments:

- **Steve McCarthy, CA Retailers Association**
- **Robert Moutrie, CA Chamber of Commerce**
- **Erin Guerrero, CA Attractions and Parks Association**
- **Bryan Little, CA Farm Bureau Federation**
- **Michel Müller, CA Association of Winegrape Growers**

Zenaida Perez Fuentes, Southern CA Coalition for Occupational Safety and Health, encouraged the Board to adopt petition 583 because swift action is needed to protect workers from exposure to COVID-19, and an emergency standard is needed to hold employers accountable. Some employers are not providing their employees with personal protective equipment (PPE) and proper training, and not allowing employees to maintain proper social distancing, thereby putting their employees at risk of getting COVID-19. **Rick Nils, former worker for Amazon and Martinez On Time Parcel**, echoed Ms. Perez Fuentes's comments.

Olivia Gallegos Murillo, CLEAN Carwash Campaign, stated that her employer is not protecting workers from exposure to COVID-19. As a result, several employees have contracted COVID-19, and there have been no changes in working conditions or proper disinfection taking place in the workplace. More training is needed, especially for management, and the proper precautions need to be taken to protect employees.

Michael Young, CA Federation of Teachers, stated that it is important to ensure that teachers, students, and others in education are protected from COVID-19 exposure. He said that many children have been diagnosed with COVID-19 and can transmit it to others, and it is important to consider that as schools and colleges reopen.

Len Welsh, Western Steel Council, stated that there are provisions in the injury and illness prevention plan (IIPP) that cover COVID-19 exposure, so it would be a better use of the Division's resources to continue with the compliance assistance mode to identify and address noncompliant employers. However, if the Board decides to adopt petition 583 and have the Division develop an emergency regulation, it needs to be kept simple. **Robert Moutrie, CA Chamber of Commerce, Bryan Little, CA Farm Bureau Federation, and Kevin Bland, Ogletree Deakins, representing the CA Framing Contractors Association, the Residential Contractors Association, and the Western Steel Council**, echoed Mr. Welsh's comments.

Eric Frumin, Change to Win, stated that there is too much misinformation going around to employers about how to protect their employees from COVID-19, so an emergency standard is needed. It needs to be a standard that the Division can quickly enforce and will cover employers that are not currently covered by the aerosol transmissible disease (ATD) standard.

Natasha Castro, Los Angeles Alliance for a New Economy, stated that her organization supports petition 583 because there are employers who are not following the public health orders. Many retail employers are not regulating the number of customers allowed in their stores at one time, and therefore, there is no social distancing taking place. There is also no access to cleaning supplies, and following a COVID-19 outbreak among employees, stores are not being deep cleaned.

Mitch Steiger, CA Labor Federation, stated that his organization supports petition 583 and is looking forward to participating in the advisory committee process. However, it is important that the emergency standards does not weaken the existing standards. There is a lot of confusion and conflicting guidance going around, but there are also some good strong protections that need to remain in place.

Stasha Lampert, Service Employees International Union Local 2015, stated that her organization supports petition 583 because there are healthcare workers who are still facing inadequate safety protocols to protect them during the pandemic, even though the ATD standard is in place. She read supporting testimonies into the record from Maria Carmen Vasquez, Nicole Marzano, and Devin Wood, who are nursing home workers.

Mirella Deniz-Zaragoza, Warehouse Worker Resource Center, stated that her organization supports petition 583 because the existing regulations do not address specific preventative measures necessary to prevent exposure to COVID-19 in the workplace. It is also important to expand the ATD standard so that it covers all employers.

Mr. Thomas called for a break at 11:20 a.m. and reconvened the meeting at 11:30 a.m.

Michael Donlon, Construction Employers Association, stated that the emergency regulation petition 583 seeks to establish is duplicative of existing regulations in the IIPP, and the Division has been able to easily cite employers under those existing regulations. The Division has also provided dozens of industry-specific guidance documents to assist employers. There are two main issues with the language in petition 583:

- It requires an employer to hire a competent person knowledgeable in infection control principles. This will be problematic for small employers who do not have the resources to comply with this regulation.
- It requires employers to update their compliance action plan within 10 days of a new order or regulation being issued. The Administrative Procedures Act (APA) does not allow regulations that automatically update without public comment and following Americans with Disabilities Act (ADA) procedures.

If the Board chooses to undertake emergency rulemaking in response to this petition, the language needs to be clear, concise, and consistent with other laws and regulations, including AB 685. It is important to not push it through too quickly so that there aren't any unintended consequences like there have been for the emergency wildfire smoke regulation.

The following individuals echoed Mr. Donlon's comments:

- **Robert Moutrie, CA Chamber of Commerce**
- **Erin Guerrero, CA Attractions and Parks Association**
- **Bryan Little, CA Farm Bureau Federation**
- **Cassie Hilaski, Nibbi Brothers General Contractors**

Gabriel Salazar, resident of Merced County, stated that he is concerned that it took the Foster Farms plant in his area two months to respond to local health and safety orders following a COVID-19 outbreak at the facility before temporarily shutting down. Workers at the plant need protection from COVID-19, and there needs to be stricter enforcement of

regulations to keep this from happening again.

Maggie Robbins, Worksafe, stated that her organization is pleased to see that the proposed decision for petition 583 strikes a balance between getting public input and getting an emergency standard in place quickly to address COVID-19 exposure in the workplace. A temporary standard will address COVID-19 and having an advisory committee meeting after it is adopted is a good idea so that changes can be made if necessary.

Jonathan Vick, Atkinson, Andelson, Loya, Ruud & Romo, also representing the Engineering Contractors Association, the Tilt-Up Concrete Contractors Association, United General Contractors, and the Southern CA Scaffolding Association, stated that the Division is successfully enforcing the existing rules that are designed to protect workers from exposure to COVID-19, and additional regulation will further confuse employers. The guidance documents that the Division has issued are helpful and sufficient for employers. The language in petition 583 requires employers to collect personally identifiable information from employees, which would trigger provisions in the CA Consumer Protection Act. He asked the Board to consider the proposed language from PRR if the Board chooses to move forward with developing an emergency regulation. **Bryan Little, CA Farm Bureau Federation**, echoed Mr. Vick's comments.

Dr. Robert Blink, Western Occupational and Environmental Medicine Association, stated that stronger regulations are needed to address COVID-19 exposure in the workplace because not all employers are covered under the ATD standard and the IIPP standard is not sufficient to cover them. He said that if the Board chooses to develop an emergency temporary standard, the following provisions should be included:

- Employers must properly report an outbreak to the local health officer. After that, any subsequent cases should be reported to the local health officer within a week of occurrence.
- Employers experiencing an outbreak should be required to submit a COVID-19 prevention plan to their employees detailing the control measures that are to be used, such as handwashing, cleaning procedures, social distancing, and training on these measures.
- Employers who refuse to comply with orders from the local health officer should be considered to be in violation of this regulation.
- Upon direction from the local health officer, employers should arrange with a local healthcare provider to do contact tracing.
- In the event of ongoing transmission despite implementing early steps to prevent it, employers should require employees to wear N95 masks, eye protection, and any other protection recommended by a healthcare professional.

His organization realizes that these regulations may be difficult for smaller workplaces to implement, so provisions should be made for them as well.

Steve McCarthy, CA Retailers Association, stated that a prescriptive emergency temporary standard to address COVID-19 is not necessary and will add an additional set of regulations for retailers to follow, creating further confusion. The Division has the capabilities to enforce, cite, and shut down noncompliant employers with the guidance documents that it has issued, which is more appropriate. His organization has several concerns with the proposed language in petition 583:

- The reporting language conflicts with the language in AB 685 and should be deleted.
- Confrontations with customers who refuse to wear masks do escalate to violence, so enforcement of mask mandates should remain with local law enforcement. The regulation should be limited to signage and state that companies will not be penalized because a customer refuses to wear a mask. **Andrew Gross Gaitan, Service Employees International Union – United Service Workers West**, echoed this comment.
- Employers cannot guarantee that employees will always maintain proper social distancing at all times.
- The language in petition 583 allows employees to bring their own PPE, but this could be problematic in some industries, so employers should retain the right to require their employees to wear only the PPE that the employer provides.
- The language in petition 583 requires a medical evaluation that is not required in any other COVID-19-related guidance documents.
- The language in petition 583 requires employers to retrain employees when site conditions change. This should be limited to when new hazards are recognized.

Erin Guerrero, CA Attractions and Parks Association, echoed Mr. McCarthy's comments.

Mr. Thomas called for a break at 12:25 p.m. and reconvened the meeting at 12:30 p.m.

Shane Gusman, Broad & Gusman, representing the CA Teamsters Public Affairs Council, stated that his organization supports petition 583 because workers are being forced to come to work when sick or face disciplinary action. Other workers are forced to work next to people who are sick and are retaliated against for complaining. Some employers are also deliberately not following the guidance given to them because they know they won't get in trouble for doing so.

Bruce Wick, CA Professional Association of Specialty Contractors, stated that it is best for the Division to continue focusing its resources on enforcing the current regulations, but if the Board decides to move forward with an emergency regulation, it should consider the version that has been proposed by the PRR. If the Board decides to use PRR's version, his organization feels that the rule should relate only to guidance issued by the Division and bear in mind the fact that this guidance has not been vetted by stakeholders.

Mr. Thomas called for a break at 12:57 p.m. due to technical issues and reconvened the meeting at 1:05 p.m.

Michel Miiller, CA Association of Winegrape Growers, stated that an emergency regulation to address COVID-19 is unnecessary and will violate the APA. He said that there are already plenty of existing regulations and guidance documents that cover the same things that the emergency regulation is intended to address. Developing more regulations will not force bad actors to comply, and the Division should be conducting stringent enforcement actions against them. **Kevin Bland, Ogletree Deakins, representing the CA Framing Contractors Association, the Residential Contractors Association, and the Western Steel Council, and Cassie Hilaski, Nibbi Brothers General Contractors**, echoed Mr. Miiller's comments.

Mr. Thomas called for a break at 1:49 p.m. due to technical issues and reconvened the meeting at 2:00 p.m.

Cassie Hilaski, Nibbi Brothers General Contractors, stated that an emergency regulation is not needed to address COVID-19 exposure in the workplace. However, if the Board feels that the IIPP and ATD standards are not doing a sufficient job to address COVID-19, her organization recommends issuing a directive that mandates that all employers must follow their local shelter-in-place orders, or CDC guidelines in the rare instances where shelter-in-place orders do not exist, and then pick a date by which employers must follow them. If they refuse to follow them by that date, then they would be in violation of those orders and subject to enforcement action.

Andrew Gross Gaitan, Service Employees International Union – United Service Workers West, stated that janitors who are providing more frequent and deeper cleaning of buildings are not being given the proper training, disinfecting procedures, and protective equipment to do their jobs safely during the COVID-19 pandemic. Many of these workers are subcontracted, so it is unclear as to who must provide them with training, procedures, and PPE. There is also no current standard, including AB 685, that requires property managers to inform subcontracted janitors and security guards of a potential exposure at their workplace. That is why an emergency regulation is needed to address COVID-19 exposure in the workplace.

The following individuals also commented in support of petition 583:

- **Silvia Hernandez, CLEAN Carwash Campaign**
- **Maria Maldonado, Fight for \$15 and a Union**
- **Christian Ramirez, Service Employees International Union – United Service Workers West**
- **Ramón Castellblanch, CA Alliance for Retired Americans**
- **Veronica Perez, Primex Farms**
- **Anjolie Rodriguez, Fight for \$15 and a Union** [Ms. Rodriguez provided a written statement to Isabel Urbano of Fight for \$15 and a Union, who read Ms. Rodriguez's statement into the record]
- **Mishaal Gill, CA Immigrant Policy Center**
- **Sylvia Alvarado, Service Employees International Union**
- **Carmen, Líderes Campesinas, Farm Worker**
- **Irene de Barraicua, Líderes Campesinas**
- **Katherine Hughes, SEIU Nurse Alliance of CA**
- **Edward Flores, UC Merced Community and Labor Center**

B. ADJOURNMENT

Mr. Thomas adjourned the Public Meeting at 2:25 p.m.

II. **BUSINESS MEETING**

Mr. Thomas called the Business Meeting of the Board to order at 2:25 p.m., September 17, 2020, in Suite 350 of the Occupational Safety and Health Standards Board Office, Sacramento, California, via teleconference at 844-992-4726, via Webex/teleconference, in accordance with Executive Order N-29-20..

A. PROPOSED PETITION DECISIONS FOR ADOPTION

1. Stephen Knight, Executive Director, Worksafe
Frances C. Schreiber, Labor & Employment Committee of the National Lawyers Guild

Petition File No. 583

Petitioners request to amend Title 8 standards to create two new regulations. The first, a temporary emergency standard that would provide specific protections to California employees who may have exposure to COVID-19, but who are not protected by the Aerosol Transmissible Diseases standards (Sections 5199 and 5199.1). The second standard would be a permanent rulemaking effort to protect workers from infectious diseases including novel pathogens (e.g. COVID-19).

Ms. Shupe summarized the history and purpose of petition 583, and stated that the proposed decision is to grant the petition in part with a three-pronged approach:

1. The Division shall draft and submit an emergency regulatory proposal for consideration of adoption by the Board no later than the November 19, 2020 Board Meeting.
2. Subsequent to the adoption of an emergency regulation, the Division shall work with the Board staff to convene an advisory committee at four-month intervals to review and recommend amendments to the emergency standard.
3. After the COVID-19 pandemic subsides, the Division shall convene a representative advisory committee to consider the necessity for a permanent regulation to protect workers not covered by Section 5199, including novel pathogens.

MOTION

A motion was made by Mr. Harrison and seconded by Ms. Stock that the Board adopt the petition decision.

Ms. Stock stated that there is clearly a need for the Board to take action to help protect workers from exposure to COVID-19 in the workplace, especially since the Division has indicated in its evaluation of the petition that an emergency regulation is needed. Developing an emergency regulation will address a lot of the confusion that employers have been facing regarding the multitude of guidance documents that have been issued. She urged the Board Members to join her in voting “aye”.

Ms. Laszcz-Davis stated that the testimony today proves there is a need for further regulation to address COVID-19 in the workplace, but the regulation needs to be performance-based, leverage the existing industry guidelines and best practices that are currently working, and allow some flexibility. She also recommended that the Board delay taking action for a month or two to allow time for stakeholder input and consideration of existing regulations.

Mr. Harrison recommended that the Board move the petition forward as presented.

Ms. Burgel stated that she hopes the process for this emergency standard will be robust and time-sensitive and will result in a performance-based standard that will focus on hierarchy of controls. She also hopes that there is greater focus on ventilation and design, with not too much reliance on PPE.

A roll call was taken, and all members present voted “aye.” The motion passed.

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Ms. Shupe stated that she is aware of no unresolved procedural issues regarding the items A-U on the consent calendar, and she believes that those items are ready for the Board’s decision on the question of adoption.

MOTION

A motion was made by Ms. Laszcz-Davis and seconded by Mr. Harrison to adopt the consent calendar.

A roll call was taken, and all members present voted “aye.” The motion passed.

C. OTHER

1. DOSH Update

Ms. Kennedy had submitted the following questions to Mr. Berg via the OSHSB email account following the July 16, 2020, Board Meeting:

- Is the Division investigating COVID-related hazards in response to complaints?
- Is the Division investigating COVID-related hazards in response to outbreaks or clusters?
- Is the Division targeting industries with increased COVID case rates?
- Is the Division focusing on populations that are most vulnerable to COVID?
- Of the numerous inspections that the Division has conducted, are there any situations where identified COVID-19-related workplace problems could not be cited under Section 3203 or the ATD standard?

Mr. Berg stated that the Division is conducting inspections into COVID-19-related hazards in response to complaints, outbreaks, and clusters. The Division is focusing its inspection efforts on industries that have vulnerable populations, increased rates of COVID, and that are having significant outbreaks and clusters.

Mr. Berg stated that in cases where employers do not fall under the requirements of the ATD standard, Sections 3203 and 5144 provide a regulatory basis that requires employers to protect workers from exposure to COVID-19 in the workplace. However, the Division feels that a regulation specific to COVID-19 would greatly increase their efficiency, effectiveness, and success in protecting workers.

2. Legislative Update

Ms. Shupe provided updates on the following bills:

- AB 2658
- AB 1512
- AB 2537
- AB 2043
- SB 1257
- SB 275
- AB 2092
- AB 685

3. Executive Officer's Report

Ms. Shupe stated that the Board staff has contracted with a company to help provide meeting support and expand public access to the Board Meetings. In addition to the Webex and teleconference options for attending Board Meetings, the meetings are now being broadcast live in English and Spanish, and audio-only streams are also available in both languages.

Ms. Shupe stated that during next month's meeting, the Board will consider the proposed decision for petition 579, and there will be a report on any enrolled bills that have been adopted by the Governor.

4. Board Member Comments and Future Agenda Items

No future agenda items were mentioned.

D. CLOSED SESSION

The need did not develop for the Board to hold a closed session at this time.

E. ADJOURNMENT

Mr. Thomas adjourned the Business Meeting at 3:00 p.m.

DEPARTMENT OF INDUSTRIAL RELATIONS
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833
Tel: (916) 274-5721 Fax: (916) 274-5743



**NOTICE OF PROPOSED EMERGENCY ACTION
BY THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
REGARDING PROPOSED CHANGES TO
CALIFORNIA CODE OF REGULATIONS, TITLE 8,
NEW SECTIONS 3205; 3205.1; 3205.2; 3205.3; and 3205.4**

COVID-19 PREVENTION

NOTICE IS HEREBY GIVEN that the Occupational Safety and Health Standards Board (Board) is proposing to take the action described in the Informative Digest as included in the Finding of Emergency. The emergency filing will adopt new sections 3205; 3205.1; 3205.2; 3205.3; and 3205.4, COVID-19 Prevention, under the California Code of Regulations, Title 8, Division 1, Chapter 4, of the General Industry Safety Orders (GISO).

Government Code Section 11346.1(a)(2) requires that, at least five (5) working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulation to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulation as set forth in Government Code Section 11349.6(b). For further information on the emergency rulemaking process, access the OAL website at: www.oal.ca.gov or contact the OAL reference attorney: (916) 323-6815 / staff@oal.ca.gov.

This proposed emergency action to adopt new sections 3205; 3205.1; 3205.2; 3205.3; and 3205.4 of the GISO has been placed on the agenda of the November 2020 Board Meeting:

November 19, 2020 at 10:00 a.m.

The physical meeting location has been cancelled. Remote attendance options below:

Video Conference: www.webex.com (meeting information 268 984 996)

Teleconference: (844) 992-4726 (access code 268 984 996, attendee ID #)

Live video/audio stream (English/Spanish): <https://videobookcase.com/california/oshsb/>

Prior to any action by the Board to adopt the proposal, the public will be given an opportunity to comment on the proposal. **You are advised, however, that comments made at this Board meeting or submitted to the Board in writing regarding this proposal will NOT be forwarded to OAL; therefore, such comments directed to the Board are NOT comments submitted to OAL in accordance with Government Code Section 11349.6.**

If this emergency proposal is adopted by the Board, the proposal will be submitted to OAL. Upon submission, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency regulation. If approved, OAL will file the emergency regulation with the Secretary of State, and the emergency regulation will become effective for 180 days, with possible extensions¹. Within the 180-day effective period, the Board may proceed with a regular rulemaking action, including a public comment period.

Attached to this Notice are: (1) the specific new language proposed to be adopted, and (2) the Finding of Emergency required by Government Code Section 11346.1(b). You may also review the proposed regulatory language and the Finding of Emergency on the Board's website: www.dir.ca.gov/oshsb/emergencyregulations.html.

If you have any questions regarding this proposed emergency action, please contact Christina Shupe, Executive Officer, at (916) 274-5721.

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD



DAVE THOMAS, Chairman

¹ Pursuant to Governor Newsom's Executive Order N-40-20, the timelines for filing, refiling, certification and/or review of regulations and emergency regulations are extended for a period of 60 calendar days. These timelines are further extended for 60 days by Executive Order N-66-20.

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Subchapter 7. General Industry Safety Orders

Amend Section 3205 to read:

§ 3205. ~~“Shall” and “Should.” [Repealed]~~ COVID-19 Prevention.

(a) Scope.

- (1) This section applies to all employees and places of employment, with the following exceptions:
 - (A) Places of employment with one employee who does not have contact with other persons.
 - (B) Employees working from home.
 - (C) Employees when covered by section 5199.
- (2) Nothing in this section is intended to limit more protective or stringent state or local health department mandates or guidance.

(b) Definitions. The following definitions apply to this section and to sections 3205.1 through 3205.4.

“COVID-19” means coronavirus disease, an infectious disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

“COVID-19 case” means a person who:

- (1) Has a positive “COVID-19 test” as defined in this section;
- (2) Is subject to COVID-19-related order to isolate issued by a local or state health official;
or
- (3) Has died due to COVID-19, in the determination of a local health department or per inclusion in the COVID-19 statistics of a county.

A person is no longer a “COVID-19 case” in this section when a licensed health care professional determines that the person does not have COVID-19, in accordance with recommendations made by the California Department of Public Health (CDPH) or the local health department pursuant to authority granted under the Health and Safety Code or title 17, California Code of Regulations to CDPH or the local health department.

“COVID-19 exposure” means being within six feet of a COVID-19 case for a cumulative total of 15 minutes or greater in any 24-hour period within or overlapping with the “high-risk exposure period” defined by this section. This definition applies regardless of the use of face coverings.

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“COVID-19 hazard” means exposure to potentially infectious material that may contain SARS-CoV-2, the virus that causes COVID-19. Potentially infectious materials include airborne droplets, small particle aerosols, and airborne droplet nuclei, which most commonly result from a person or persons exhaling, talking or vocalizing, coughing, sneezing, or procedures performed on persons which may aerosolize saliva or respiratory tract fluids, among other things. This also includes objects or surfaces that may be contaminated with SARS-CoV-2.

“COVID-19 symptoms” means fever of 100.4 degrees Fahrenheit or higher, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea, unless a licensed health care professional determines the person’s symptoms were caused by a known condition other than COVID-19.

“COVID-19 test” means a viral test for SARS-CoV-2 that is:

- (1) Approved by the United States Food and Drug Administration (FDA) or has an Emergency Use Authorization from the FDA to diagnose current infection with the SARS-CoV-2 virus; and
- (2) Administered in accordance with the FDA approval or the FDA Emergency Use Authorization as applicable.

“Exposed workplace” means any work location, working area, or common area at work used or accessed by a COVID-19 case during the high-risk period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. The exposed workplace does not include buildings or facilities not entered by a COVID-19 case.

Effective January 1, 2021, the “exposed workplace” also includes but is not limited to the “worksite” of the COVID-19 case as defined by Labor Code section 6409.6(d)(5).

“Face covering” means a tightly woven fabric or non-woven material with no visible holes or openings, which covers the nose and mouth.

“High-risk exposure period” means the following time period:

- (1) For persons who develop COVID-19 symptoms: from two days before they first develop symptoms until 10 days after symptoms first appeared, and 24 hours have passed with no fever, without the use of fever-reducing medications, and symptoms have improved; or
 - (2) For persons who test positive who never develop COVID-19 symptoms: from two days before until ten days after the specimen for their first positive test for COVID-19 was collected.
- (c) Written COVID-19 Prevention Program. Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program, which may be integrated into the

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employer's Injury and Illness Program required by section 3203, or be maintained in a separate document. The written elements of a COVID-19 Prevention Program shall include:

- (1) System for communicating. The employer shall do all of the following in a form readily understandable by employees:
 - (A) Ask employees to report to the employer, without fear of reprisal, COVID-19 symptoms, possible COVID-19 exposures, and possible COVID-19 hazards at the workplace.
 - (B) Describe procedures or policies for accommodating employees with medical or other conditions that put them at increased risk of severe COVID-19 illness.
 - (C) Provide information about access to COVID-19 testing. If testing is required under this section, section 3205.1, or section 3205.2, the employer shall inform affected employees of the reason for the COVID-19 testing and the possible consequences of a positive test.
 - (D) In accordance with subsection (c)(3)(B)3., communicate information about COVID-19 hazards and the employer's COVID-19 policies and procedures to employees and to other employers, persons, and entities within or in contact with the employer's workplace.

NOTE: See subsections (c)(3)(C) and (c)(3)(D) for confidentiality requirements for COVID-19 cases.

- (2) Identification and evaluation of COVID-19 hazards.
 - (A) The employer shall allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards.
 - (B) The employer shall develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms. The employer may ask employees to evaluate their own symptoms before reporting to work. If the employer conducts screening at the workplace, the employer shall ensure that face coverings are used during screening by both screeners and employees and, if temperatures are measured, that non-contact thermometers are used.
 - (C) The employer shall develop COVID-19 policies and procedures to respond effectively and immediately to individuals at the workplace who are a COVID-19 case to prevent or reduce the risk of transmission of COVID-19 in the workplace.
 - (D) The employer shall conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards. Employers shall treat all persons, regardless of symptoms or negative COVID-19 test results, as potentially infectious.

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1. This shall include identification of places and times when people may congregate or come in contact with one another, regardless of whether employees are performing an assigned work task or not, for instance during meetings or trainings and including in and around entrances, bathrooms, hallways, aisles, walkways, elevators, break or eating areas, cool-down areas, and waiting areas.
2. This shall include an evaluation of employees' potential workplace exposure to all persons at the workplace or who may enter the workplace, including coworkers, employees of other entities, members of the public, customers or clients, and independent contractors. Employers shall consider how employees and other persons enter, leave, and travel through the workplace, in addition to addressing fixed work locations.
 - (E) For indoor locations, the employer shall evaluate how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system.
 - (F) The employer shall review applicable orders and guidance from the State of California and the local health department related to COVID-19 hazards and prevention, including information of general application and information specific to the employer's industry, location, and operations.
 - (G) The employer shall evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls. This includes evaluation of controls in subsections (c)(4), and (c)(6) through (c)(8).
 - (H) The employer shall conduct periodic inspections as needed to identify unhealthy conditions, work practices, and work procedures related to COVID-19 and to ensure compliance with employers' COVID-19 policies and procedures.
- (3) Investigating and responding to COVID-19 cases in the workplace.
 - (A) Employers shall have an effective procedure to investigate COVID-19 cases in the workplace. This includes procedures for verifying COVID-19 case status, receiving information regarding COVID-19 test results and onset of COVID-19 symptoms, and identifying and recording COVID-19 cases.
 - (B) The employer shall take the following actions when there has been a COVID-19 case at the place of employment:
 1. Determine the day and time the COVID-19 case was last present and, to the extent possible, the date of the positive COVID-19 test(s) and/or diagnosis, and the date the

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COVID-19 case first had one or more COVID-19 symptoms, if any were experienced.

2. Determine who may have had a COVID-19 exposure. This requires an evaluation of the activities of the COVID-19 case and all locations at the workplace which may have been visited by the COVID-19 case during the high-risk exposure period.

Note: See subsection (c)(10) for exclusion requirements for employees with COVID-19 exposure.

3. Give notice of the potential COVID-19 exposure, within one business day, in a way that does not reveal any personal identifying information of the COVID-19 case, to the following:
 - a. All employees who may have had COVID-19 exposure and their authorized representatives.
 - b. Independent contractors and other employers present at the workplace during the high-risk exposure period.
4. Offer COVID-19 testing at no cost to employees during their working hours to all employees who had potential COVID-19 exposure in the workplace and provide them with the information on benefits described in subsections (c)(5)(B) and (c)(10)(C).
5. Investigate whether any workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.

- (C) Personal identifying information of COVID-19 cases or persons with COVID-19 symptoms shall be kept confidential. All COVID-19 testing or related medical services provided by the employer under this section and sections 3205.1 through 3205.4 shall be provided in a manner that ensures the confidentiality of employees.

EXCEPTION to subsection (c)(3)(C): Unredacted information on COVID-19 cases shall be provided to the local health department, CDPH, the Division, the National Institute for Occupational Safety and Health (NIOSH), or as otherwise required by law immediately upon request.

- (D) The employer shall ensure that all employee medical records required by this section and sections 3205.1 through 3205.4 are kept confidential and are not disclosed or

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reported without the employee's express written consent to any person within or outside the workplace.

EXCEPTION 1 to subsection (c)(3)(D): Unredacted medical records shall be provided to the local health department, CDPH, the Division, NIOSH, or as otherwise required by law immediately upon request.

EXCEPTION 2 to subsection (c)(3)(D): This provision does not apply to records that do not contain individually identifiable medical information or from which individually identifiable medical information has been removed.

- (4) Correction of COVID-19 hazards. Employers shall implement effective policies and/or procedures for correcting unsafe or unhealthy conditions, work practices, policies and procedures in a timely manner based on the severity of the hazard. This includes, but is not limited to, implementing controls and/or policies and procedures in response to the evaluations conducted under subsections (c)(2) and (c)(3) and implementing the controls required by subsection (c)(6) through (c)(8).
- (5) Training and instruction. The employer shall provide effective training and instruction to employees that includes the following:
- (A) The employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards.
 - (B) Information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws. This includes any benefits available under workers' compensation law, the federal Families First Coronavirus Response Act, Labor Code sections 248.1 and 248.5, Labor Code sections 3212.86 through 3212.88, local governmental requirements, the employer's own leave policies, and leave guaranteed by contract.
 - (C) The fact that COVID-19 is an infectious disease that can be spread through the air when an infectious person talks or vocalizes, sneezes, coughs, or exhales; that COVID-19 may be transmitted when a person touches a contaminated object and then touches their eyes, nose, or mouth, although that is less common; and that an infectious person may have no symptoms.
 - (D) Methods of physical distancing of at least six feet and the importance of combining physical distancing with the wearing of face coverings.
 - (E) The fact that particles containing the virus can travel more than six feet, especially indoors, so physical distancing must be combined with other controls, including face coverings and hand hygiene, to be effective.

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- (F) The importance of frequent hand washing with soap and water for at least 20 seconds and using hand sanitizer when employees do not have immediate access to a sink or hand washing facility, and that hand sanitizer does not work if the hands are soiled.
 - (G) Proper use of face coverings and the fact that face coverings are not respiratory protective equipment.
 - (H) COVID-19 symptoms, and the importance of not coming to work and obtaining a COVID-19 test if the employee has COVID-19 symptoms.
- (6) Physical distancing.
- (A) All employees shall be separated from other persons by at least six feet, except where an employer can demonstrate that six feet of separation is not possible, and except for momentary exposure while persons are in movement. Methods of physical distancing include: telework or other remote work arrangements; reducing the number of persons in an area at one time, including visitors; visual cues such as signs and floor markings to indicate where employees and others should be located or their direction and path of travel; staggered arrival, departure, work, and break times; and adjusted work processes or procedures, such as reducing production speed, to allow greater distance between employees.
 - (B) When it is not possible to maintain a distance of at least six feet, individuals shall be as far apart as possible.
- (7) Face coverings.
- (A) Employers shall provide face coverings and ensure they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and where required by orders from the CDPH or local health department. Employers shall ensure face coverings are clean and undamaged. Face shields are not a replacement for face coverings, although they may be worn together for additional protection. The following are exceptions to the face coverings requirement:
 1. When an employee is alone in a room.
 2. While eating and drinking at the workplace, provided employees are at least six feet apart and outside air supply to the area, if indoors, has been maximized to the extent possible.
 3. Employees wearing respiratory protection in accordance with section 5144 or other title 8 safety orders.
 4. Employees who cannot wear face coverings due to a medical or mental health condition or disability, or who are hearing-impaired or communicating with a hearing-impaired person.

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5. Specific tasks which cannot feasibly be performed with a face covering. This exception is limited to the time period in which such tasks are actually being performed, and the unmasked employee shall be at least six feet away from all other persons unless unmasked employees are tested at least twice weekly for COVID-19.

NOTE: CDPH has issued guidance for employers that identifies examples when wearing a face covering is likely not feasible.

- (B) Employees exempted from wearing face coverings due to a medical condition, mental health condition, or disability shall wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it.
 - (C) Any employee not wearing a face covering, face shield with a drape or other effective alternative, or respiratory protection, for any reason, shall be at least six feet apart from all other persons unless the unmasked employee is tested at least twice weekly for COVID-19. Employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required by this section.
 - (D) No employer shall prevent any employee from wearing a face covering when not required by this section, unless it would create a safety hazard, such as interfering with the safe operation of equipment.
 - (E) Employers shall implement measures to communicate to non-employees the face coverings requirements on their premises.
 - (F) The employer shall develop COVID-19 policies and procedures to minimize employee exposure to COVID-19 hazards originating from any person not wearing a face covering, including a member of the public.
- (8) Other engineering controls, administrative controls, and personal protective equipment.
- (A) At fixed work locations where it is not possible to maintain the physical distancing requirement at all times, the employer shall install cleanable solid partitions that effectively reduce aerosol transmission between the employee and other persons.
 - (B) For buildings with mechanical or natural ventilation, or both, employers shall maximize the quantity of outside air provided to the extent feasible, except when the United States Environmental Protection Agency (EPA) Air Quality Index is greater than 100 for any pollutant or if opening windows or letting in outdoor air by other means would cause a hazard to employees, for instance from excessive heat or cold.
 - (C) Employers shall implement cleaning and disinfecting procedures, which require:
 - 1. Identifying and regularly cleaning and disinfecting frequently touched surfaces and objects, such as doorknobs, elevator buttons, equipment, tools, handrails, handles, controls, bathroom surfaces, and steering wheels. The employer shall inform

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employees and authorized employee representatives of cleaning and disinfection protocols, including the planned frequency and scope of regular cleaning and disinfection.

2. Prohibiting the sharing of personal protective equipment and to the extent feasible, items that employees come in regular physical contact with such as phones, headsets, desks, keyboards, writing materials, instruments, and tools. When it is not feasible to prevent sharing, sharing shall be minimized and such items and equipment shall be disinfected between uses by different people. Sharing of vehicles shall be minimized to the extent feasible, and high touch points (steering wheel, door handles, seatbelt buckles, armrests, shifter, etc.) shall be disinfected between users.
3. Cleaning and disinfection of areas, material, and equipment used by a COVID-19 case during the high-risk exposure period.

NOTE: Cleaning and disinfecting must be done in a manner that does not create a hazard to employees. See Group 2 and Group 16 of the General Industry Safety Orders for further information.

(D) To protect employees from COVID-19 hazards, the employer shall evaluate its handwashing facilities, determine the need for additional facilities, encourage and allow time for employee handwashing, and provide employees with an effective hand sanitizer. Employers shall encourage employees to wash their hands for at least 20 seconds each time. Provision or use of hand sanitizers with methyl alcohol is prohibited.

(E) Personal protective equipment.

1. Employers shall evaluate the need for personal protective equipment to prevent exposure to COVID-19 hazards, such as gloves, goggles, and face shields, and provide such personal protective equipment as needed.
2. Employers shall evaluate the need for respiratory protection in accordance with section 5144 when the physical distancing requirements in subsection (c)(6) are not feasible or are not maintained.
3. Employers shall provide and ensure use of respirators in accordance with section 5144 when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.
4. Employers shall provide and ensure use of eye protection and respiratory protection in accordance with section 5144 when employees are exposed to procedures that

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may aerosolize potentially infectious material such as saliva or respiratory tract fluids.

NOTE: Examples of work covered by subsection (c)(8)(E)4. include, but are not limited to, certain dental procedures and outpatient medical specialties not covered by section 5199.

(9) Reporting, recordkeeping, and access.

- (A) The employer shall report information about COVID-19 cases at the workplace to the local health department whenever required by law, and shall provide any related information requested by the local health department.
- (B) The employer shall report immediately to the Division any COVID-19-related serious illnesses or death, as defined under section 330(h), of an employee occurring in a place of employment or in connection with any employment.
- (C) The employer shall maintain records of the steps taken to implement the written COVID-19 Prevention Program in accordance with section 3203(b).
- (D) The written COVID-19 Prevention Program shall be made available at the workplace to employees, authorized employee representatives, and to representatives of the Division immediately upon request.
- (E) The employer shall keep a record of and track all COVID-19 cases with the employee's name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test. Medical information shall be kept confidential in accordance with subsections (c)(3)(C) and (c)(3)(D). The information shall be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed.

Note: Subsection (c)(9)(E) does not alter the right of employees or their representatives to request and obtain an employer's Log of Work-Related Injuries and Illnesses (Log 300), without redaction, or to request and obtain information as otherwise allowed by law.

- (10) Exclusion of COVID-19 cases. The purpose of this subsection is to limit transmission of COVID-19 in the workplace.

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- (A) Employers shall ensure that COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(11) are met.
- (B) Employers shall exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case.
- (C) For employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers shall 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. Employers may use employer-provided employee sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers' compensation.

EXCEPTION 1: Subsection (c)(10)(C) does 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.

EXCEPTION 2: Subsection (c)(10)(C) does not apply where the employer demonstrates that the COVID-19 exposure is not work related.

- (D) Subsection (c)(10) does not limit any other applicable law, employer policy, or collective bargaining agreement that provides for greater protections.
- (E) At the time of exclusion, the employer shall provide the employee the information on benefits described in subsections (c)(5)(B) and (c)(10)(C).

EXCEPTION to subsection (c)(10): Employees who have not been excluded or isolated by the local health department need not be excluded by the employer, if they are temporarily reassigned to work where they do not have contact with other persons until the return to work requirements of subsection (c)(11) are met.

(11) Return to work criteria.

- (A) COVID-19 cases with COVID-19 symptoms shall not return to work until:
 - 1. At least 24 hours have passed since a fever of 100.4 or higher has resolved without the use of fever-reducing medications;
 - 2. COVID-19 symptoms have improved; and
 - 3. At least 10 days have passed since COVID-19 symptoms first appeared.
- (B) COVID-19 cases who tested positive but never developed COVID-19 symptoms shall not return to work until a minimum of 10 days have passed since the date of specimen collection of their first positive COVID-19 test.

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- (C) A negative COVID-19 test shall not be required for an employee to return to work.
- (D) If an order to isolate or quarantine an employee is issued by a local or state health official, the employee shall not return to work until the period of isolation or quarantine is completed or the order is lifted. If no period was specified, then the period shall be 10 days from the time the order to isolate was effective, or 14 days from the time the order to quarantine was effective.
- (E) If there are no violations of local or state health officer orders for isolation or quarantine, the Division may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety. In such cases, the employer shall develop, implement, and maintain effective control measures to prevent transmission in the workplace including providing isolation for the employee at the workplace and, if isolation is not possible, the use of respiratory protection in the workplace.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.1 to read:

§ 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks.

(a) Scope.

- (1) This section applies to a place of employment covered by section 3205 if it has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period.
- (2) This section shall apply until there are no new COVID-19 cases detected in a workplace for a 14-day period.

(b) COVID-19 testing.

- (1) The employer shall provide COVID-19 testing to all employees at the exposed workplace except for employees who were not present during the period of an outbreak identified by a local health department or the relevant 14-day period(s) under subsection (a), as applicable. COVID-19 testing shall be provided at no cost to employees during employees' working hours.

(2) COVID-19 testing shall consist of the following:

- (A) Immediately upon being covered by this section, all employees in the exposed workplace shall be tested and then tested again one week later. Negative COVID-19 test results of employees with COVID-19 exposure shall not impact the duration of any quarantine period required by, or orders issued by, the local health department.
- (B) After the first two COVID-19 tests required by (b)(2)(A), employers shall provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or more frequently if recommended by the local health department, until this section no longer applies pursuant to subsection (a)(2).
- (C) Employers shall provide additional testing when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

- (c) Exclusion of COVID-19 cases. Employers shall ensure COVID-19 cases and employees who had COVID-19 exposure are excluded from the workplace in accordance with subsections 3205(c)(10) and (c)(11) and local health officer orders if applicable.
- (d) Investigation of workplace COVID-19 illness. The employer shall immediately investigate and determine possible workplace related factors that contributed to the COVID-19 outbreak in accordance with subsection 3205(c)(3).
- (e) COVID-19 Investigation, review and hazard correction. In addition to the requirements of subsection 3205(c)(2) and 3205(c)(4), the employer shall immediately perform a review of

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potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19. The investigation and review shall be documented and include:

- (1) Investigation of new or unabated COVID-19 hazards including the employer's leave policies and practices and whether employees are discouraged from remaining home when sick; the employer's COVID-19 testing policies; insufficient outdoor air; insufficient air filtration; and lack of physical distancing.
 - (2) The review shall be updated every thirty days that the outbreak continues, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.
 - (3) The employer shall implement changes to reduce the transmission of COVID-19 based on the investigation and review required by subsections (e)(1) and (e)(2). The employer shall consider moving indoor tasks outdoors or having them performed remotely, increasing outdoor air supply when work is done indoors, improving air filtration, increasing physical distancing as much as possible, respiratory protection, and other applicable controls.
- (f) Notifications to the local health department.
- (1) The employer shall contact the local health department immediately but no longer than 48 hours after the employer knows, or with diligent inquiry would have known, of three or more COVID-19 cases for guidance on preventing the further spread of COVID-19 within the workplace.
 - (2) The employer shall provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, the hospitalization and/or fatality status, and North American Industry Classification System code of the workplace of the COVID-19 case, and any other information requested by the local health department. The employer shall continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.
 - (3) Effective January 1, 2021, the employer shall provide all information to the local health department required by Labor Code section 6409.6.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.2 to read:

§ 3205.2. Major COVID-19 Outbreaks.

(a) Scope.

- (1) This section applies to any place of employment covered by section 3205 when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period.
- (2) This section shall apply until there are no new COVID-19 cases detected in a workplace for a 14-day period.

(b) COVID-19 testing. Employers shall provide twice a week COVID-19 testing, or more frequently if recommended by the local health department, to all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. COVID-19 testing shall be provided at no cost to employees during employees' working hours.

(c) Exclusion of COVID-19 cases. Employers shall ensure COVID-19 cases and employees with COVID-19 exposure are excluded from the workplace in accordance with subsections 3205(c)(10) and (c)(11) and any relevant local health department orders.

(d) Investigation of workplace COVID-19 illnesses. The employer shall comply with the requirements of subsection 3205(c)(3).

(e) COVID-19 hazard correction. In addition to the requirements of subsection 3205(c)(4), the employer shall take the following actions:

- (1) In buildings or structures with mechanical ventilation, employers shall filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering efficiency. Employers shall also evaluate whether portable or mounted High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems would reduce the risk of transmission and shall implement their use to the degree feasible.
- (2) The employer shall determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards.
- (3) The employer shall evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.
- (4) Any other control measures deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

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(f) Notifications to the local health department. Employers shall comply with the requirements of section 3205.1(f).

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.3 to read:

§ 3205.3. COVID-19 Prevention in Employer-Provided Housing.

(a) Scope. This section applies to employer-provided housing. Employer-provided housing is any place or area of land, any portion of any housing accommodation, or property upon which a housing accommodation is located, consisting of: living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured home, recreational vehicle, travel trailer, or other housing accommodations. Employer-provided housing includes a “labor camp” as that term is used in title 8 of the California Code of Regulations or other regulations or codes. The employer-provided housing may be maintained in one or more buildings or one or more sites, including hotels and motels, and the premises upon which they are situated, or the area set aside and provided for parking of mobile homes or camping. Employer-provided housing is housing that is arranged for or provided by an employer, other person, or entity to workers, and in some cases to workers and persons in their households, in connection with the worker’s employment, whether or not rent or fees are paid or collected.

The following exceptions apply:

- (1) This section does not apply to housing provided for the purpose of emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations, if:
 - (A) The employer is a government entity; or
 - (B) The housing is provided temporarily by a private employer and is necessary to conduct the emergency response operations.
 - (2) Subsections (c), (d), (e), (f), and (h) do not apply to occupants who maintained a household together prior to residing in employer-provided housing, such as family members, when no other persons outside the household are present.
- (b) Assignment of housing units. Employers shall ensure that shared housing unit assignments are prioritized in the following order:
- (1) Residents who usually maintain a household together outside of work, such as family members, shall be housed in the same housing unit without other persons.
 - (2) Residents who work in the same crew or work together at the same worksite shall be housed in the same housing unit without other persons.
 - (3) Employees who do not usually maintain a common household, work crew, or worksite shall be housed in the same housing unit only when no other housing alternatives are possible.

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- (c) Physical distancing and controls. Employers shall:
- (1) Ensure the premises are of sufficient size and layout to permit at least six feet of physical distancing between residents in housing units, common areas, and other areas of the premises.
 - (2) Ensure beds are spaced at least six feet apart in all directions and positioned to maximize the distance between sleepers' heads. For beds positioned next to each other, i.e. side by side, the beds shall be arranged so that the head of one bed is next to the foot of the next bed. For beds positioned across from each other, i.e. end to end, the beds shall be arranged so that the foot of one bed is closest to the foot of the next bed. Bunk beds shall not be used.
 - (3) In housing units, maximize the quantity and supply of outdoor air and increase filtration efficiency to the highest level compatible with the existing ventilation system.
- (d) Face coverings. Employers shall provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.
- (e) Cleaning and disinfecting.
- (1) Employers shall ensure that housing units, kitchens, bathrooms, and common areas are effectively cleaned and disinfected at least once a day to prevent the spread of COVID-19. Cleaning and disinfecting shall be done in a manner that protects the privacy of residents.
 - (2) Employers shall ensure that unwashed dishes, drinking glasses, cups, eating utensils, and similar items are not shared.
- (f) Screening. The employer shall encourage residents to report COVID-19 symptoms to the employer.
- (g) COVID-19 testing. The employer shall establish, implement, and maintain effective policies and procedures for COVID-19 testing of occupants who had a COVID-19 exposure, who have COVID-19 symptoms, or as recommended by the local health department.
- (h) Isolation of COVID-19 cases and persons with COVID-19 exposure.
- (1) Employers shall effectively isolate COVID-19 exposed residents from all other occupants. Effective isolation shall include providing COVID-19 exposed residents with a private bathroom, sleeping area, and cooking and eating facility.
 - (2) Employers shall effectively isolate COVID-19 cases from all occupants who are not COVID-19 cases. Effective isolation shall include housing COVID-19 cases only with other COVID-19 cases, and providing COVID-19 case occupants with a sleeping area,

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bathroom, and cooking and eating facility that is not shared by non-COVID-19 case occupants.

- (3) Personal identifying information regarding COVID-19 cases and persons with COVID-19 symptoms shall be kept confidential in accordance with subsections 3205(c)(3)(C) and 3205(c)(3)(D).
- (4) Employers shall end isolation in accordance with subsections 3205(c)(10) and (c)(11) and any applicable local or state health officer orders.

Note: Authority cited: Section 142.3, Labor Code, Section 1708, Health and Safety Code.
Reference: Sections 142.3 and 144.6, Labor Code.

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Add new section 3205.4 to read:

§ 3205.4. COVID-19 Prevention in Employer-Provided Transportation to and from Work.

- (a) Scope. This section applies to employer-provided motor vehicle transportation to and from work, which is any transportation of an employee, during the course and scope of employment, provided, arranged for, or secured by an employer including ride-share vans or shuttle vehicles, car-pools, and private charter buses, regardless of the travel distance or duration involved. Subsections (b) through (g) apply to employer-provided transportation. The following exceptions apply:
- (1) This section does not apply if the driver and all passengers are from the same household outside of work, such as family members.
 - (2) This section does not apply to employer-provided transportation when necessary for emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations.
- (b) Assignment of transportation. Employers shall prioritize shared transportation assignments in the following order:
- (1) Employees residing in the same housing unit shall be transported in the same vehicle.
 - (2) Employees working in the same crew or worksite shall be transported in the same vehicle.
 - (3) Employees who do not share the same household, work crew or worksite shall be transported in the same vehicle only when no other transportation alternatives are possible.
- (c) Physical distancing and face coverings. Employers shall ensure that:
- (1) Physical distancing and face covering requirements of subsection 3205(c)(6) and (c)(7) are followed for employees waiting for transportation.
 - (2) The vehicle operator and any passengers are separated by at least three feet in all directions during the operation of the vehicle, regardless of the vehicle's normal capacity.
 - (3) The vehicle operator and any passengers are provided and wear a face covering in the vehicle as required by subsection 3205(c)(7).
- (d) Screening. Employers shall develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation.
- (e) Cleaning and disinfecting. Employers shall ensure that:

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- (1) All high-contact surfaces (door handles, seatbelt buckles, armrests, etc.) used by passengers are cleaned and disinfected before each trip.
- (2) All high-contact surfaces used by drivers, such as the steering wheel, armrests, seatbelt buckles, door handles and shifter, shall be cleaned and disinfected between different drivers.
- (3) Employers shall provide sanitizing materials and ensure they are kept in adequate supply.
- (f) Ventilation. Employers shall ensure that vehicle windows are kept open, and the ventilation system set to maximize outdoor air and not set to recirculate air. Windows do not have to be kept open if one or more of the following conditions exist:
 - (1) The vehicle has functioning air conditioning in use and the outside temperature is greater than 90 degrees Fahrenheit.
 - (2) The vehicle has functioning heating in use and the outside temperature is less than 60 degrees Fahrenheit.
 - (3) Protection is needed from weather conditions, such as rain or snow.
 - (4) The vehicle has a cabin air filter in use and the U.S. EPA Air Quality Index for any pollutant is greater than 100.
- (g) Hand hygiene. Employers shall provide hand sanitizer in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle. Hand sanitizers with methyl alcohol are prohibited.

Note: Authority cited: Section 142.3, Labor Code. Reference: Sections 142.3 and 144.6, Labor Code.

DEPARTMENT OF INDUSTRIAL RELATIONS
Occupational Safety and Health Standards Board
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**FINDING OF EMERGENCY
GOVERNMENT CODE SECTION 11346.1
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
PROPOSED EMERGENCY REGULATION
TITLE 8, CALIFORNIA CODE OF REGULATIONS
GENERAL INDUSTRY SAFETY ORDERS
CHAPTER 4, SUBCHAPTER 7, NEW SECTIONS
3205; 3205.1; 3205.2; 3205.3; and 3205.4**

COVID-19 Prevention

The objective of the proposed emergency standard is to reduce employee exposure to the virus that causes COVID-19 and therefore reduce COVID-19 illness and transmission.

Government Code (GC) section 11346.1 requires a finding of emergency to include a written statement with the information required by paragraphs (2), (3), (4), (5) and (6) of subdivision (a) of section 11346.5 and a description of the specific facts demonstrating the existence of an emergency and showing the need for immediate action.

GC section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulation to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in GC section 11349.6(b), unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest.

The Occupational Safety and Health Standards Board (Board) finds that the adoption of this proposed emergency standard is necessary to address an emergency pursuant to GC section 11346.1(b)(1). The Board finds that immediate action must be taken to avoid serious harm to the public peace, health, safety, or general welfare, for the reasons stated below.

FINDING OF EMERGENCY

Basis for the Finding of Emergency

1. On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California in response to the outbreak of respiratory illness due to the novel coronavirus, known as COVID-19¹.
2. COVID-19 is a pandemic disease, found in every county in California, every state in the United States and nearly every country in the world. While a high percentage of individuals affected by COVID-19 will experience mild to moderate flu-like symptoms, some will have more serious symptoms and will require hospitalization, particularly individuals who are elderly or have underlying medical conditions.² Serious symptoms of COVID-19 include shortness of breath, difficulty breathing, pneumonia, and organ failure, and can result in death.³ The virus can damage the lungs, heart and brain and can cause long-term health problems.⁴
3. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, a stay-at-home order to protect Californians and slow the spread of COVID-19. The order prohibited operations at all but essential businesses and workplaces.⁵
4. As of May 4, 2020, Governor Newsom allowed a number of lower-risk business sectors to reopen.⁶
5. On May 6, 2020, Governor Newsom issued Executive Order N-62-20⁷, which provides that under certain circumstances it is presumed that workers who contract a COVID-19-related illness between March 19, 2020, and July 5, 2020, have done so at work and are thus eligible

¹ Gavin Newsom, Governor of California; Proclamation of a State of Emergency; March 4, 2020.

<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>

² CDC. Evidence used to update the list of underlying medical conditions that increase a person's risk of severe illness from COVID-19. Accessed on October 15, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html>

³ Wiersinga WJ, Rhodes A, Cheng AC, Peacock SJ, Prescott HC. Pathophysiology, Transmission, Diagnosis, and Treatment of Coronavirus Disease 2019 (COVID-19): A Review. *JAMA*. 2020; 324(8):782–793. doi:10.1001/jama.2020.12839. <https://jamanetwork.com/journals/jama/fullarticle/2768391>

⁴ World Health Organization. What we know about Long-term effects of COVID-19. September 9, 2020. https://www.who.int/docs/default-source/coronaviruse/risk-comms-updates/update-36-long-term-symptoms.pdf?sfvrsn=5d3789a6_2

⁵ Gavin Newsom, Governor of California; Executive Order N-33-20; March 19, 2020. <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>

⁶ Gavin Newsom, Governor of California; Update on California's Reopening; May 4, 2020. <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>

⁷ Gavin Newsom, Governor of California; Executive Order N-62-20; May 6, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

for workers' compensation benefits. The Executive Order declares that "employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19, which may require medical treatment, including hospitalization" and that "employees who report to work while sick increase health and safety risks for themselves, their fellow employees, and others with whom they come into contact."

6. There has been an overrepresentation of migrant temporary farmworkers testing positive for COVID-19 in California compared to workers in any other industry.⁸ Many of these workers live in compact, dorm-like housing facilities provided by employers.⁹ One California health officer noted that "farmworkers face the greatest infection risk not at work, but at home."¹⁰ Indeed, in Ventura County, almost 190 workers living in employer-provided housing tested positive for COVID-19 out of 216 people tested.¹¹ In recognition of the need to control against the spread of COVID-19 among farmworkers, on July 24, 2020, Governor Newsom unveiled the Housing for the Harvest program, which provides 14 paid days of temporary hotel rooms for California farmworkers who have been exposed to, or tested positive for, COVID-19 but are unable to adequately quarantine at home.¹² In addition, the federal Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control (CDC) have published COVID-19 prevention guidance documents encouraging employers to adopt various workplace control measures for workers residing in communal living arrangements, including employer-furnished housing, and workers traveling to and from work in shared motor vehicles.¹³

⁸ The Californian. COVID-19 rips through California motel rooms of guest workers who pick nation's produce, dated August 26, 2020. Accessed on November 6, 2020.

<https://www.thecalifornian.com/story/news/2020/08/17/california-motel-guest-farm-workers-coronavirus-case-outbreak/5475182002/>

⁹ VC Star. Farmworker housing coronavirus outbreak: 188 test positive for COVID-19, dated July 4, 2020. Accessed on November 6, 2020.

<https://www.vcstar.com/story/news/local/2020/07/03/oxnard-california-farmworker-housing-covid-19-coronavirus-outbreak/5368774002/>

¹⁰ The Californian. COVID-19 rips through California motel rooms of guest workers who pick nation's produce, dated August 26, 2020. Accessed on November 6, 2020.

<https://www.thecalifornian.com/story/news/2020/08/17/california-motel-guest-farm-workers-coronavirus-case-outbreak/5475182002/>

¹¹ VC Star. Farmworker housing coronavirus outbreak: 188 test positive for COVID-19, dated July 4, 2020. Accessed on November 6, 2020.

<https://www.vcstar.com/story/news/local/2020/07/03/oxnard-california-farmworker-housing-covid-19-coronavirus-outbreak/5368774002/>

¹² California Department of Food and Agriculture, et al. Housing for the Harvest – Program Overview, dated July 29, 2020. Accessed on November 6, 2020. https://files.covid19.ca.gov/pdf/Housing_for_the_Harvest-Program_Overview.pdf

¹³ Federal OSHA. Additional Considerations for Workers Who Reside in Communal Living Arrangements. Accessed on November 6, 2020. <https://www.osha.gov/SLTC/covid-19/workers-in-shared-housing.html>; CDC.

Agriculture Workers & Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>; CDC. COVID-19

Guidance for Shared or Congregate Housing, Updated Aug. 22, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>

<https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>

7. As of October 2020, the majority of California workplaces are allowed to engage in on-site work operations despite the continuing spread of COVID-19. Millions of California workers face potential exposure to COVID-19 on the job.
8. Clusters and outbreaks of COVID-19 have occurred in workplaces throughout California, including in food manufacturing, agricultural operations, and warehouses.
9. As of October 14, 2020, there have been 858,401 cases of COVID-19 infection and 16,757 deaths reported in California.¹⁴ Data for the number of cases of COVID-19 infection and number of deaths attributable to workplace exposure to COVID-19 is not currently available; however, the numbers are likely substantial, particularly among essential workers, due to workers' exposure to persons outside of those in one's household, along with the close proximity between persons required in some industries.
10. Employees infected with COVID-19 at work can transmit the infection to persons in their homes and communities, resulting in an increase in infection rates.
11. Emergency rulemaking is required to address the immediate threat to employees from COVID-19. The nature of the threat has been characterized by the occupational health and medical community as both acute and chronic adverse health effects which can manifest as serious illness, permanent incapacitation, or death. Regular rulemaking cannot be completed in time to address these significant and ongoing risks to workers presented by the COVID-19 pandemic.
12. The Division of Occupational Safety and Health's (Division) Aerosol Transmissible Diseases standard, title 8, section 5199, provides important protections to workers in specified work settings from exposure to novel pathogens, including COVID-19, particularly in health care and corrections. However, the scope of section 5199 is limited. Thus, the majority of California workers are not covered by the protections afforded by section 5199.
13. During its September 17, 2020, meeting, the Board considered Petition 583, which requested an emergency rulemaking to address the potential harm posed to workers by COVID-19. The Petition sought adoption of an emergency standard that would apply to employees in any facility, service category, or operation not covered by title 8, sections 5199 or 5199.1. In addition, the Petition sought a permanent regulation to protect employees from infectious diseases, including those caused by novel pathogens.

¹⁴ CDPH. COVID-19 by the Numbers; accessed October 15, 2020.
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>

14. 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.” The Board requested the Division draft an emergency rulemaking proposal to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace, for consideration no later than the November 19, 2020, Board meeting.¹⁵
15. Between February 1, 2020, and September 27, 2020, the Division received over 6,937 complaints alleging inadequate protections for and potential exposure to COVID-19 in workplaces.
16. Occupational safety and health standards within title 8 of the California Code of Regulations (CCR) protect workers from hazards in general. However, other than those employees who are covered under section 5199, there is currently no specific regulation that protects all workers from exposure to infectious diseases such as COVID-19.
17. Guidance currently exists from a number of different authorities—including the federal CDC, federal OSHA, the California Department of Public Health (CDPH) and the Division—on how employers can best protect workers from COVID-19. However, guidance varies between federal and state agencies and contains some contradictory information. Employers and employees would benefit from a specific set of regulations related to COVID-19 prevention in all workplaces.
18. Adoption of the proposed emergency action is necessary to preserve worker safety and health by making existing general requirements, such as sections 3203, 3362, 3366, 5141, and 5144, specific to COVID-19 and easy to understand.
19. The proposed emergency action is necessary to combat the spread of COVID-19 in California workers. The proposed regulation would significantly reduce the number COVID-19 related illnesses, disabilities and deaths in California’s workforce.
20. Adoption of the proposed emergency regulation is necessary to strengthen the Division’s enforcement efforts related to the hazard of COVID-19 in workplaces, through regulatory mandates specific to preventing the spread of the virus.

AUTHORITY AND REFERENCE CITATIONS

These regulations are submitted pursuant to the Occupational Safety and Health Standards Board's authority under Labor Code section 142.3.

¹⁵ Occupational Safety and Health Standards Board; Petition File No. 583; Adopted Decision; September 17, 2020. <https://www.dir.ca.gov/oshsb/documents/petition-583-adopteddecision.pdf>

California Labor Code section 142.3 establishes that the Board may adopt, amend, or repeal occupational safety and health standards or orders. Section 142.3 permits the Board to prescribe suitable protective equipment and control or technological procedures to be used in connection with occupational hazards and to provide for monitoring or measuring employee exposure for the protection of employees.

Additionally, California Labor Code section 144.6 requires the Board, when dealing with standards for toxic materials and harmful physical agents, to “adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.” Section 144.6 also requires that the Board base standards on research, demonstrations, experiments and other appropriate information, taking into consideration the latest scientific literature, the reasonableness of the standards, and the experience gained under the health and safety laws.

Authority: Labor Code section 142.3.

Reference: Labor Code sections 142.3 and 144.6.

**INFORMATIVE DIGEST OF PROPOSED ACTION/
POLICY STATEMENT OVERVIEW**

Summary of Existing Regulations and the Effect of the Proposed Regulation

Labor Code (LC) sections 60.5 and 6308 provide that the Division is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act, commencing with LC section 6300, as well as other provisions of law affecting the health and safety of employees in the State of California.

Existing law, title 8, section 342, “Reporting Work-Connected Fatalities and Serious Injuries,” requires employers to report immediately to the Division any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Existing law, title 8, section 3203, “Injury and Illness Prevention Program,” establishes a general framework for the identification, evaluation, and correction of unsafe or unhealthy work conditions and practices; communication with employees; and employee safety and health training.

Existing law, title 8, section 3380, “Personal Protective Devices,” contains general requirements for personal protective equipment (PPE). Requirements for specific types of PPE are given in existing law, title 8, sections 3381 (Head Protection), 3382 (Eye and Face Protection), 3383

(Body Protection), 3384 (Hand Protection), and 3385 (Foot Protection). However, none of these sections require PPE to help prevent the transmission of COVID-19.

Existing law, title 8, section 5140, “Definitions,” states that a “harmful exposure” is an “exposure to dusts, fumes, mists, vapors, or gases” which are either “(a) In excess of any permissible limit prescribed by section 5155; or (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function.” There is no permissible exposure limit prescribed by section 5155 for SARS-CoV-2, the virus that causes COVID-19; however, inhalation of the virus does have a probability to result in injury, illness, disease, impairment, or loss of function. Exposure to COVID-19 is considered a harmful exposure, as exposure to aerosols (in the breath of infected persons) containing SARS-CoV-2 has the probability to result in illness, disease, impairment, or loss of function.

Existing law, title 8, section 5141, “Control of Harmful Exposure to Employees,” lists the hierarchy of controls that employers shall follow to address employee exposure to harmful air contaminants. Employers shall first rely on engineering controls whenever feasible, but if engineering controls are not feasible or do not achieve full compliance, administrative controls shall be implemented “if practicable.” When engineering and administrative controls fail to achieve full compliance, then respiratory protective equipment shall be used.

Existing law, title 8, section 5144, “Respiratory Protection,” requires respirators be used to protect the health of employees when effective engineering controls to prevent harmful atmospheres are not feasible.

Existing law, title 8, section 5199, “Aerosol Transmissible Diseases,” requires specific protections for novel pathogens such as COVID-19; however, it does not protect all workers. Its scope is limited to work in specified health care facilities, services, or operations, as well as in specified non-health care facilities, services, or operations. The majority of workers not covered by section 5199 are at risk for COVID-19 infection.

Existing law, title 8, section 3350, “Labor Camp Permits,” requires that every employer operating a labor camp under the provisions of the California Employee Housing Act obtain a valid permit issued by the Department of Housing and Community Development or by a local governmental agency authorized to issue such permits by the Department. The employer shall either post or have available a valid and current permit.

Existing law, title 8, section 3362, “General Requirements” (Sanitation), requires that workplaces are kept in a clean and sanitary condition. It also requires that buildings be cleaned and maintained to prevent harmful exposures (defined in section 5140 – see above).

Existing law, title 8, section 3366, “Washing Facilities,” requires that washing facilities be reasonably accessible to all employees. However, the section does not specifically require measures to ensure that employees are able to maintain personal hygiene, such as allowing time for employee handwashing, and the provision of hand sanitizer by the employer.

Federal Regulations and Statutes

While there is no federal regulation governing airborne exposure to infectious disease such as SARS-CoV-2, federal OSHA has the “General Duty Clause” in section 5(a)(1) of the Occupational Safety and Health Act of 1970. The clause states the following:

Each employer shall furnish to each of his [sic] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

The General Duty Clause is used by federal OSHA to address 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.

Other federal OSHA regulations, such as those governing respiratory protection (29 Code of Federal Regulations (CFR) section 1910.134), sanitation and washing facilities (29 CFR section 1910.141), and PPE (29 CFR sections 1910.132, 1910.133, and 1910.138), are similar to their counterpart regulations in the CCR, title 8, discussed above. The federal OSHA regulation governing temporary labor camps (29 CFR section 1920.142) is more detailed than its counterpart regulation in title 8, section 3350, discussed above.

No federal law or regulations exist or have been promulgated that specifically address occupational exposure to COVID-19.

Amended Section 3205. COVID-19 Prevention.

This proposed emergency regulation would amend section 3205, which has a current title of “Shall” and “Should.” [Repealed], by replacing the current title with a new title of “COVID-19 Prevention.” It would be in Subchapter 7. General Industry Safety Orders; Introduction; directly after section 3204. Access to Employee Exposure and Medical Records. The regulation would include the following specific requirements.

New Subsection 3205(a). Scope.

Proposed subsection (a)(1) establishes the application of the proposed regulation to all workplaces, with three exceptions: (A) places of employment with one employee who does not

have contact with other persons; (B) employees working from home; and (C) employees when covered by section 5199.

The subsection is necessary to establish the places of employment for which employers will be required to comply with the proposed regulation and take action to protect employees from exposure to COVID-19.

Proposed subsection (a)(2) clarifies that nothing in this section is intended to limit state or local health department mandates or guidance that are more protective or stringent than this section.

This subsection is necessary because state or local health department mandates or guidance may be more stringent than this section, and it is important that such mandates or guidance are not in any way limited by the provisions of this section.

New Subsection 3205(b). Definitions.

Proposed subsection (b) provides definitions for the terms “COVID-19,” “COVID-19 case,” “COVID-19 exposure,” “COVID-19 hazard,” “COVID-19 symptoms,” “COVID-19 test,” “exposed workplace,” “face covering,” and “high-risk exposure period,” as used in sections 3205 through 3205.4.

The subsection is necessary to clarify the application and meanings of terms used in the proposed regulations.

New Subsection 3205(c). Written COVID-19 Prevention Program.

Proposed subsection (c) requires employers to establish, implement, and maintain an effective, written COVID-19 Prevention Program (Program). The subsection allows the written Program to be integrated into the employer’s written Injury and Illness Prevention Program (IIPP), required by section 3203, or kept as a separate document. Subsection (c) establishes the basic elements that an employer is responsible for including in their Program. They are as follows:

New Subsection 3205(c)(1). System for communicating.

Proposed subsection (c)(1) requires employers to take the actions described in subsections (c)(1)(A) through (c)(1)(D). These actions are designed to ensure that employers have methods in place, and use those methods, to exchange information with employees about COVID-19. Subsection (c)(1)(A), asks employees to provide information to their employers about COVID-19 symptoms, possible COVID-19 exposures, and possible COVID-19 hazards at the workplace without the fear of reprisal. Subsection (c)(1)(B) would require employers to provide information to its employees about accommodating employees with medical or other conditions that put them

at increased risk of severe COVID-19 illness. Subsection (c)(1)(C) would require employers to provide information about access to COVID-19 testing. If testing is required under this section, section 3205.1, or section 3205.2, the employer shall inform affected employees of the reason for the testing and the possible outcome of a positive test. Subsection (c)(1)(D) would require employers to communicate information about COVID-19 hazards to employees and to other employers, persons, and entities in or in contact with the employer's workplace, along with the employer's COVID-19 policies and procedures.

These subsections are necessary, as communicating information, from employees to their employers, and from employers to their employees and others, is critical in preventing the spread of COVID-19 in workplaces.

New Subsection 3205(c)(2). Identification and evaluation of COVID-19 hazards.

Proposed subsection (c)(2) requires employers to take the actions described in subsections (c)(2)(A) through (c)(2)(H). These actions are designed to ensure that employers have methods in place, and use those methods, to identify and evaluate COVID-19 hazards.

The subsection is necessary, as identifying and evaluating COVID-19 hazards in the workplace is critical in preventing the spread of COVID-19 in workplaces.

Proposed subsection (c)(2)(A) requires employers to allow employees and authorized employee representatives to participate in the identification and evaluation of COVID-19 hazards.

This subsection is necessary because it is important to include employees and employee representatives in the process of identifying and evaluating COVID-19 hazards, due to their intimate knowledge of specific work practices and workplace conditions.

Proposed subsection (c)(2)(B) requires employers to develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms. It allows the employer to ask employees to evaluate their own symptoms before reporting to work. If the employer conducts the screening at the workplace, the employer must ensure that face coverings are used during screening by both screeners and employees and, if temperatures are measured, that non-contact thermometers are used.

This subsection is necessary, as it is important for employers to have a process to screen employees for potential symptoms of COVID-19, and effectively respond to those symptoms, to prevent or reduce the risk of transmission of COVID-19 in the workplace. Allowing employers to ask employees to evaluate whether or not they have symptoms of COVID-19 before reporting would prevent ill employees from coming to work, thus reducing the potential spread of COVID-19. Requiring the use of face coverings and non-contact thermometers during screening would

minimize possible exposure to COVID-19 to screening employees and employees being screened.

Proposed subsection (c)(2)(C) requires employers to develop policies and procedures to effectively respond to individuals at the workplace who are a COVID-19 case.

This subsection is necessary, as it is important for employers to effectively respond to individuals at the workplace who are COVID-19 cases, to prevent or reduce the risk of transmission of COVID-19.

Proposed subsection (c)(2)(D) requires employers to conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards. The proposed subsection requires employers to treat all persons, regardless of symptoms or negative COVID-19 test results, as potentially infectious. Proposed subsection (c)(2)(D)1. requires employers to include in their workplace assessment the identification of places and times when people may congregate or come in contact with one another, regardless of whether employees are performing an assigned work task or not. Proposed subsection (c)(2)(D)2. requires an evaluation of employees' potential workplace exposure to all persons at the workplace or who may enter the workplace. Further, it requires employers to consider how employees and other persons enter, leave, and travel through the workplace, in addition to addressing fixed work locations.

These subsections are necessary, as conducting a thorough evaluation and identifying and evaluating COVID-19 hazards is critical in preventing the spread of COVID-19 in the workplace. It is important to assume that all persons are potentially infectious for COVID-19, as many infectious persons have no symptoms of COVID-19, and some may test negative for the virus.

Proposed subsection (c)(2)(E) requires, for indoor locations, the employer to evaluate how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system.

This subsection is necessary as increased ventilation in indoor locations and increased filtration of indoor air dilutes the concentration of any infectious COVID-19 virus in the air, thus reducing the potential for employee exposure to the virus.

Proposed subsection (c)(2)(F) requires employers to review applicable orders and guidance from the State of California and the local health department related to COVID-19 hazards and prevention.

This subsection is necessary, as it is important for employers to become familiar with the information in such orders and guidance documents to reduce the risk of transmission in the workplace.

Proposed subsection (c)(2)(G) requires employers to evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls.

This subsection is necessary as it is important to evaluate COVID-19 prevention controls to determine if they are effective at minimizing employee exposure to COVID-19 in the workplace.

Proposed subsection (c)(2)(H) requires employers to conduct periodic inspections to identify unhealthy conditions, work practices, and work procedures related to COVID-19, and to ensure compliance with employers' COVID-19 policies and procedures.

This subsection is necessary to evaluate conditions that may change over time, and to identify and correct situations where employers' policies and procedures are not adhered to.

New Subsection 3205(c)(3). Investigating and responding to COVID-19 cases in the workplace.

Proposed subsection (c)(3) requires employers to take the actions described in subsections (c)(3)(A) through (c)(3)(D). These actions are designed to ensure that employers have methods in place, and use those methods, to investigate and respond to COVID-19 cases in the workplace.

The subsection is necessary, as investigating and responding to COVID-19 cases is critical in preventing the spread of COVID-19 in the workplace.

Proposed subsection (c)(3)(A) requires employers to have effective procedures to investigate COVID-19 cases in the workplace. This includes procedures for verifying COVID-19 case status, receiving information regarding COVID-19 test results and onset of COVID-19 symptoms, and identifying and recording COVID-19 cases.

This subsection is necessary, as it is important to have procedures in place to gather information needed to investigate and respond to COVID-19 cases in the workplace.

Proposed subsection (c)(3)(B) requires employers to take specified actions when there has been a COVID-19 case at the place of employment. These actions include: 1. determining the day and time the COVID-19 case was last at work, and, to the extent possible, the date of the positive test(s) and/or diagnosis, and the date the COVID-19 case first had one or more COVID-19 symptoms, if any; 2. determining who may have had a COVID-19 exposure; 3. giving notice of the potential COVID-19 exposure, within one business day, in a way that does not reveal any

personal identifying information of the COVID-19 case, to specified individuals; 4. offering testing at no cost during the employee's working hours to all employees who had potential COVID-19 exposure in the workplace, and providing employees with information on benefits described in subsections (c)(5)(B) and (c)(10)(C); and 5. investigating whether any workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.

This subsection is necessary to ensure that employers do a thorough investigation of any COVID-19 cases in the workplace and to ensure that employees, independent contractors and other employers are informed about potential exposure during the high-risk exposure period. Offering COVID-19 testing at no cost to employees following a potential exposure to COVID-19 in the workplace and providing information about benefits available to them will encourage these employees to get tested for COVID-19 and also to not report to work following a COVID-19 exposure. These steps are necessary to prevent the spread of COVID-19 in the workplace when there has been a COVID-19 case present at the place of employment.

Proposed subsection (c)(3)(C) requires employers to keep personal identifying information of COVID-19 cases or persons with COVID-19 symptoms confidential. All COVID-19 testing or related medical services provided by the employer under sections 3205 through 3205.4 shall be provided in a manner that ensures the confidentiality of employees. An exception is given for information on COVID-19 cases provided to the local health department, CDPH, the Division, and the National Institute for Occupational Safety and Health (NIOSH), or as otherwise required by law immediately upon request.

This subsection is necessary to ensure that personal identifying information with regard to COVID-19 is kept confidential, as required by various state and federal regulations. Proposed subsection (c)(3)(D) requires employers to ensure that all employee medical records required by sections 3205 through 3205.4 are kept confidential and not disclosed or reported without the employee's express written consent to any person within or outside the workplace. Exceptions are given for medical records provided to the local health department, CDPH, the Division, or NIOSH; or if the records do not contain individually identifiable medical information.

This subsection is necessary to ensure that employees' medical records are kept confidential, as required by various state and federal regulations.

New Subsection 3205(c)(4). Correction of COVID-19 hazards.

Proposed subsection (c)(4) requires employers to implement effective policies and/or procedures to correct unsafe or unhealthy conditions, work practices, and procedures related to COVID-19 in a timely manner based on the severity of the hazard.

The subsection is necessary, as correcting unsafe or unhealthy conditions, work practices, and procedures related to COVID-19 in a timely manner is critical in preventing the spread of COVID-19 in the workplace.

New Subsection 3205(c)(5). Training and instruction.

Proposed subsection (c)(5) requires employers to provide training and instruction to employees on the topics described in subsections (c)(5)(A) through (c)(5)(H). Required topics include the employer's COVID-19 policies and procedures to protect employees from COVID-19 hazards (subsection (c)(5)(A)); information on benefits to which an employee may be entitled (subsection (c)(5)(B)); how COVID-19 is spread, and that an infectious person may have no symptoms (subsection (c)(5)(C)); methods of physical distancing of at least six feet and the importance of combining physical distancing with the wearing of face coverings (subsection (c)(5)(D)); that particles containing the virus can travel more than six feet, especially indoors, so physical distancing must be combined with other controls, including face coverings and hand hygiene to be effective (subsection (c)(5)(E)); information about hand washing and using hand sanitizer (subsection (c)(5)(F)); proper use of face coverings (subsection (c)(5)(G)); and COVID-19 symptoms, and the importance of not coming to work and obtaining a COVID-19 test, if the employee has COVID-19 symptoms (subsection (c)(5)(H)).

The subsection is necessary, as providing employees with knowledge about the hazards of exposure to COVID-19, including how it is spread, along with methods used in the workplace to minimize exposure to COVID-19, and the importance of not coming to work and obtaining a COVID-19 test, if the employee has COVID-19 symptoms, is critical in preventing the spread of COVID-19 in the workplace.

New Subsection 3205(c)(6). Physical distancing.

Proposed subsection (c)(6) requires employers to take the actions described in subsections (c)(6)(A) and (c)(6)(B).

These actions are designed to ensure that employees maintain a minimum distance between themselves and others in the workplace.

Proposed subsection (c)(6)(A) requires that all employees in the workplace be separated from other persons by at least six feet, except where an employer can demonstrate that six feet of separation is not possible and except for momentary exposure while persons are in movement. The subsection includes a listing of some methods of physical distancing.

This subsection is necessary to ensure that exposure to COVID-19 is minimized through adequate physical distancing between employees and others in the workplace. In particular, ensuring that employees are separated, when feasible, by at least six feet from other persons is critical in preventing the spread of COVID-19 in the workplace.

Proposed subsection (c)(6)(B) requires that when it is not feasible to maintain a distance of at least six feet, individuals shall be as far apart as possible.

This subsection is necessary to ensure that even when it is not feasible to maintain a distance of at least six feet between individuals, exposure to COVID-19 is minimized by maintaining the greatest physical distance possible between employees and others at the workplace.

New Subsection 3205(c)(7). Face coverings.

Proposed subsection (c)(7) requires employers to take the actions described in subsections (c)(7)(A) through (c)(7)(F). These actions are designed to ensure that employees are provided with and use face coverings in the workplace.

The subsection is necessary, as the use of face coverings is recommended to reduce the transmission of COVID-19¹⁶.

Proposed subsection (c)(7)(A) requires employers to ensure that employees wear clean and undamaged face coverings over the nose and mouth when they are indoors, when they are outdoors and less than six feet away from another person, and where required by orders from CDPH or local health department. The subsection states that face shields are not a replacement for face coverings, but may be worn with face coverings for additional protection. The subsection also provides exceptions to the requirements given in subsection (c)(7)(A). The exceptions to the requirements are given for conditions under which the risk of transmission of COVID-19 is minimal; the wearing of a face covering is incompatible with the employee wearing respiratory protection; the employee has a medical or mental health condition, disability or is hearing impaired or communicating with a hearing-impaired person; or specific tasks cannot feasibly be performed while the employee is wearing a face covering. Under this last exception, the unmasked employee shall be at least six feet away from all other persons, unless unmasked employees are tested at least twice weekly for COVID-19.

This subsection is necessary, as it sets parameters for when face coverings are required, and also takes into account the increased likelihood of transmission of COVID-19 in indoor spaces compared to outdoor spaces. Evidence exists that infectious virus particles can travel more than

¹⁶ CDPH; Face Covering Guidance issued on June 18, 2020, available at: https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf

six feet through the air¹⁷, and face coverings reduce the amount of particles that are emitted into the air from an infected person.¹⁸

Proposed subsections (c)(7)(B) addresses situations where an employee is unable to wear a face covering, e.g., due to a medical condition.

This subsection is necessary to ensure that procedures are in place to provide adequate protection from COVID-19 to employees working in an area where another employee is unable to wear a face covering.

Proposed subsections (c)(7)(C) requires that any employee not wearing a face covering or an acceptable alternative shall be at least six feet apart from all other persons unless the unmasked employee is tested at least twice weekly for COVID-19. It also states that COVID-19 testing cannot be used as an alternative to face coverings.

This subsection is necessary to ensure that procedures are in place to provide adequate protection from COVID-19 to employees who are unable to wear a face covering.

Proposed subsection (c)(7)(D) explicitly prohibits employers from preventing any employee from wearing a face covering when not required by this section, unless it would create a safety hazard.

This subsection is necessary to ensure that employees are permitted to wear face coverings when they choose to do so, even when not required by this section.

Proposed subsection (c)(7)(E) requires employers to implement measures to communicate to non-employees the requirements for the use of face coverings on their premises.

This subsection is necessary to ensure that non-employees are made aware of the requirements to wear face coverings when in the particular workplace. The required communication with non-employees will minimize COVID-19 exposure to employees by increasing the likelihood that non-employees will wear face coverings when in the workplace.

Proposed subsection (c)(7)(F) requires that when there may be a person not wearing a face covering, including a member of the public, in the workplace, the employer shall have policies

¹⁷ CDC; How COVID-19 Spreads, Updated October 28, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

¹⁸ Lindsley WG, Blachere FM, Law BF, Beezhold DH, Noti JD. Efficacy of face masks, neck gaiters and face shields for reducing the expulsion of simulated cough-generated aerosols. Health Effects Laboratory Division, National Institute for Occupational Safety and Health, CDC, October 7, 2020.

<https://www.medrxiv.org/content/10.1101/2020.10.05.20207241v1.full.pdf>

and procedures to minimize employee exposure to COVID-19 hazards originating from that person.

This subsection is necessary to ensure that procedures are in place to provide adequate protection from COVID-19 to employees working in an area where another person is not wearing a face covering.

New Subsection 3205(c)(8). Other engineering controls, administrative controls, and personal protective equipment.

Proposed subsection (c)(8) requires employers to take the actions described in subsections (c)(8)(A) through (c)(8)(E). These actions are designed to ensure appropriate control measures are implemented to minimize employee exposure to COVID-19 hazards in the workplace.

The subsection is necessary, as the implementation of control methods is important in minimizing employee exposure to COVID-19.

Subsection (c)(8)(A) requires employers to install cleanable solid partitions at fixed work locations where it is not possible to maintain the physical distancing requirement at all times that effectively reduce aerosol transmission between the employee and other persons.

The subsection is necessary to reduce employee exposure to potentially infectious material that may contain the virus that causes COVID-19. Potentially infectious material most commonly results from person(s) exhaling, vocalizing, coughing, or sneezing.

Subsection (c)(8)(B) requires employers to maximize the quantity of outside air provided to the extent feasible, for buildings with mechanical or natural ventilation, except in cases when the United States EPA Air Quality Index is greater than 100 for any air pollutant, or if letting in outdoor air would cause a hazard to employees.

This subsection is necessary to reduce employee exposure to COVID-19 in the workplace, as increased ventilation reduces the concentration of potentially infectious material in the indoor air.

Subsection (c)(8)(C) requires employers to implement cleaning and disinfecting procedures in their workplace.

This subsection is necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces that have not been cleaned and disinfected. The provisions of this subsection are designed to reduce transmission of COVID-19 that may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Subsection (c)(8)(D) requires employers to evaluate its handwashing facilities and policies.

This subsection is necessary to protect employees from COVID-19 hazards by encouraging and allowing time for employee handwashing, and providing employees with hand sanitizer. The provisions of this subsection are designed to reduce transmission of COVID-19 that may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (c)(8)(E) requires employers to take the actions described in subsections (c)(8)(E)1. through (c)(8)(E)4. These actions are designed to ensure that appropriate PPE is made available and used to minimize employee exposure to COVID-19 hazards in the workplace.

Subsection (c)(8)(E)1. requires employers to evaluate the need for PPE to protect employees from exposure to COVID-19, and provide such equipment as needed. Subsection (c)(8)(E)2. requires employers to evaluate the need for respiratory protection in accordance with section 5144 when the physical distancing requirements in subsection (c)(6) are not feasible or are not maintained. Subsection (c)(8)(E)3. requires employers to provide and ensure the use of respirators in accordance with section 5144 when deemed necessary by the Division through Issuance of Order to Take Special Action, in accordance with section 332.3. Subsection (c)(8)(E)4. requires employers to provide and ensure use of eye protection and respiratory protection in accordance with section 5144 when employees are exposed to procedures that may aerosolize potentially infectious material such as saliva or respiratory tract fluids.

These subsections are necessary to minimize employee exposure to COVID-19 by ensuring appropriate PPE will be provided and used, and respirators are provided and used when required by this subsection. As described in this subsection, PPE is designed to protect employees from exposure to potentially infectious material they may come into contact with, either on surfaces or in the air, while respirators are designed to protect employees from potentially infectious material in the air they breathe. When employees are exposed to procedures that may aerosolize potentially infectious material such as saliva or respiratory tract fluids, a respirator worn in accordance with the requirements of section 5144 is needed to provide adequate respiratory protection.

New Subsection 3205(c)(9). Reporting, recordkeeping, and access.

Proposed subsection (c)(9) requires employers to take the actions described in subsections (c)(9)(A) through (c)(9)(E). These actions are designed to ensure that employers report information about COVID-19 cases at the workplace to the local health department (subsection (c)(9)(A)), and serious illnesses from COVID-19 to the Division, as required (subsection (c)(9)(B)). In addition, subsection (c)(9)(C) requires employers to maintain records of the steps taken to implement the written COVID-19 Prevention Program in accordance with section 3203(b), while subsection (c)(9)(D) requires the COVID-19 Prevention Program to be made available at the worksite to employees, authorized employee representatives, and to representatives of the Division immediately upon request. Finally, subsection (c)(9)(E) requires

the employer to keep a record of and track all COVID-19 cases at the workplace, including specified information about the employee and their presence at the worksite. The subsection requires medical information to be kept confidential, and to be made available upon request to employees, their designated representatives, and the local public health department, with identifiable medical information removed.

These subsections are necessary to ensure that important information about COVID-19 cases in the workplace is maintained and reported to the appropriate agency, to be used in the event that further surveillance or investigation is needed. In addition, access to employees and employee representatives to information on COVID-19 cases, as well as to the employer's written COVID-19 Prevention Program is important to ensure that employers are taking the steps needed to minimize employee exposure to COVID-19 in the workplace.

New Subsection 3205(c)(10). Exclusion of COVID-19 cases.

Proposed subsection (c)(10) requires employers to take the actions described in subsections (c)(10)(A) through (c)(10)(D). These actions are designed to ensure that per subsection (c)(10)(A), COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(11) are met, and that per subsection (c)(10)(B), employees with COVID-19 exposure are excluded from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case. Subsection (c)(10)(C) requires that for employees excluded from work under subsection (c)(10) and otherwise able and available to work, employers 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. Exception 1 to subsection (c)(10)(C) does 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. Exception 2 to subsection (c)(10)(C) does not apply where the employer demonstrates that the COVID-19 exposure is not work related. Subsection (c)(10)(D) does not limit any other applicable law, employer policy, or collective bargaining agreement that provides for greater protection. In addition, subsection (c)(10)(E) requires that at the time of exclusion, the employer shall provide the employee the information on benefits described in this section. An exception to subsection (c)(10) allows that employees who have not been excluded or isolated by the local health department need not be excluded by the employer, if they are temporarily reassigned to work where they do not have contact with other persons until the return to work requirements of subsection (c)(11) are met.

This subsection is necessary to limit transmission of COVID-19 in the workplace. Toward this end, it is important that employees who are COVID-19 cases or who had exposure to COVID-19 do not come to work. Maintaining employees' earnings and benefits when they are excluded from the workplace is important in ensuring that employees will notify their employers if they

test positive for COVID-19 or have an exposure to COVID-19, and stay away from the workplace during the high-risk exposure period when they may be infectious.

New Subsection 3205(c)(11). Return to work criteria.

Proposed subsection (c)(11) specifies when employees who are COVID-19 cases, with or without symptoms, may return to work. Specifications are given in subsections (c)(11)(A) through (c)(11)(E).

The subsection is necessary to inform employers and employees of the conditions under which an employee may return to work following exclusion, and to ensure that employees do not return to work until they do not pose a significant risk of exposing others to COVID-19 in the workplace.

Proposed subsection (c)(11)(A) specifies three criteria that must be met before a COVID-19 case with COVID-19 symptoms may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH.

Proposed subsection (c)(11)(B) specifies criteria that must be met before a COVID-19 case who tested positive but never developed COVID-19 symptoms may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH.

Proposed subsection (c)(11)(C) clarifies that a negative COVID-19 test shall not be required for an employer to return to work.

This subsection is necessary because polymerase chain reaction (PCR) tests can remain positive long after an individual is no longer infectious, so proof of a negative test must not be required prior to an individual returning to the workplace after a documented COVID infection. Requiring a negative test before returning to work could impermissibly discriminate against employees who have previously tested positive for COVID-19.

Proposed subsection (c)(11)(D) specifies criteria that must be met before an employee who was issued an order to isolate or quarantine for COVID-19 may return to work.

This subsection is necessary to maintain consistency with criteria established by CDPH.

Proposed subsection (c)(11)(E) specifies criteria under which the Division may, upon request, allow employees to return to work on the basis that the removal of an employee would create undue risk to a community's health and safety.

This subsection is necessary to ensure that control measures are in place to prevent COVID-19 transmission in the workplace before allowing any such employees to return to work.

New Section 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks.

This proposed emergency regulation, new section 3205.1, would be in Subchapter 7. General Industry Safety Orders; directly after proposed section 3205. COVID-19 Prevention. The regulation would include the following specific requirements.

New Subsection 3205.1(a). Scope.

This proposed subsection (a)(1) establishes the application of the proposed regulation to a workplace covered by section 3205 if the local health department has identified it as a location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period.

The subsection is necessary to establish the conditions in which employers will be required to comply with the proposed regulation and to take action to reduce the further spread of COVID-19 at the workplace.

Proposed subsection (a)(2) sets forth the requirement to comply with this section until there are no new COVID-19 cases detected in the workplace for a 14-day period.

The subsection is necessary to ensure that all COVID-19 cases associated with a COVID-19 outbreak are identified and reported to the local health department.

New Subsection 3205.1(b). COVID-19 testing.

Proposed subsection (b)(1) requires employers to provide COVID-19 testing to all employees at the exposed workplace. An exception is provided for employees who were not present during the period of an outbreak identified by a local health department or the relevant 14-day period(s) under subsection(a). It further establishes that COVID-19 testing be provided at no cost to employees during employees' working hours.

The subsection is necessary to provide employees who were present during the period of an outbreak identified by a local health department or the relevant 14-day period(s) the opportunity to get tested for COVID-19 without being deterred by cost or feasibility and for the employer to identify additional COVID-19 cases. With testing, employees who test positive and have symptoms can get care earlier. Contacts can be traced and self-isolation or quarantine can be started sooner to help stop the spread of the virus.

Proposed subsection (b)(2) establishes specific timeframes for which all employees covered by this section are tested. In proposed subsection (b)(2)(A), it provides that all employees in the exposed workplace are immediately tested upon being covered by this section, and then again one week later. It further establishes that negative COVID-19 test results of employees with COVID-19 exposure shall not impact the duration of any quarantine period required by orders issued by the local health department.

The subsection is necessary to ensure that employers follow the specific instructions of their local health department on managing the COVID-19 outbreak.

Subsection (b)(2)(B) establishes that after the first two COVID-19 tests required by (b)(2)(A), employers provide continuous COVID-19 testing of employees who remain at the workplace at least once per week, or more frequently if recommended by the local health department, until this section no longer applies pursuant to subsection (a)(2). Further, subsection (b)(2)(C) requires employers to provide additional testing when deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

The subsection is necessary to ensure that employers provide all additional COVID-19 testing as instructed by the local health department and the Division.

New Subsection 3205.1(c). Exclusion of COVID-19 cases.

This proposed subsection establishes the requirement that employers exclude from the workplace COVID-19 cases and employees who had COVID-19 exposure in accordance with subsections 3205(c)(10) and (c)(11), and in accordance with any applicable local health officer orders.

The subsection is necessary to make sure employees who are COVID-19 cases and employees who had COVID-19 exposure do not remain at work and will therefore help prevent further spread of COVID-19 in the exposed workplace.

New Subsection 3205.1(d). Investigation of workplace COVID-19 illness.

This proposed subsection requires that the employer immediately investigate and determine possible workplace related factors that contributed to the COVID-19 outbreak in accordance with subsection 3205(c)(3).

The subsection is necessary to ensure the employer follows its procedures for verifying COVID-19 case status, receiving information regarding COVID-19 test results and onset of symptoms, and identifying and recording COVID-19 cases.

New Subsection 3205.1(e). COVID-19 Investigation, review and hazard correction.

This proposed subsection requires that following a COVID-19 outbreak, the employer immediately perform a review of potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19.

The subsection is necessary to ensure that a thorough investigation is conducted and review of COVID-19 hazards are identified and corrected to control and prevent further spread of the disease in the exposed workplace.

Subsection (e)(1) establishes the elements of the investigation of new or unabated COVID-19 hazards to include the employer's leave policies and practices, whether employees are discouraged from remaining home when sick, and the employer's COVID-19 testing policies. The subsection further requires the employer to identify and evaluate specific conditions in the exposed workplace that the employer would need to control to prevent further COVID-19 transmission.

This subsection is necessary to ensure that employers review their leave policies and practices and working environment to ensure they identify conditions that contribute to the transmission of COVID-19.

Subsection (e)(2) establishes the review be updated every thirty days that the outbreak continues, in response to new information or to new or previously unrecognized COVID-19 hazards, or when otherwise necessary.

The subsection is necessary to allow time for the employer's improvements to take effect. It is also necessary that the employer update the review after responding to any new information or to new or previously unrecognized COVID-19 hazards that an employer is likely to identify or be made aware of should an outbreak continue to occur, or when otherwise necessary.

Subsection (e)(3) establishes that the employers implement changes to reduce the transmission of COVID-19 based on the investigation and review required by subsections (e)(1) and (e)(2). The employer shall consider moving indoor tasks outdoors or having them performed remotely, increasing outdoor air supply when work is done indoors, improving air filtration, increasing physical distancing as much as possible, respiratory protection, and other applicable controls.

The subsection is necessary to ensure that the employer implement changes for COVID-19 hazards identified by the investigation and review. The employer is required to consider specific measures that will help to control and prevent further COVID-19 transmission.

New Subsection 3205.1(f). Notifications to the local health department.

Proposed subsection (f)(1) establishes the requirement of the employer to contact the local health department immediately but no longer than 48 hours after the employer knows, or with diligent inquiry would have known, of three or more COVID-19 cases for guidance on preventing the further spread of COVID-19 within the workplace.

The subsection is necessary so that the employer is provided guidance and is made aware about the local health department's requirements for isolation or quarantine, possible testing, and when it is appropriate for COVID-19 cases to return to work.

Proposed subsection (f)(2) further requires the employer to provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, the hospitalization and/or fatality status, and North American Industry Classification System (NAICS) code of the worksite of the COVID-19 case, and any other information requested by the local health department. It also requires the employer to continue to give notice to the local health department of any subsequent COVID-19 cases at the worksite. Subsection (f)(3) sets forth January 1, 2021, as the effective date the employer shall provide all information to the local health department required by Labor Code section 6409.6.

These subsections are necessary to ensure that employers meet their reporting obligations to the local health department and are intended to be consistent with Labor Code section 6409.6.

New Section 3205.2. Major COVID-19 Outbreaks.

This proposed emergency regulation, new section 3205.2, would be in Subchapter 7. General Industry Safety Orders; Introduction; directly after proposed section 3205.1. Multiple COVID-19 Infections and COVID-19 Outbreaks. The regulation would include the following specific requirements.

New Subsection 3205.2.(a). Scope.

This proposed subsection (a)(1) establishes the application of the proposed regulation to a workplace covered by section 3205 when there are 20 or more COVID-19 cases in an exposed workplace within a 30-day period.

The subsection is necessary to establish the conditions in which employers will be required to comply with the proposed regulation and to take action to reduce the further spread of COVID-19 during a major outbreak at the workplace.

Proposed subsection (a)(2) sets forth the requirement to comply with this section until there are no new COVID-19 cases detected in the workplace for a 14-day period.

The subsection is necessary to ensure that all COVID-19 cases associated with a major COVID-19 outbreak are identified and reported to the local health department.

New Subsection 3205.2(b). COVID-19 testing.

This proposed subsection requires employers to provide twice a week COVID-19 testing, or more frequently if recommended by the local health department, to all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. This subsection additionally requires employers to provide COVID-19 testing at no cost to employees during employees' working hours.

The subsection is necessary to provide employees who were present during the relevant 30-day period(s) the opportunity to get tested for COVID-19 without being deterred by cost or feasibility and for the employer to identify additional COVID-19 cases. With testing, employees who test positive and have symptoms can get care earlier. Contacts can be traced and self-isolation or quarantine can be started sooner to help stop the spread of the virus.

New Subsection 3205.2(c). Exclusion of COVID-19 cases.

This proposed subsection establishes the requirement that employers exclude from the workplace employees who are COVID-19 cases and employees with COVID-19 exposure in accordance with subsections 3205(c)(10) and (c)(11) and any relevant local health department orders.

The subsection is necessary to make sure employees who are COVID-19 cases and employees with COVID-19 exposures do not remain at work and, will therefore help to prevent further spread of COVID-19 in the exposed workplace.

New Subsection 3205.2(d). Investigation of workplace COVID-19 illnesses.

This proposed subsection establishes the requirement the employer comply with section 3205(c)(3), which is to immediately investigate and determine possible worksite related factors that contributed to the outbreak.

The subsection is necessary to ensure the employer follow its procedures for verifying COVID-19 case status, receiving information regarding COVID-19 test results and onset of symptoms, and identifying and recording COVID-19 cases.

New Subsection 3205.2(e). COVID-19 hazard correction.

This proposed subsection requires that in addition to the requirements of subsection 3205(c)(4) to investigate and respond to COVID-19 cases in the workplace, the employer take specific actions to correct hazards during a major COVID-19 outbreak.

Proposed subsection (e)(1) sets forth the requirement that in buildings or structures with mechanical ventilation, employers filter recirculated air with Minimum Efficiency Reporting Value (MERV)-13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering efficiency. Employers shall also evaluate whether portable or mounted High Efficiency Particulate Air (HEPA) filtration units or other air cleaning systems would reduce the risk of transmission and shall implement their use to the degree feasible.

Proposed subsection (e)(2) sets forth the requirement that the employer determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144 to address COVID-19 hazards.

Proposed subsection (e)(3) sets forth the requirement for the employer to evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected.

Proposed subsection (e)(4) sets forth the requirement that the employer implement any other control measures deemed necessary by the Division through the Issuance of Order to Take Special Action, in accordance with title 8 section 332.3.

These subsections are necessary to establish additional measures employers will be required to comply with in order to reduce the further spread of COVID-19 at the workplace.

New Subsection 3205.2(f). Notifications to the local health department.

This proposed subsection requires employers to comply with the notification requirements of section 3205.1(f), which is to contact the local health department immediately but no longer than 24 hours after the employer knows or with diligent inquiry would have known of three or more COVID-19 cases within the workplace. It establishes that the employer provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, and the hospitalization and/or fatality status, and NAICS code of the workplace of the COVID-19 case, and any other information requested by the local health department. It further requires the employer to continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace. The subsection sets forth January 1, 2021, as the effective date the employer shall provide all information to the local health department required by Labor Code section 6409.6.

The subsection is necessary so that, during a major COVID-19 outbreak, the employer is provided guidance and is made aware about the local health department's requirements for isolation or quarantine, possible testing, and when it is appropriate for COVID-19 cases to return to work.

New Section 3205.3. COVID-19 Prevention in Employer-Provided Housing.

This proposed emergency regulation, new section 3205.3 would be in Subchapter 7. General Industry Safety Orders; Introduction; directly after section 3205.2. Major COVID-19 Outbreaks. The regulation would include the following specific requirements.

New Subsection 3205.3(a). Scope.

Proposed subsection (a) establishes the application of the proposed regulation to employer-provided housing.

The purpose of the definition is to inform the regulated community of the type of housing covered by the regulation.

The purpose of subsection (a)(1) is to exempt the applicability of the proposed regulation for the purpose of emergency response, where either (A) the employer is a government entity; or (B) the housing is provided temporarily by a private employer and is necessary to conduct the emergency response operations. This exemption recognizes that the imminent risks associated with an emergency response operation supersede the risks associated with not enforcing the proposed housing requirements in emergency-response operations.

The purpose of subsection (a)(2) is to exempt the applicability of subsections (c), (d), (e), (f), and (h) to employer-provided housing where the occupants maintained a household together prior to residing in employer-provided housing, such as family members, when no other persons outside the household are present. This exemption is necessary as individuals who maintain a household together are assumed to spend time in close proximity to one another within their household.

These subsections are necessary to specify the types of employer-provided housing for which employers will be required to comply with the proposed regulation and take action to protect employees from exposure to COVID-19. Shared worker housing presents unique challenges for preventing and controlling the spread of COVID-19. Consistent application of the proposed regulatory requirements can help reduce the COVID-19 exposure risk among workers in shared housing.

New Subsection 3205.3(b). Assignment of housing units.

The purpose of the proposed subsection is to establish a prioritization order for employers to use when assigning employees to shared housing units. The prioritization order is necessary to limit the number of persons coming in contact with employees residing in employer-provided housing, and is consistent with CDC recommendations for preventing and controlling the spread of COVID-19 in shared worker housing.

The purpose of proposed subsection (b)(1) in requiring employers to first prioritize shared-housing units by assigning residents who usually maintain a household together outside of work, such as family members, to the same housing unit without other persons is to limit the number of persons coming in contact with employees residing in employer-provided housing, and is necessary to reduce the spread of COVID-19.

The purpose of proposed subsection (b)(2) in requiring employers to next prioritize shared-housing units by assigning residents who work in the same crew or work together at the same worksite to the same housing unit without other persons is to limit the number of persons coming in contact with employees residing in employer-provided housing, and is necessary to reduce the spread of COVID-19.

The purpose of proposed subsection (b)(3) is to provide employers with an option to assign employees who do not usually maintain a common household, work crew, or worksite to the same housing unit in situations where no other housing alternatives are possible. This subsection is necessary to ensure housing for all employees requiring shared housing.

The above subsections governing housing assignment prioritization are necessary to reduce the spread of COVID-19 transmission in both the workplace and employer-provided housing by minimizing the number of different individuals who come into close contact with each other.¹⁹

New Subsection 3205.3(c). Physical distancing and controls.

Proposed subsection (c) requires employers to take the actions described in subsections (c)(1), (c)(2) and (c)(3).

These actions are designed to ensure that resident employees maintain a minimum distance between themselves and others in the employer-provided shared housing unit, and maximize the quantity and supply of outdoor air and increase the filtration efficiency to the highest level compatible with the existing ventilation system to minimize resident employee exposure to COVID-19 hazards.

¹⁹ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

Proposed subsection (c)(1) requires employers to ensure that the premises of employer-provided shared housing units are of sufficient size and layout to permit at least six feet of physical distancing between residents in housing units, common areas, and other areas of the premises.²⁰

This subsection is necessary to ensure that exposure to COVID-19 is minimized through adequate physical distancing between resident employees in employer-provided shared housing units. Evidence exists that infectious virus particles can travel more than six feet through the air.²¹

The purpose of proposed subsection (c)(2) is to require employers to ensure beds in employer-provided shared housing units are spaced at least six feet apart in all directions and positioned to maximize the distance between sleepers' heads and prohibits the use of bunk beds.²²

This subsection is necessary to ensure that employee exposure to COVID-19 is minimized through adequate physical distancing between residents in the employer-provided shared sleeping quarters. Evidence exists that infectious virus particles can travel more than six feet through the air.²³

The purpose of proposed subsection (c)(3) is to require employers to maximize the quantity and supply of outdoor air and increase the filtration efficiency to the highest level compatible with the existing ventilation system.

This subsection is necessary to reduce the indoor concentration of the virus, thereby reducing the risk of employee exposure to COVID-19 in each employer-provided housing unit. Evidence exists that increased ventilation, when used along with the other control measures required in this section, such as physical distancing, face coverings, and cleaning, can reduce risk from airborne transmission of COVID-19.²⁴ Federal OSHA recommends that employers work with building maintenance staff to determine if the building ventilation system can be modified to increase

²⁰ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>; CDC. Living in Shared Housing, Updated October 28, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/shared-housing/index.html>
²¹ CDC. How COVID-19 Spreads, Updated October 28, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

²² CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

²³ CDC. How COVID-19 Spreads, Updated October 28, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

²⁴ EPA. Ventilation and Coronavirus (COVID-19). Accessed on November 6, 2020. <https://www.epa.gov/coronavirus/ventilation-and-coronavirus-covid-19>; CDC. COVID-19 Employer Information for Office Buildings, Updated October 29, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>

ventilation rates and/or the percentage of outdoor air (as close to 100% as possible) that circulates in the system.²⁵

New Subsection 3205.3(d). Face coverings.

The purpose of this proposed subsection is to require employers to provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.

The subsection is necessary, as the use of face coverings has been demonstrated to reduce the transmission of COVID-19.²⁶

New Subsection 3205.3(e). Cleaning and disinfecting.

This proposed subsection requires employers to implement cleaning and disinfecting procedures in their employer-provided shared housing units. Transmission of COVID-19 may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (e)(1) requires employers to ensure shared housing units, kitchens, bathrooms, and common areas are effectively cleaned and disinfected at least once a day to prevent the spread of COVID-19. Such cleaning and disinfecting shall be done in a manner that protects the privacy of residents.

Proposed subsection (e)(2) requires employers ensure that unwashed dishes, drinking glasses, cups, eating utensils, and similar items are not shared.

These subsections are necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces that have not been cleaned and disinfected.²⁷

²⁵ Federal OSHA. Additional Considerations for Workers Who Reside in Communal Living Arrangements. Accessed on November 6, 2020. <https://www.osha.gov/SLTC/covid-19/workers-in-shared-housing.html>; OSHA. Publication: COVID-19 Guidance on Ventilation in the Workplace. Accessed on November 6, 2020. <https://www.osha.gov/Publications/OSHA4103.pdf>

²⁶ CDC. CDC Newsroom Release: CDC calls on Americans to wear masks to prevent COVID-19 spread, dated July 14, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>; Lindsley WG, Blachere FM, Law BF, Beezhold DH, Noti JD. Efficacy of face masks, neck gaiters and face shields for reducing the expulsion of simulated cough-generated aerosols. Health Effects Laboratory Division, National Institute for Occupational Safety and Health, CDC, October 7, 2020. <https://www.medrxiv.org/content/10.1101/2020.10.05.20207241v1.full.pdf>

²⁷ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>; CDC; Considerations for Restaurants and Bars, updated October 29, 2020. Accessed on October 15, 2020 and November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>

New Subsection 3205.3(f). Screening.

This proposed subsection requires employers to encourage residents to report COVID-19 symptoms.

This subsection is necessary, as it is important for employers to know which residents are experiencing potential symptoms of COVID-19 so the employer may effectively respond to such symptoms to prevent or reduce the risk of transmission of COVID-19 in the workplace and employer-provided shared housing units.

New Subsection 3205.3(g). COVID-19 testing.

This proposed subsection requires employers to establish, implement and maintain effective policies and procedures for COVID-19 testing of occupants who had a COVID-19 exposure, who have COVID-19 symptoms, or as recommended by the local health department.

The subsection is necessary to minimize the transmission of COVID-19 in employer-provided housing because diagnostic testing identifies which residents are infected and in need of isolation to prevent further spread to employees and residents.

New Subsection 3205.3(h). Isolation of COVID-19 cases and persons with COVID-19 exposure.

Proposed subsection (h) requires that employers ensure that COVID-19 cases are isolated from all occupants who are not COVID-19 cases, and that persons with COVID-19 exposure are effectively isolated from all other occupants in the employer-provided shared housing unit.

Proposed subsection (h)(1) requires employers to effectively isolate COVID-19 exposed residents from all other occupants. Subsection (h)(1) defines effective isolation to include providing COVID-19 exposed residents with a private bathroom, sleeping area, and a cooking and eating facility.

Proposed subsection (h)(2) requires employers to effectively isolate COVID-19 cases from all occupants who are not COVID-19 cases. Subsection (h)(2) defines effective isolation to include housing COVID-19 cases only with other COVID-19 cases, and providing COVID-19 case occupants with a sleeping area, bathroom, cooking and eating facility that is not shared by non-COVID-19 case occupants.

These subsections are necessary to limit transmission of COVID-19 in the workplace and employer-provided housing. Toward this end, it is critically important that employees who are

COVID-19 cases or who had exposure to COVID-19 isolate to further prevent the spread to other employees and residents.

Proposed subsection (h)(3) requires employers to keep confidential personal identifying information regarding COVID-19 cases and persons with COVID-19 symptoms in accordance with subsections 3205(c)(3)(C) and 3205(c)(3)(D).

This subsection is necessary to ensure compliance with state and federal privacy laws.

Proposed subsection (h)(4) requires employers to end isolation in accordance with subsections 3205(c)(10) and (c)(11) and any applicable local or state health officer orders.

This subsection is necessary to limit transmission of COVID-19 in the workplace and employer-provided housing. Toward this end, it is critically important that employees who are COVID-19 cases or who had exposure to COVID-19 do not expose other residents.

New Section 3205.4. COVID-19 Prevention in Employer-Provided Transportation to and from Work.

This proposed emergency regulation, new section 3205.4 would be in Subchapter 7. General Industry Safety Orders, Introduction; directly after section 3205.3. COVID-19 Prevention in Employer-Provided Housing.

The regulation would include the following specific requirements.

New Subsection 3205.4(a). Scope.

Proposed subsection (a) establishes the application of the proposed regulation to employer-provided motor vehicle transportation to and from work.

The purpose of this subsection is to inform the regulated community of the type of employer-provided transportation covered by the regulation.

Proposed subsection (a)(1) exempts the applicability of the proposed regulation in employer-provided transportation where the driver and all passengers are from the same household outside of work, such as family members.

This exemption is necessary as individuals who maintain a household together are assumed to spend time in close proximity to one another within their household.

Proposed subsection (a)(2) exempts the applicability of the proposed regulation in employer-provided transportation when necessary for emergency response, including firefighting, rescue, and evacuation, and support activities directly aiding response such as utilities, communications, and medical operations.

This exemption recognizes that the imminent risks associated with an emergency response operation supersede the risks associated with not enforcing the proposed transportation requirements in transporting employees for emergency response.

These subsections are necessary to specify the types of employer-provided transportation for which employers will be required to comply with the proposed regulation.

New Subsection 3205.4(b). Assignment of transportation.

This proposed subsection establishes a prioritization order for employers to use when assigning employees to shared vehicles.

Proposed subsection (b)(1) requires employers to first prioritize shared-transportation by assigning employees residing in the same housing unit to the same shared vehicle.

The prioritization order is necessary to reduce the number of persons coming in contact with employees, and thus, reduce employee exposure to COVID-19. The proposed prioritization order is consistent with CDC recommendations for preventing and controlling the spread of COVID-19 in employer-provided transportation.²⁸

Proposed subsection (b)(2) requires employers to next prioritize shared transportation by assigning employees who work in the same crew or worksite to the same shared vehicle.

The prioritization order is necessary to reduce the number of persons coming in contact with employees, and thus, reduce employee exposure to COVID-19. The proposed prioritization order is consistent with CDC recommendations for preventing and controlling the spread of COVID-19 in employer-provided transportation.²⁹

Proposed subsection (b)(3) requires employers to assign employees who do not share the same household, work crew, or worksite to the same shared vehicle only when no other transportation alternatives are possible. This last option is necessary to ensure employees receive safe transportation to and from work when no other alternatives are available.

²⁸ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

²⁹ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

The above subsections are necessary to reduce the spread of COVID-19 transmission in the workplace by minimizing the number of different individuals who come into close contact with each other while using employer-provided transportation.³⁰

New Subsection 3205.4(c). Physical distancing and face coverings.

Proposed subsection (c) requires employers to take the actions described in subsections (c)(1), (c)(2) and (c)(3).

These actions are necessary to ensure that employees use face coverings and maintain a minimum distance between themselves and others in employer-provided shared transportation to minimize employee exposure to COVID-19 hazards.

Proposed subsection (c)(1) requires employers to ensure that physical distancing and face covering requirements of subsection 3205(c)(6) and (c)(7) are followed for employees waiting for transportation.

This subsection is necessary to minimize employee exposure to COVID-19 while waiting for transportation through adequate physical distancing between employees and the use of face coverings. Evidence exists that infectious virus particles can travel more than six feet through the air.³¹

Proposed subsection (c)(2) requires employers ensure the vehicle operator and any passengers are separated by at least three feet during the operation of the vehicle, regardless of the vehicle's normal capacity.

This subsection is necessary to minimize employee exposure to COVID-19 in employer-provided transportation through adequate physical distancing between passengers.

Proposed subsection (c)(3) requires employers ensure the vehicle operator and any passengers are provided and wear face coverings in the vehicle as required by subsection 3205(c)(7).³²

³⁰ CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

³¹ CDC. How COVID-19 Spreads, Updated October 28, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

³² CDC. Agriculture Workers and Employers, Updated November 6, 2020. Accessed on November 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

The subsection is necessary, as the use of face coverings has been demonstrated to reduce the transmission of COVID-19.³³

New Subsection 3205.4(d). Screening.

This proposed subsection requires employers to develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation.

This subsection is necessary, as it is important for employers to screen drivers and riders of employer-provided transportation for potential symptoms of COVID-19, and effectively respond to those symptoms to prevent or reduce the risk of transmission of COVID-19 in the workplace.

New Subsection 3205.4(e). Cleaning and disinfecting.

This proposed subsection requires employers to implement cleaning and disinfecting procedures in employer-provided transportation. Transmission of COVID-19 may occur after an employee touches a contaminated surface, then touches their eyes, nose, or mouth.

Proposed subsection (e)(1) requires employers to ensure that all high-contact surfaces (door handles, seatbelt buckles, armrests, etc.) used by passengers are cleaned and disinfected before each trip.

Proposed subsection (e)(2) requires employers to ensure that all high-contact surfaces used by drivers, such as the steering wheel, armrests, seatbelt buckles, door handles and shifter, are cleaned and disinfected between different drivers.

Proposed subsection (e)(3) requires employers to provide sanitizing materials and ensure that they are kept in adequate supply.

These subsections are necessary to reduce employee exposure to COVID-19, as potentially infectious material may be present on surfaces that have not been cleaned and disinfected.³⁴

³³ CDC. CDC Newsroom Release: CDC calls on Americans to wear masks to prevent COVID-19 spread, dated July 14, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>; Lindsley WG, Blachere FM, Law BF, Beezhold DH, Noti JD. Efficacy of face masks, neck gaiters and face shields for reducing the expulsion of simulated cough-generated aerosols. Health Effects Laboratory Division, National Institute for Occupational Safety and Health, CDC, October 7, 2020. <https://www.medrxiv.org/content/10.1101/2020.10.05.20207241v1.full.pdf>

³⁴ CDC; Cleaning and Disinfection for Non-emergency Transport Vehicles; Accessed on October 15, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/disinfecting-transport-vehicles.html>

New Subsection 3205.4(f). Ventilation.

This proposed subsection requires employers to ensure, that when transporting employees, the vehicle windows are kept open, and the ventilation system is set to maximize outdoor air rather than to recirculate air.

Proposed subsection (f)(1) exempts the applicability of the proposed regulation in employer-provided transportation when the vehicle has functioning air conditioning in use and the outside temperature is greater than 90 degrees Fahrenheit.

Proposed subsection (f)(2) exempts the applicability of the proposed regulation in employer-provided transportation when the vehicle has functioning heating in use and the outside temperature is less than 60 degrees Fahrenheit.

Proposed subsection (f)(3) exempts the applicability of the proposed regulation in employer-provided transportation when protection is needed from weather conditions, such as rain or snow.

Proposed subsection (f)(4) exempts the applicability of the proposed regulation in employer-provided transportation when the vehicle has a cabin air filter in use and the United States EPA Air Quality Index for any pollutant is greater than 100.

These subsections are necessary to reduce employee exposure to COVID-19, as increased ventilation has been demonstrated to reduce the concentration of potentially infectious material in the indoor air.³⁵ The exemptions are necessary to relieve an employer from compliance with subsection (f) when weather and/or air quality hazards pose a greater and immediate risk to employee health than the transmission of COVID-19.³⁶

New Subsection 3205.4(g). Hand hygiene.

This proposed subsection requires employers to provide hand sanitizer without methyl alcohol in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle.

³⁵ U.S. EPA. Ventilation and Coronavirus (COVID-19). Accessed on November 6, 2020. <https://www.epa.gov/coronavirus/ventilation-and-coronavirus-covid-19>; CDC. Protect Yourself When Using Transportation, Updated October 21, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html>

³⁶ CDC. COVID-19 Considerations for Cleaner Air Shelters and Cleaner Air Spaces to Protect the Public from Wildfire Smoke, Updated May 1, 2020. Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/php/cleaner-air-shelters.html>; CDC. Employer Information for Heat Stress Prevention during the COVID-19 Pandemic, Updated August 26, 2020; Accessed on November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/heat-stress-employers.html>

This subsection is necessary to protect employees from COVID-19 hazards by providing drivers and riders with hand sanitizer and requiring them to sanitize their hands before entering and exiting shared vehicles. Hand hygiene has been demonstrated to reduce the transmission of COVID-19 and is an important part of the United States response to the international emergence of COVID-19.³⁷

Policy Statement and Anticipated Benefits

The Board is proposing these emergency regulations, title 8, new sections 3205 through 3205.4, to preserve worker health and safety and to clarify employers' existing obligations, making compliance easier and more straightforward.

Emergency rulemaking is required in this matter to address the immediate potential threat to employees from exposure to COVID-19. Infection with COVID-19 may result in a serious illness that can include difficulty breathing, pneumonia, and hospitalization. In some cases, the disease can progress, and organ failure and death may result. COVID-19 symptoms can sometimes persist for months. The virus can damage the lungs, heart, and brain, which increases the risk of long-term health problems. Regular rulemaking, which requires a fiscal analysis and approval from the Department of Finance, cannot be completed in time to address the risks to workers presented by the current pandemic.

As COVID-19 continues to infect workers, the proposed regulation will reduce the number of COVID-19 infections in the workplace. This in turn will reduce the financial costs caused by medical care and lost workdays, costs that may be borne by employees, their families, employers, insurers, and public benefits programs.

Thus, the benefits of the proposed regulation are two-fold:

- 1) Monetary benefits, including lowered costs to employers, insurers, employees, their families and public benefits programs; and
- 2) Non-monetary benefits, including a reduction in the pain and suffering associated with COVID-19 illnesses and deaths for those affected, directly or indirectly, by COVID-19.

These emergency regulations are also proposed in response to the Board's September 17, 2020, Petition Decision to partially grant Petition 583, to protect employees from exposure to COVID-19.

³⁷ CDC. Hand Hygiene Recommendations, Updated May 17, 2020; Accessed on October 15, 2020 and November 6, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/hand-hygiene.html>

Current regulations are not sufficiently specific as to what employers are required to do during the COVID-19 pandemic. This results in confusion on behalf of both employers and employees, leaving many employees unprotected.

This confusion also causes the Division to expend staff resources to respond to questions that would be answered by title 8, new sections 3205 through 3205.4.

Controlling the spread of COVID-19 is a challenge. A person who is infected with COVID-19 may have no obvious symptoms, or no symptoms at all, yet still be infectious to others³⁸. Therefore, the proposed regulations require, in some cases, employers to implement multiple methods of protection from exposure to COVID-19 at its workplace. These include identifying and controlling COVID-19 hazards in the workplace; investigating and responding to COVID-19 exposures and illnesses; training its employees; ensuring physical distancing and the use of face coverings; implementing engineering and administrative controls; providing and ensuring the use of PPE; and excluding COVID-19 cases from the workplace.

Many public health jurisdictions require that face coverings be worn when it is not possible to maintain a distance of at least six feet from another person. Evidence exists, however, that infectious virus particles can travel more than six feet through the air³⁹. Further, there is an increased likelihood of transmission of COVID-19 in indoor spaces compared to outdoor spaces⁴⁰. Therefore, proposed section 3205(c)(7)(A) requires employers to ensure that employees wear face coverings when they are indoors (with several exceptions), or outdoors and less than six feet from other persons.

The emergency regulations, COVID-19 Prevention, title 8, new sections 3205 through 3205.4, will provide clear and specific requirements to employers so that they may better protect employees from the harmful effects of COVID-19.

Following the adoption of these emergency regulations, at the direction of the Board, 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, as further guidance on the prevention of workplace transmission and exposure of COVID-19 becomes available.

³⁸ Furukawa NW, Brooks JT, Sobel J. Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic. *Emerging Infectious Diseases*. July, 2020. <https://doi.org/10.3201/eid2607.201595>

³⁹ Setti L, Passarini F, De Gennaro G, et al. Airborne Transmission Route of COVID-19: Why 2 Meters/6 Feet of Inter-Personal Distance Could Not Be Enough. *Int J Environ Res Public Health*. 2020;17(8):2932. April 23, 2020. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7215485/pdf/ijerph-17-02932.pdf>

⁴⁰ Hiroshi Nishiura, Hitoshi Oshitani, Tetsuro Kobayashi, Tomoya Saito, Tomimasa Sunagawa, Tamano Matsui, Takaji Wakita. MHLW COVID-19 Response Team, Motoi Suzuki. Closed environments facilitate secondary transmission of coronavirus disease 2019 (COVID-19). doi: <https://doi.org/10.1101/2020.02.28.20029272>

Evaluation of Inconsistency/Incompatibility with Existing State Regulations

Under California Labor Code 142.3, the Occupational Safety and Health Standards Board is the only agency in the state authorized to adopt occupational safety and health standards. The Board has reviewed existing regulations on this topic and has concluded that the proposed regulations are not inconsistent or incompatible with existing state regulations.

DOCUMENTS INCORPORATED BY REFERENCE

None.

**TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES,
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These documents are available for review BY APPOINTMENT Monday through Friday, from 8:00 a.m. to 4:30 p.m., at the Standards Board's office at 2520 Venture Oaks Way, Suite 350, Sacramento, California 95833. Appointments can be scheduled via email at oshsb@dir.ca.gov or by calling (916) 274-5721.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Board has determined that proposed sections 3205 through 3205.4 do not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 of Division 4 of the Government Code (commencing with section 17500).

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

The majority of the requirements in the proposal are consistent with guidance and orders from the CDPH and are thus already followed by state employers. For all parts of this analysis, the Division has used the average wage for the first quarter of 2020, the most recent data available. According to EDD, this wage is \$30.22 per hour.⁴¹

Subsection 3205(c) [Written COVID-19 Prevention Program]

Under existing section 3203, employers in California are already required to have a written and effective Injury and Illness Prevention Plan that expressly requires, among other things, a system for ensuring that employees comply with safe and healthy work practices; a system for communicating with employees on matters relating to occupational safety and health; procedures for identifying and evaluating workplace hazards including scheduled periodic inspections; a procedure to investigate and respond to occupational injury or occupational illness; methods and/or procedures for correcting unsafe or unhealthy conditions; and training and instruction.

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. The Division has also issued guidance and done outreach to warn employers that COVID-19 is a workplace hazard under section 3203.

Proposed section 3205(c) provides information about how to apply section 3203 in the specific context of COVID-19. Much of that subsection makes explicit actions that are already required by existing section 3203, such as creating COVID-19 prevention policies, and/or includes

⁴¹ EDD, Occupational Employment (May 2019) & Wage (2020 1st Quarter) Data, released June 2020, available at <https://www.labormarketinfo.edd.ca.gov/data/oes-employment-and-wages.html#OES> (State of California 2020 1st Quarter).

requirements which are already mandated by local government entities. Additional quantified and unquantified costs have been identified as follows.

Reviewing and updating written COVID-19 Prevention Program for the elements below: The Division believes that all state agencies already have comprehensive written COVID-19 prevention programs, which are very unlikely to need revision as a result of this regulation. Executive Orders issued by Governor Newsom order all residents to follow the guidance of state and local health officials, which in turn require such plans. The proposed section 3205 corresponds to public health orders and guidance, thus it should require no alteration of state entity employers' written policies.⁴²

Nonetheless, state employers will likely review their plans to ensure compliance with this regulation, but this cost cannot be quantified. The speed of review will vary significantly depending on the size of the state workforce covered by a particular program, the nature of the state entity's operations, and what units within the entity (if any) have their own distinct policies and plans. To provide some idea of the number of establishments involved, in the first quarter of 2020 there were 13,607 state entity establishments, according to EDD.⁴³ However, in all or nearly all cases, changes to the actual policies should not be required.

Subsections 3205(c)(1) [System for communicating] and (c)(2) [Identification and evaluation of COVID-19 hazards]

The proposal requires employers to allow employees and their authorized representatives to participate in the identification and evaluation of COVID-19 hazards. The particular hazard of an infectious virus requires employee participation in order to be addressed effectively. This should not be a significant issue for state employers; they have unionized workplaces and therefore already have methods of allowing employee participation in safety and health matters.

The remaining requirements in these subsections should already be provided by the employer under existing section 3203(a)(3) and (a)(4), including the most time-intensive tasks such as the worksite specific evaluation of COVID-19 hazards and updating written policies and procedures. It is not possible to evaluate COVID-19 hazards, as required by section 3203, without doing so in a manner specific to the employer's operations at the worksite, after reviewing government-provided information about the virus. Similarly, the items in the proposed 3205(c)(1) are necessary in order to have an effective "system for communicating with employees," about COVID-19 as required by existing section 3203(a)(3). A virus, unlike some safety hazards, requires communication about matters beyond the existence of the hazard and how to avoid it—

⁴² Executive Order N-25-20 (March 4, 2020) <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf>, and Executive Order N-33-20 (March 19, 2020) <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

⁴³ EDD; Quarterly Census of Employment and Wages, California – Statewide, 2020 – First Quarter, accessed 10/13/20 from <https://www.labormarketinfo.edd.ca.gov/qcew/qcew-select.asp>

for instance, communication would not be “effective” if employees at particular risk of severe illnesses were unaware of what they should do, or if workers did not know how to get tested.

State entities are already reviewing public health orders and guidance in compliance with “California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe,” also titled the “Blueprint for a Safer Economy.”⁴⁴

Employers are required to evaluate how to maximize outdoor air and use any existing filtration system for indoor workplaces most efficiently, but they are not required to update any ventilation systems. This will simply mean opening windows and confirming that the filters being used in any existing systems are the correct type and properly maintained/replaced as appropriate. This minimal evaluation is already required by the existing section 3203. As for screening, this regulation allows employers to ask employees to evaluate their own symptoms before reporting to work, which should have minimal cost. To the Board’s knowledge, this is already being performed by state agencies.

Subsection 3205(c)(3) [Investigating and responding to COVID-19 illness in the workplace]

The California Department of Public Health (CDPH) data from October 14, 2020 shows that there have been 675,889 confirmed cases among Californians over 18 and under 65.⁴⁵ Although people outside this age range certainly work, the CDPH category for people “65+” has not been included because the high proportion of retirees within that group makes it less representative of the working population. DOF population estimates for 2020 show 24,854,968 residents in the selected age group.⁴⁶ Dividing cases by population, that gives a confirmed COVID-19 case rate of about 0.02719.

Please note that past infections are not necessarily a reflection of future infections. Among many factors, a vaccine may be developed, broad population testing and contract testing may increase or decrease, compliance with protective measures within the general population may change, and aspects of the virus itself might lead to spikes or declines. This number of past cases also reflects a period of less than twelve months. However, given that the Division cannot predict the course of the virus, this provides a basis for estimating COVID-19 cases among employees in the coming year.

⁴⁴ See Statewide Public Health Officer Order, August 28, 2020, available at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf.

⁴⁵ CDPH “California COVID-19 By the Numbers,” October 15, 2020, numbers as of October 14, 2020, accessed from <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers> on October 15, 2020.

⁴⁶ DOF, “Total Estimated and Projected Population of California by Age: July 1, 2010 to July 1, 2060 in 1-year Increments,” available at <http://www.dof.ca.gov/forecasting/demographics/Projections/>, accessed Oct. 2020.

According to EDD data, in the first quarter of 2020 (the last quarter available), there were 476,242 employees working in state government in California.⁴⁷ The following state employees were likely not covered the proposal:

State Government Employees Not Covered by Proposal

NAICS	Industry	Employees, Q1 2020	Assumed % not covered by proposal	Reasoning	Employees not covered
54	Professional and Technical Services	4,229	50%	Remote or solo work during pandemic	2,115
62	Healthcare and Social Service ⁴⁸	65,392	80%	Covered by 5199	52,314
921	Executive, Legislative, & Gen Government	34,590	15%	Remote or solo work during pandemic	5,189
922	Justice, Public Order, and Safety Activities ⁴⁹	71,780	70%	Covered by 5199	50,246
923	Administration of Human Resource Program	33,876	20%	Remote or solo work during pandemic	6,775
925	Community and Housing Program Admin	962	10%	Covered by 5199	96
926	Administration of Economic Programs	43,250	20%	Remote or solo work during pandemic	8,650
				TOTAL	125,385

Subtracting the total number of state government employees not covered by the proposal, 125,385, from a total of 476,242 state government employees shows that **350,857 state government employees are covered by the proposal**. Applying the estimated COVID-19 rate for persons 18-64 of 0.02719 (as described above), this provides an estimate of 9,540 cases.

The existing section 3203 already requires effective procedures to investigate workplace illnesses. In the case of COVID-19, this necessarily requires employers to determine the infected

⁴⁷ EDD projections for 2021, used elsewhere in this analysis, could not be used for this purpose or for state cost estimates, because they did not include sufficient detail about public employment. See footnote 42 for source.

⁴⁸ Of these, 56,428 work in hospitals.

⁴⁹ Of these, 48,805 work in correctional institutions.

person’s exposure to other people at the worksite, alert all potentially exposed persons so that they can take the necessary precautions, and investigate whether any workplace condition contributed to the illness. Without these steps, an investigation will not be adequate because it will not aid the employer in its efforts to arrest the spread of the virus.

With regard to the notice requirements for people exposed to COVID-19, in addition to existing requirements under section 3203 and local government requirements, starting January 1, 2021, AB 685 will require employers to give notice of COVID-19 cases to employees, including employees of subcontractors, those employees’ exclusive representatives (i.e. unions), and other employers onsite.⁵⁰

Furthermore, a statewide order of the Public Health Officer requires counties to adhere to “California’s Plan for Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and Safe,” also titled the “Blueprint for a Safer Economy, which includes the CDPH document “Responding to COVID-19 in the Workplace for Employers.”⁵¹ To the Division’s knowledge all local jurisdictions have requirements consistent with, or more stringent than, the requirements set forth in that document. It requires “contract tracing...of close contacts of confirmed cases,” notification to workers who may have been exposed, and maintenance of confidentiality for employees with known or suspected COVID-19 cases.⁵²

Proposed subsection (c)(3) primarily describes how to perform this investigation and contact tracing effectively, rather than add new requirements—for example, an effective investigation cannot be performed without determining when/where the COVID-19 case was present and which individuals may have been exposed. However, the Division recognizes that employers may become more systematic in their investigations as a result of the specificity of the proposed subsection, which will slow down their investigations slightly to ensure that all of the activities of the person with COVID-19 have been considered, all potentially exposed persons have been given notice, etc. To account for the specificity of 3205(c)(3), the Division estimates that **each confirmed case will require an additional .5 work hours** under the proposal. This does not mean that each investigation will require only half an hour, rather that the proposed subsection may increase the level of detail during investigations that should already be occurring under existing law.

This subsection also requires employers to offer testing to COVID-19 exposed employees. This should already be covered by public employees’ workers’ compensation insurance or their health insurance. Nonetheless, the Division requested information about testing costs from the CDPH

⁵⁰ Labor Code 6409.6 (added by AB 685, chaptered 9/17/20, effective 1/1/21). The Division cannot determine the exact extent to which the statute will overlap with the proposed regulation, because the statute refers to CDPH definitions that have not been promulgated by that agency by regulation. However, the Division believes its proposal is currently consistent with definitions published by CDPH. Please note that the statute imposes some requirements not included in the proposed regulation. These include requiring employers to provide notice of COVID-19 cases *in writing*.

⁵¹ Statewide Public Health Officer Order, August 28, 2020, available at https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf. “Responding to COVID-19 in the Workplace for Employers,” released June 16, 2020, revised September 18, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx>.

⁵² The CDPH uses “close contacts” in a manner consistent with “COVID-19 exposure” as defined in this proposal.

Occupational Health Branch, in October 2020. The Division was told that, based on information from the CDPH Testing Task Force, the cost of a PCR testing for SARS-CoV-2 can range from \$80 - \$250 per person, depending on the test. The cost of antigen testing can range from \$5 - \$40 per person. The proposed regulation does not specify PCR or antigen testing.

To the extent that a state agency incurs some part of these costs, that cannot be quantified. Even if the above estimate of future infections turned out to be correct, there is no way to estimate the number of individuals who might be exposed, as defined in this proposal, for every given confirmed case. A COVID-19 case will generate few exposures if the infected person is able to practice physical distancing at work. But if the infected person regularly spends 15 minutes or more within six feet of a large number of different people, perhaps because they work in a small space with many other individuals or travel to multiple workstations where physical distancing is impossible, then more potential exposures will result. The Division is unaware of any estimate of how many close contacts of this kind occur to the average state worker or workers in general, since the number will vary by workplace and may even change from day to day.

Subsection 3205(c)(4) [Correction of COVID-19 hazards]

Correction of unsafe or unhealthy conditions is already expressly required by existing section 3203(a)(6).

Subsection 3205(c)(5) [Training and instruction]

Employers are already required to provide training and instruction regarding COVID-19 hazards and prevention under section 3203(a)(7), and the specifics listed in the proposed subsection can be incorporated into employers' existing COVID-19 related training. The Division believes that most employers are already implementing all or most of the training requirements, such as handwashing and face covering information. Because employers will have to have specific benefits information on hand in order to meet the requirements of Labor Code section 6409.6(a)(3) on January 1, 2021, and must provide that information to employees as specified in that section, compiling that information will not incur any additional costs for the purposes of this regulation.

Subsections 3205(c)(6) [Physical distancing] and (c)(7) [Face coverings]

Based on its COVID-19 inspections and related research, 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, and that state entities are following these requirements both under local requirements and in accordance with CDPH guidance and the Blueprint for a Safer Economy.

3205(c)(8) [Other engineering controls, administrative controls, and personal protective equipment]

This subsection requires cleanable solid partitions when physical distancing cannot be maintained. Evaluating the need for such partitions is already required under section 3203, and many state employers will have sufficient space for physical distancing and will not need any partitions. Though state agencies are likely to have already installed partitions where necessary, for those that have not, the cost of installation cannot be determined. This is a performance

standard; employers are free to determine the size/shape/material best suited to their business, so the ease of installation will depend on each individual workplace. Even if it were possible to establish an average cost, the Division is not aware of any basis for determining the total number of work areas in state places of employment in which it is impossible to maintain six feet of distance, or the number of employees working under those conditions.

Counties already require the handwashing and cleaning/disinfection protocols required here, including the prohibition on sharing personal items such as gloves, goggles, and other personal protective equipment, and state agencies should be in compliance.

This subsection requires employers to maximize the quantity of outside air unless it creates a hazard or is above a certain pollution level. This essentially mean keeping windows open more often and/or continuing to use existing ventilation systems, so the Division has not estimated additional costs.

For the requirement related to aerosolizing activities, the majority of such activities are covered by the existing section 5199 and therefore exempt from proposed section 3205. This provision mainly applies to dental offices that meet the requirements necessary to be exempt from 5199. Such offices are already required to provide the specified respiratory protection under existing section 5144, but this subsection allows all COVID-19 requirements to be located in the same part of Title 8.

Subsection 3205(c)(9) [Reporting, recordkeeping and access]

Reporting to CDPH and the Division will not take more time than existing requirements that employers take to report to those agencies.

Existing section 3203 already requires employers to maintain illness records and records of steps taken to implement COVID-19 hazard correction. Because this proposed subsection specifies particular information to be collected by the employer, employers will have to ask for and record additional information such as the workers' last day at the site and the date of any positive COVID-19 test. This does not require extensive questions, but since it will require a few more questions and some additional data entry, the Division estimates that will require **an additional .2 hours per COVID-19 case**, as indicated in the table below.

Subsections 3205(c)(10) [Exclusion of COVID-19 cases] and (c)(11) [Return to work criteria]

Exclusion of confirmed cases in accordance with accepted medical and public health practices is necessarily required under existing section 3203 in order to correct a significant occupational hazard, namely transmission of COVID-19 between employees. Although the proposed subsection provides for pay for excluded workers who are otherwise able to work, the cost of this cannot be determined because the Division cannot determine how many excluded state employees are likely to have exhausted all available paid time off related to COVID-19. Nothing

in this provision prevents employers from requiring employees to exhaust existing leave during the exclusion period.

Ensuring that employees are excluded pursuant to this subsection is a performance standard but presumably requires alerting employees to the fact that they cannot immediately return to work, which will sometimes require a phone call, email, or some other kind of communication to the infected person. Employers will also have to provide the excluded employee with the required information regarding benefits (which, as described above, employers must compile for reasons other than the proposed regulation). Although employers can meet these obligations with a quick email, the Division recognizes that, in many cases, employers will spend a few minutes discussing these issues with the employee, especially given the potential seriousness of a COVID-19 illness. The Division has therefore estimated an **average cost of .3 employee hours per COVID-19 case.**

Sections 3205.1 [Multiple COVID-19 Infections and COVID-19 Outbreaks] and 3205.2 [Major COVID-19 Outbreaks]

This section applies to employers covered by proposed section 3205 only when there are three or more infections in a 14-day period within a workplace. CDPH informed the Division that, as of September 30, 2020, the department was aware of nearly 400 COVID-19 outbreaks in settings in California that were not covered by existing section 5199. This is likely an undercount, since CDPH relied on reporting from other entities, including heavily burdened local health departments, and the fact that employers in some counties were not obliged to report outbreaks to their local health department until September 18, 2020.⁵³

The Division is aware that the government employers most likely to experience “major COVID-19 outbreaks” as defined in this proposal are hospitals, residential nursing centers (including those for the elderly), other medical facilities, homeless shelters, and correctional facilities. These are circumstances covered by section 5199 and would be exempt from this proposal. Major outbreak costs have thus not been estimated for state or local government entities.

The information provided by CDPH did not distinguish between public and private employers. Thus, for incidents involving three COVID-19 cases in 14 days (i.e. a COVID-19 outbreak) and meeting the requirements of proposed section 3205.1, the Division does not have information about how many state entities have had such an incident. In the absence of evidence, the Division will err on the side of overestimating these incidents by presuming that 10 is a reasonable estimate, each one requiring ten hours of response. Given that only 400 outbreaks not covered by existing section 5199 have been recorded by CDPH for the entire state, 10 is likely an

⁵³ “Responding to COVID-19 in the Workplace for Employers,” released June 16, 2020, revised September 18, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Workplace-Outbreak-Employer-Guidance.aspx>.

overestimate, given that the majority of outbreaks in state workplaces have occurred in situations covered by 5199.

In locations covered by this proposed section, the employer would have to provide additional COVID-19 testing, the cost of which cannot be quantified (see above), and additional review/correction of its COVID-19 policies and prevention methods, which is estimated to require 10 hours per outbreak.

It is possible that a state entity employer could have to repeat this reevaluation, if the outbreak continued for more than 30 days. However, the Division cannot presently quantify this cost, because the agency lacks data about the length of outbreaks. Though CDPH has provided information about the number of outbreaks to which this section would apply, it did not provide information about the number of days each incident continued to qualify as an outbreak.

Sections 3205.3 [COVID-19 Prevention in Employer-Provided Housing] and 3205.4 [COVID-19 Prevention in Employer-Provided Transportation]

No housing or transportation costs have been estimated. The Division is aware that the Department of Forestry and Fire Protection (CalFire) maintains employer-provided housing, but that housing is exempted, along with transportation to and from such locations, since that housing and transportation serves firefighting purposes.

Quantifiable annual costs of proposal (State Government)

Subsection 3205(c)(3): Employer response to COVID-19 cases in the workplace (\$30.22 * .5 hours * 9,540 cases)	\$144,149
Subsection 3205(c)(9): Recordkeeping for COVID-19 cases (\$30.22 * .2 hours * 9,540 cases)	\$57,660
Subsection 3205(c)(10): Exclusion of employees with COVID-19 cases (\$30.22 * .3 hours * 9,540 cases)	\$86,490
Section 3205.1: Multi-infection incidents (\$30.22 * 10 hours * 10 cases)	\$3,022
Total	\$291,321

As described in detail above, please note that **these are only the quantifiable costs.**

The primarily savings to state agencies would come from reduced COVID-19 occupational transmission and thus fewer COVID-19 illnesses. The amount of this reduction is unknown and depends on the course of the pandemic. The proportion of any future reduction that could be attributed to the proposal, as opposed to other state or local mandates, cannot be determined in advance.

Savings would result not only from improved health among state employees, but also from an overall reduction in the statewide COVID-19 transmission rate, which would lead to a reduction in the costs associated with publicly-provided medical care and benefits.

The benefit from reduced COVID-19 infections is unquantifiable, but could result in fewer deaths, hospitalizations, and long-term injuries including harm to patients' pulmonary systems, respiratory systems, and neurological function.

A reduction in the spread of COVID-19 will also allow for increased reopening of businesses and public services. This would increase employment and the overall economy.

The Division expects that it would receive fewer queries about COVID-19 if proposed sections 3205 through 3205.4 are enacted. The proposed regulations would also make it easier and faster for Division staff to respond to questions. However, this is unlikely to lead to any fiscal savings. Those staff who have been diverted from their usual duties in response to COVID-19-related issues would simply be returned to their usual enforcement activities.

Costs to Any Local Agency or School District Which Must be Reimbursed in Accordance with Government Code Sections 17500 through 17630:

None.

Other Nondiscretionary Cost or Savings Imposed on Local Agencies:

The above analysis for state agencies' costs and savings applies to local agencies as well. Costs have been estimated in the same manner as above.

Given that local government entities are particularly likely to be aware of—and comply with—the requirements of their own counties, the Division does not believe that changes are likely to be needed in local government entities' current COVID-19 prevention policies. As described above with regard to state employers, the Division is aware that local entities will still review their existing COVID-19 prevention programs to ensure compliance with this regulation, but the time required will vary dramatically between public agencies and cannot be quantified. The speed of review will depend on the size of the agency, the nature of its operations, and what units within the entity (if any) have their own distinct policies and plans. To provide some idea of the number of establishments involved, there were 19,380 local government establishments in the first quarter of 2020, according to EDD.⁵⁴

⁵⁴ EDD Quarterly Census of Employment and Wages, California – Statewide, 2020 – First Quarter, accessed 10/13/20 from <https://www.labormarketinfo.edd.ca.gov/qcew/qcew-select.asp>.

According to EDD data, in the first quarter of 2020 (the last quarter available), there were 1,829,639 employees working in local government in California.⁵⁵ The following local government employees were likely not covered the proposal:

Local Government Employees Not Covered by Proposal

NAICS	Industry	Employees, Q1 2020	Assumed % not covered by proposal	Reasoning	Employees not covered
488	Support Activities for Transportation	11,787	5%	Remote or solo work during pandemic	589
51	Information	14,495	30%	Remote or solo work during pandemic	4,349
52	Finance and Insurance	3,810	30%	Remote or solo work during pandemic	1,143
54	Professional and Technical Services	1,430	50%	Remote or solo work during pandemic	715
62	Health Care and Social Assistance ⁵⁶	114,367	80%	Covered by 5199	91,494
921	Executive, Legislative, & Gen Government	182,635	15%	Remote or solo work during pandemic	27,395
922	Justice, Public Order, and Safety Activities ⁵⁷	186,011	70%	Covered by 5199	130,208

⁵⁵ EDD projections for 2021, used elsewhere in this analysis, could not be used for this purpose or for state cost estimates, because they did not include sufficient detail about public employment. See footnote 42 for source.

⁵⁶ Of these, the majority (95,567) worked in hospitals.

⁵⁷ This includes police, corrections, and public health administration, among other things. The exact amount of corrections-related employment is suppressed from public EDD data, but it reasonably assumed that this constitutes a significant portion of this category.

923	Administration of Human Resource Program	98,016	20%	Remote or solo work during pandemic	19,603
925	Community and Housing Program Admin	5,460	10%	Covered by 5199	546
926	Administration of Economic Programs	15,964	20%	Remote or solo work during pandemic	3,193
				TOTAL	279,235

Subtracting the total number of local government employees not covered by the proposal, 279,235 from 1,829,639 local government employees in the first quarter of 2020 gives a total of **1,550,404 local government employees covered by the proposal**. Applying the estimated COVID-19 rate for persons 18-64 of 0.02719 (as described above), this provides an **estimate of 42,155 cases**.

Local government employers most likely to experience “major COVID-19 outbreaks” as defined in this proposal are hospitals, residential nursing centers (including those for the elderly), other medical facilities, homeless shelters, and correctional facilities. These are circumstances covered by section 5199 and would be exempt from this proposal. Major outbreak costs have thus not been estimated for local government entities.

As described above, CDPH information on the 400 outbreaks not covered by 5199 does not distinguish between public and private employers. In the absence of data, the Division has estimated 30 such outbreaks would be covered by the proposed section 3205.2 for local entities, even though that is likely to be a significant overestimate.

Local government employers have been exempted from the employer-provided housing and transportation requirements while conducting emergency operations. For instance, public employers may create temporary housing sites and provide transportation during wildland firefighting operations. Outside of those circumstances, the Division is not aware of any public provision of housing/transportation which would be covered by this proposal.

Quantifiable annual costs of proposal (Local Government)

Subsection 3205(c)(3): Employer response to COVID-19 cases in the workplace (\$30.22 * .5 hours * 42,155 cases)	\$636,962
Subsection 3205(c)(9): Recordkeeping for COVID-19 cases (\$30.22 * .2 hours * 42,155 cases)	\$254,785
Subsection 3205(c)(10): Exclusion of employees with COVID-19 cases (\$30.22 * .3 hours * 42,155 cases)	\$382,177
Section 3205.1: Multi-infection incidents (\$30.22 * 10 hours * 30 cases)	\$9,066
Total	\$1,282,990

As described in detail above, please note that **these are only the quantifiable costs.**

Annual savings for local government employers cannot be determined; please see the section on savings for state entities, above.

Costs or Savings in Federal Funding to the State:

None.

Addendum #1 to the Finding of Emergency.

Further Basis for the Finding of Emergency:

- i. During the early stage of the pandemic, among other things the Division was directed to “have primary focus on providing technical assistance and support to have maximum effect to address to risk of COVID-19” and to “focus enforcement efforts where there are allegations of the most serious violations impacting health and safety.” (Executive Order N-27-20, March 15, 2020.)
- ii. At that point, and throughout the spring, the expected length of the pandemic was unclear. Stay-at-home orders had initially “flattened the curve” relative to other states, such as New York. Among the workplaces most affected by the pandemic, the existing Aerosol Transmissible Disease Standard, title 8 section 5199, protected many employees because they were involved in patient care or other activities covered by that section. For all other employees, the Division relied on existing regulations, including title 8 section 3203, Injury and Illness Prevention Plans.
- iii. In May, businesses began to reopen according to the state’s phased reopening plan. On May 20, 2020, the Occupational Safety and Health Standards Board (OSHSB) received a petition, filed by Worksafe and the National Lawyers’ Guild, Labor & Employment Committee (Petitioners), requesting the Board amend title 8 standards to create new temporary emergency standards. Petitioners requested OSHSB provide specific protections to California employees who may have exposure to COVID-19, but who are not protected by the Aerosol Transmissible Diseases standards (sections 5199 and 5199.1).
- iv. The Board directed Staff to prioritize the evaluation of this petition and the efficacy of existing regulations to address the health and safety of workers in the wake of the novel corona virus. The evaluation process included an analysis of current regulations, finding that while protections exist in Cal/OSHA’s Aerosol Transmissible Diseases (ATD) standard (title 8, section 5199), they are limited in scope primarily to medical facilities. Employers not included in the scope of the ATD standard have generally 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), Sanitation (article 9), and Control of Harmful Exposures (section 5141).
- v. While existing regulations (such as IIPP, section 3203) require employers to protect workers from harmful exposures, they do 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 intimate knowledge of the hazards at issue and the workings of the place of employment, to devise such methods or procedures. Investigations in the field over the summer, along with rising positivity

- rates, showed that employers were struggling to address the novel hazards presented by COVID-19.
- vi. Given the unprecedented nature of the COVID-19 pandemic, and informed by analysis performed by OSHSB staff and the Division, on September 17, 2020, the Board found a specific emergency regulation in title 8 is necessary to provide clear instructions to employers and employees on what needs to be done to protect workers from COVID-19, eliminating any confusion and enhancing compliance. The Board requested the Division work with Board staff to expeditiously submit a proposal for an emergency regulation to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace, for consideration no later than the November 19, 2020 Board meeting.
 - vii. Throughout the course of the pandemic, the Division issued guidance for employers regarding safe reopening. 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 is not sufficient to address the present increase in cases and the risk of occupational spread. Furthermore, the proposed emergency regulations introduce specific requirements, such as employer-provided testing, that are critical to reduce occupational spread during the ongoing rise in infections. The present threat of exponential growth in COVID-19 cases demands immediate action.

Documents Relied Upon:

The dates of the following documents-relied-upon are corrected as follows:

34. CDC; People with Certain Medical Conditions. October 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

35. CDC; Evidence used to update the list of underlying medical conditions that increase a person's risk of severe illness from COVID-19. October 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html>

38. CDC; Considerations for Restaurants and Bars. September 6, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html>

61. CDC; Agriculture Workers and Employers. November 10, 2020.

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html>

Local Mandate Determination

There is no local mandate imposed by these proposed regulations.

Non-duplication

Portions of the proposed regulations repeat or rephrase, in whole or part, state statutes and regulations. This duplication is necessary so that employers and employees will be able to review all provisions specific to prevention of COVID-19 in the workplace within the same portion of title 8, making compliance easier. In addition, to the extent that some language within the proposed regulations may repeat portions of AB 685 (Chaptered September 17, 2020), that bill does not take effect until January 1, 2021, after the effective date of these regulations.

Comparison of Emergency Temporary Standards with Cal/OSHA Guidance

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Written COVID-19 Prevention Program: The employer “shall establish, implement, and maintain an effective, written COVID-19 Prevention Program.” § 3205(c).</p>	<p>“California employers are required to establish and implement an IIPP (title 8 section 3203) to protect employees from workplace hazards, including infectious diseases. Employers are required to determine if COVID-19 infection is a hazard in their workplace. If it is a workplace hazard, then employers must implement infection control measures, including applicable and relevant recommendations from the Centers for Disease Control and Prevention (CDC), Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), and Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others. For most California workplaces, adopting changes to their IIPP is mandatory since COVID-19 is widespread in the community.” <i>Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19</i> (May 14, 2020) (“<i>General Guidelines</i>”), https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html. The <i>General Guidelines</i> then include various infection prevention measures to include in a written IIPP.</p> <p>The employer should “develop an infectious disease preparedness and response plan that can help guide protective actions against COVID-19.” Fed/OSHA, <i>Guidance on Preparing Workplaces for COVID-19</i> at 7 (Mar. 9, 2020) (“<i>Fed/OSHA Preparation Guidance</i>”), https://www.osha.gov/Publications/OSHA3990.pdf</p> <p>“Before reopening, all facilities must . . . create a work site-specific COVID-19 prevention plan.” <i>California’s COVID-19 Employer Playbook</i> at 6 (Sept. 25, 2020) (“<i>Employer Playbook</i>”), https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>System for Employee Reporting: “The employer shall . . . [a]sk employees to report to the employer, without fear of reprisal, COVID-19 symptoms, possible COVID-19 exposures, and possible COVID-19 hazards at the workplace.” § 3205(c)(1)(A).</p>	<p>The IIPP shall “[i]nclude a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.” § 3203(a)(3).</p> <p>The employer should “[e]nsure workers understand their rights to a safe and healthful work environment, who to contact with questions or concerns about workplace safety and health, and prohibitions against retaliation for raising workplace safety and health concerns” and “[e]nsure workers understand their right to raise workplace safety and health concerns and seek an OSHA inspection under the Occupational Safety and Health Act.” Fed/OSHA, <i>Guidance on Returning to Work</i> at (June 17, 2020) (“<i>Fed/OSHA Returning to Work Guidance</i>”), https://www.osha.gov/Publications/OSHA4045.pdf</p>
<p>System for Accommodating Vulnerable Employees: “The employer shall . . . [d]escribe procedures or policies for accommodating employees with medical or other conditions that put them at increased risk of severe COVID-19 illness.” § 3205(c)(1)(B).</p>	<p>The employer’s COVID-19 response plan “should consider and address the level(s) of risk associated with various worksites and job tasks workers perform at those sites. Such considerations may include . . . “[w]orkers’ individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy). <i>Fed/OSHA Preparation Guidance</i> at 7-8.</p>
<p>System for Communicating Testing Information: “The employer shall . . . [p]rovide information about access to COVID-19 testing.” § 3205(c)(1)(C).</p>	<p>“Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, referral to their LHD.” <i>Employer Playbook</i> at 12.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>System for Communicating Policies and Procedures: “The employer shall . . . communicate information about COVID-19 hazards and the employer’s COVID-19 policies and procedures to employees and to other employers, persons, and entities within or in contact with the employer’s workplace.” § 3205(c)(1)(D).</p>	<p>The IIPP shall “[i]nclude a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.” § 3203(a)(2).</p> <p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall provide training in a language that is readily understandable by all employee on “the employer’s procedures for preventing [COVID-19’s] spread at the workplace.” <i>General Guidelines</i>.</p>
<p>Employee Participation in Hazard Assessment: “The employer shall allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards.” § 3205(c)(2)(A).</p>	<p>New requirement.</p>
<p>Employee Screening Process: “The employer shall develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms.” § 3205(c)(2)(B).</p>	<p>The employer shall “[i]mmediately send employees home or to medical care, as needed, if they have a frequent cough, fever, difficulty breathing, chills, muscle pain, headache, sore throat, or recent loss of taste or smell.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [s]et up individual control measures and screenings.” <i>Employer Playbook</i> at 6.</p> <p>The employer’s COVID-19 response plan should include the “identification and isolation of sick employees, including practices for worker self-monitoring or screening, and isolating and excluding from the workplace any employees with signs or symptoms of COVID-19.” The employer should “[a]sk employees to evaluate themselves for signs/symptoms of COVID-19 before coming to work, and to stay home if they are not well.” <i>Fed/OSHA Returning to Work Guidance</i> at 7.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Response to COVID-19 Case in Workplace: “The employer shall develop COVID-19 policies and procedures to respond effectively and immediately to individuals at the workplace who are a COVID-19 case to prevent or reduce the risk of transmission of COVID-19 in the workplace.” § 3205(c)(2)(C).</p>	<p>“If an employee is confirmed to have COVID-19 infection,” the employer should follow specific procedures to reduce the risk of transmission in the workplace. <i>General Guidelines.</i></p> <p>The employer’s COVID-19 response plan should include the “identification and isolation of sick employees, including practices for worker self-monitoring or screening, and isolating and excluding from the workplace any employees with signs or symptoms of COVID-19.” The employer should “[e]stablish a protocol for managing people who become ill in the workplace, including details about how and where a sick person will be isolated (in the event they are unable to leave immediately) while awaiting transportation from the workplace, to their home or to a health care facility, and cleaning and disinfecting spaces the ill person has occupied to prevent exposure to other workers, customers, or visitors.” <i>Fed/OSHA Returning to Work Guidance</i> at 7.</p>
<p>Hazard Assessment: “The employer shall conduct a workplace-specific identification of all interactions, areas, activities, processes, equipment, and materials that could potentially expose employees to COVID-19 hazards.” § 3205(c)(2)(D).</p>	<p>The IIPP shall “[i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.” “Inspections shall be made to identify and evaluate hazards: . . . [w]henver the employer is made aware of a new or previously unrecognized hazard.” § 3205(a)(4)(C).</p> <p>“Before reopening, all facilities must . . . [p]erform a detailed risk assessment.” <i>Employer Playbook</i> at 6.</p> <p>The employer should conduct a “[h]azard assessment, including practices to determine when, where, how, and to what sources of SARS-CoV-2 workers are likely to be exposed in the course of their job duties.” <i>Fed/OSHA Returning to Work Guidance</i> at 6.</p>
<p>Assessment of Indoor Ventilation: “For indoor locations, the employer shall evaluate how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system.” § 3205(c)(2)(E).</p>	<p>“Employers should work with a heating, ventilation, and air conditioning (HVAC) professional to consider steps to optimize building ventilation,” such as using filters with a MERV rating of 13 or higher and increasing the HVAC system’s outdoor air intake. <i>Fed/OSHA, COVID-19 Guidance on Ventilation in the Workplace</i> (Nov. 4, 2020) (“<i>Fed/OSHA Ventilation Guidance</i>”), https://www.osha.gov/Publications/OSHA4103.pdf.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Monitoring of Orders and Guidance: “The employer shall review applicable orders and guidance from the State of California and the local health department related to COVID-19 hazards and prevention.” § 3205(c)(2)(F).</p>	<p>The IIPP shall “[i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.” “Inspections shall be made to identify and evaluate hazards: . . . [w]henver the employer is made aware of a new or previously unrecognized hazard.” § 3205(a)(4)(C).</p>
<p>Assessment of Existing Controls: “The employer shall evaluate existing COVID-19 prevention controls at the workplace and the need for different or additional controls.” § 3205(c)(2)(G).</p>	<p>The IIPP shall “[i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.” “Inspections shall be made to identify and evaluate hazards: . . . [w]henver the employer is made aware of a new or previously unrecognized hazard.” § 3205(a)(4)(C).</p>
<p>Periodic Inspections: “The employer shall conduct periodic inspections as needed to identify unhealthy conditions, work practices, and work procedures related to COVID-19 and to ensure compliance with employers’ COVID-19 policies and procedures.” § 3205(c)(2)(H).</p>	<p>The IIPP shall “[i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.” “Inspections shall be made to identify and evaluate hazards: . . . [w]henver the employer is made aware of a new or previously unrecognized hazard.” § 3205(a)(4)(C).</p>
<p>Investigation of COVID-19 Cases: The employer “shall have an effective procedure to investigate COVID-19 cases in the workplace.” § 3205(c)(3)(A). The employer shall “[i]nvestigate whether any workplace conditions could have contributed to the risk of COVID-19 exposure and what could be done to reduce exposure to COVID-19 hazards.” § 3205(c)(3)(B)(5).</p>	<p>The IIPP shall include the employer’s “procedure to investigate occupational injury or occupational illness.” § 3203(a)(5).</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Contact Tracing: The employer shall perform contact tracing and determine who may be a close contact. § 3205(c)(3)(B)(1)-(2).</p>	<p>“In consultation with the LHD, [the employer should] interview workers with laboratory-confirmed COVID-19 by phone to determine when their symptoms began, the shifts they worked during their infectious period, and to identify other workers with whom they had close contact during their infectious period Close contacts should be instructed to quarantine at home for 14 days from their last known contact with the worker with COVID-19 and should be tested for COVID-19. Use employment records to verify shifts worked during the infectious period and other workers who may have worked closely with them during that time period.” <i>Employer Playbook</i> at 14.</p>
<p>Notice to Close Contacts: The employer shall give notice of potential COVID-19 exposure to employees, their authorized employee representatives, independent contractors, and other employers about close contact. § 3205(c)(3)(B)(3).</p>	<p>“If an employee is confirmed to have COVID-19 infection,” the employer should “[i]nform employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).” <i>General Guidelines</i>.</p> <p>“Employers must notify all workers who were potentially exposed to the individuals with COVID-19” and should “include worker representative groups in communicating strategies.” <i>Employer Playbook</i> at 12.</p>
<p>Testing for Close Contacts: The employer shall provide testing and information on available benefits to employees who qualify as close contacts. § 3205(c)(3)(B)(4).</p>	<p>No requirement to provide testing.</p> <p>“Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, referral to their LHD.” <i>Employer Playbook</i> at 12.</p> <p>The employer should “ensure that sick leave policies are sufficiently generous and flexible to enable workers who are sick to stay home without penalty and ensure that workers are aware of such policies.” <i>Employer Playbook</i> at 10.</p>
<p>Keep Personal and Medical Information Confidential: Personal identifying information of COVID-19 cases or persons with COVID-19 symptoms shall be kept confidential.” § 3205(c)(3)(C)-(D).</p>	<p>“Employers must make every effort to maintain the confidentiality of workers with suspected or confirmed COVID-19 infection when communicating with other workers. Employers should refer to the guidelines issued by DFEH and EEOC.” <i>Employer Playbook</i> at 12.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Correction of COVID-19 Hazards: The employer “shall implement effective policies and/or procedures for correcting unsafe or unhealthy conditions, work practices, policies and procedures in a timely manner based on the severity of the hazard.” § 3205(c)(4).</p>	<p>The IIPP shall “[i]nclude methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard: (A) When observed or discovered; and, (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards. § 3203(a)(6).</p>
<p>Training on Policies and Procedures: “The employer shall provide effective training and instruction to employees” on “[t]he employer’s COVID-19 policies and procedures to protect employees from COVID-19 hazards.” § 3205(c)(5)(A).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall provide training in a language that is readily understandable by all employee on “the employer’s procedures for preventing its spread at the workplace.” <i>General Guidelines</i>.</p>
<p>Training on COVID-19 Related Benefits: “The employer shall provide effective training and instruction to employees” on “[i]nformation regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state, or local laws.” § 3205(c)(5)(B).</p>	<p>The employer should “ensure that sick leave policies are sufficiently generous and flexible to enable workers who are sick to stay home without penalty and ensure that workers are aware of such policies.” <i>Employer Playbook</i> at 10.</p> <p>The employer should “Train workers in the appropriate language and literacy level about their risks of exposure to SARS-CoV-2, what the employer is doing to protect them, including site-specific measures, and how they can protect themselves.” <i>Fed/OSHA Returning to Work Guidance</i> at 9.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Training on COVID-19 Transmission: “The employer shall provide effective training and instruction to employees” on how COVID-19 can spread through the air and may be transmitted by touch. § 3205(c)(5)(C).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall provide training in a language that is readily understandable by all employee on the “when to seek medical attention, how to prevent its spread,” and “[h]ow an infected person can spread COVID-19 to others even if they are not sick.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [t]rain workers on how to limit the spread of COVID-19. This includes how to screen themselves for symptoms and when to stay home.” <i>Employer Playbook</i> at 6.</p>
<p>Training on Physical Distancing: “The employer shall provide effective training and instruction to employees” on “[m]ethods of physical distancing of at least six feet and the importance of combining physical distancing with the wearing of face coverings” and that “physical distancing must be combined with other controls, including face coverings and hand hygiene, to be effective.” § 3205(c)(5)(D)-(E).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>“Before reopening, all facilities must . . . [e]stablish physical distancing guidelines.” <i>Employer Playbook</i> at 6.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Training on Hand Hygiene: “The employer shall provide effective training and instruction to employees” on “[t]he importance of frequent hand washing with soap and water for at least 20 seconds and using hand sanitizer when employees do not have immediate access to a sink or hand washing facility, and that hand sanitizer does not work if the hands are soiled.” § 3205(c)(5)(F).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall provide training in a language that is readily understandable by all employee on the “[w]ashing hands with soap and water for at least 20 seconds, after interacting with other persons and after contacting shared surfaces or objects.”</p> <p><i>General Guidelines.</i></p>
<p>Training on Face Covering Use: “The employer shall provide effective training and instruction to employees” on “[p]roper use of face coverings and the fact that face coverings are not respiratory protective equipment.” § 3205(c)(5)(G).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall provide training in a language that is readily understandable by all employee on the “[h]ow to prevent the spread of COVID-19 by using cloth face covers, including:</p> <ul style="list-style-type: none"> • <u>CDC guidelines</u> that everyone should use cloth face covers when around other persons. • How cloth face covers can help protect persons around the user when combined with physical distancing and frequent hand washing. • Information that cloth face covers are not protective equipment and do not protect the person wearing a cloth face cover from COVID-19. • Instructions on washing and sanitizing hands before and after using face coverings, which should be washed after each shift.” <p><i>General Guidelines.</i></p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Training on COVID-19 Symptoms: “The employer shall provide effective training and instruction to employees” on “COVID-19 symptoms, and the importance of not coming to work and obtaining a COVID-19 test if the employee has COVID-19 symptoms.” § 3205(c)(5)(H).</p>	<p>The IIPP shall “[p]rovide training and instruction . . . (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and, (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” § 3203(a)(7).</p> <p>The employer shall “[a]ctively encourage sick employees to stay home.” <i>General Guidelines</i>.</p> <p>The employer shall provide training in a language that is readily understandable by all employee on the “[g]eneral description of COVID-19[] symptoms.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [t]rain workers on how to limit the spread of COVID-19. This includes how to screen themselves for symptoms and when to stay home.” <i>Employer Playbook</i> at 6.</p>
<p>Methods of Physical Distancing: “All employees shall be separated from other persons by at least six feet, except where an employer can demonstrate that six feet of separation is not possible, and except for momentary exposure while persons are in movement.” The section then identifies general methods of physical distancing. § 3205(c)(6).</p>	<p>The employer shall “[e]ncourage employees to telework from home when possible” and “[p]ractice physical distancing by cancelling in-person meetings, using video or telephonic meetings, and maintaining a distance of at least 6 feet between persons at the workplace when possible.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [e]stablish physical distancing guidelines.” <i>Employer Playbook</i> at 6.</p> <p>The employer’s COVID-19 response plan should include “[s]ocial distancing, including practices for maximizing to the extent feasible and maintaining distance between all people, including workers, customers, and visitors.” <i>Fed/OSHA Returning to Work Guidance</i> at 9.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Face Coverings: The employer “shall provide face coverings and ensure they are worn by employees over the nose and mouth when indoors, when outdoors and less than six feet away from another person, and where required by orders from the CDPH or local health department.” The employer “shall ensure face coverings are clean and undamaged.” “Employees exempted from wearing face coverings due to a medical condition, mental health condition, or disability shall wear an effective non-restrictive alternative, such as a face shield with a drape on the bottom, if their condition or disability permits it.” “Any employee not wearing a face covering, face shield with a drape or other effective alternative, or respiratory protection, for any reason, shall be at least six feet apart from all other persons unless the unmasked employee is tested at least twice weekly for COVID-19. Employers may not use COVID-19 testing as an alternative to face coverings when face coverings are otherwise required by this section.” “No employer shall prevent any employee from wearing a face covering when not required by this section, unless it would create a safety hazard, such as interfering with the safe operation of equipment.” “Employers shall implement measures to communicate to non-employees the face coverings requirements on their premises.” “The employer shall develop COVID-19 policies and procedures to minimize employee exposure to COVID-19 hazards originating from any person not wearing a face covering, including a member of the public.” § 3205(c)(7).</p>	<p>The employer shall “[p]rovide employees with cloth face covers or encourage employees to use their own face covers for use whenever employees may be in workplaces with other persons.” <i>General Guidelines</i>.</p> <p>“If exposures to the general public cannot be eliminated with engineering controls, require or encourage customers to wear face coverings, which are mandatory in some jurisdictions.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [e]stablish universal face covering requirements (with allowed exceptions) in accordance with CDPH guidelines. Additionally, refer to Appendix A: Resources for further guidance for employers and workers in enforcing mask requirements.” <i>Employer Playbook</i> at 6.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Engineering Controls – Partitions: “At fixed work locations where it is not possible to maintain the physical distancing requirement at all times, the employer shall install cleanable solid partitions that effectively reduce aerosol transmission between the employee and other persons.” § 3205(c)(8)(A).</p>	<p>“Protect cashiers and other workers who have frequent interaction with the public with engineering controls such as Plexiglas screens or other physical barriers, or spatial barriers of at least six feet, if feasible.” <i>General Guidelines</i>.</p> <p>Engineering control for COVID-19 include “[i]nstalling physical barriers, such as clear plastic sneeze guards. <i>Fed/OSHA Preparation Guidance</i> at 12.</p> <p>The employer should “[s]elect and implement appropriate engineering controls (e.g., physical barriers/shields to separate workers[]).” <i>Fed/OSHA Returning to Work Guidance</i> at 8.</p>
<p>Engineering Controls – Ventilation: “For buildings with mechanical or natural ventilation, or both, employers shall maximize the quantity of outside air provided to the extent feasible, except when the United States Environmental Protection Agency (EPA) Air Quality Index is greater than 100 for any pollutant or if opening windows or letting in outdoor air by other means would cause a hazard to employees, for instance from excessive heat or cold.” § 3205(c)(8)(B).</p>	<p>“Employers should work with a heating, ventilation, and air conditioning (HVAC) professional to consider steps to optimize building ventilation,” such as using filters with a MERV rating of 13 or higher and increasing the HVAC system’s outdoor air intake. <i>Fed/OSHA Ventilation Guidance</i>.</p>
<p>Cleaning and Disinfecting Procedures: The employer shall identify and regularly clean and disinfect frequently touched surfaces and objects and inform employees and authorized employee representatives of cleaning and disinfection protocols. The employer shall prohibit the sharing of PPE and, to the extent feasible, equipment. The employer will clean and disinfect areas, material, and equipment used by a COVID-19 case during the high-risk exposure period. § 3205(c)(8)(C).</p>	<p>The employer shall “[a]void shared workspaces (desks, offices, and cubicles) and work items (phones, computers, other work tools, and equipment) when possible, but “[i]f they must be shared, clean and disinfect shared workspaces and work items before and after use.” <i>General Guidelines</i>.</p> <p>The employer shall “[e]stablish procedures to routinely clean and disinfect commonly touched objects and surfaces.” <i>General Guidelines</i>. In response to a confirmed case in the workplace, the employer shall “[c]onduct deep cleaning of the entire general area where the infected employee worked and may have been, including breakrooms, restrooms and travel areas, with a cleaning agent approved for use by the EPA against coronavirus.” <i>General Guidelines</i>.</p> <p>“Before reopening, all facilities must . . . [p]ut disinfection protocols in place.” <i>Employer Playbook</i> at 6.</p> <p>Employers must perform certain cleaning actions after a worker with COVID-19 has been to work. <i>Employer Playbook</i> at 19.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Handwashing: “[T]he employer shall evaluate its handwashing facilities, determine the need for additional facilities, encourage and allow time for employee handwashing, and provide employees with an effective hand sanitizer. Employers shall encourage employees to wash their hands for at least 20 seconds each time. Provision or use of hand sanitizers with methyl alcohol is prohibited.” § 3205(c)(8)(D).</p>	<p>All employers must provide washing facilities that have an adequate supply of suitable cleansing agents, water, and single-use towels or blowers. §§ 1527, 3366, 3457, 8397.4.</p> <p>The employer shall provide training in a language that is readily understandable by all employee on the “[w]ashing hands with soap and water for at least 20 seconds, after interacting with other persons and after contacting shared surfaces or objects.” <i>General Guidelines</i>.</p>
<p>Personal Protected Equipment: The employer “shall evaluate the need for personal protective equipment to prevent exposure to COVID-19 hazards, such as gloves, goggles, and face shields, and provide such personal protective equipment as needed.” “Employers shall evaluate the need for respiratory protection in accordance with section 5144 when the physical distancing requirements in subsection (c)(6) are not feasible or are not maintained.” Employers shall provide and ensure use of respirators in accordance with section 5144 when deemed necessary by Cal/OSHA. § 3205(c)(8)(E).</p>	<p>Employers must conduct a hazard assessment to determine if any PPE is needed to protect employees from hazards that are present or are likely to be present in the workplace, including health hazards. Employers must select and provide employees with properly fitting and sanitary PPE that will effectively protect them against these hazards. Employers must also ensure the appropriate PPE is provided to and used by employees who use cleaners and disinfectants. § 3380.</p> <p>“As required by OSHA standards for PPE, including respiratory protection, and consistent with OSHA and CDC guidance, train workers how to put on, use, and take off PPE; how to clean, maintain, store, and dispose of PPE; and what the limitations of the PPE are.” <i>Fed/OSHA Returning to Work Guidance</i> at 9.</p>
<p>Reporting to Local Health Department: “The employer shall report information about COVID-19 cases at the workplace to the local health department whenever required by law, and shall provide any related information requested by the local health department.” § 3205(c)(9)(A).</p>	<p>In non-healthcare or non-residential congregate setting workplaces, an outbreak is three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period. As of July 28, 2020, employers are required to report outbreaks to the LHD in the jurisdiction where the workplace is located and the LHDs of residence of employees with COVID-19.” <i>Employer Playbook</i> at 9.</p> <p>“Employers must notify the LHD where the workplace is located and where the workers live” when there is an outbreak. <i>Employer Playbook</i> at 10-11.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Reporting to Cal/OSHA: “The employer shall report immediately to the Division any COVID-19-related serious illnesses or death, as defined under section 330(h), of an employee occurring in a place of employment or in connection with any employment.” § 3205(c)(9)(B).</p>	<p>California employers must report to Cal/OSHA any serious illness, serious injury or death of an employee that occurred at work or in connection with work within eight hours of when they knew or should have known of the illness. § 342. “This includes a COVID-19 illness if it meets the definition of serious illness.” https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html A “serious injury or illness” means any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing.”§ 330(h).</p>
<p>Recordkeeping of Steps to Implement CPP: “The employer shall maintain records of the steps taken to implement the written COVID-19 Prevention Program in accordance with section 3203(b).” § 3205(c)(9)(C).</p>	<p>The employer must maintain records of the steps taken to implement and maintain the IIPP, which includes records of scheduled and periodic inspections and documentation of safety and health training. § 3203(b).</p>
<p>Access to CPP: “The written COVID-19 Prevention Program shall be made available at the workplace to employees, authorized employee representatives, and to representatives of the Division immediately upon request.” § 3205(c)(9)(D).</p>	<p>The employer shall allow employees and their “designated representative” access to examine and receive a copy of the IIPP. § 3203(a)(8).</p>
<p>Contact Tracing Recordkeeping: “The employer shall keep a record of and track all COVID-19 cases with the employee’s name, contact information, occupation, location where the employee worked, the date of the last day at the workplace, and the date of a positive COVID-19 test.” “The information shall be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed. § 3205(c)(9)(E).</p>	<p>Employees or their representatives have the right to request and obtain an employer’s Log of Work-Related Injuries and Illnesses (Log 300), without redaction, or to request and obtain information as otherwise allowed by law. § 14300.35.</p>
<p>Exclusion of Confirmed COVID-19 Cases: The employer “shall ensure that COVID-19 cases are excluded from the workplace until the return to work requirements of subsection (c)(11) are met.” § 3205(c)(10)(A).</p>	<p>“When employers identify a worker who has tested positive for COVID-19 or a worker who has symptoms, they should make sure the worker does not remain at work.” <i>Employer Playbook</i> at 21.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Exclusion of Close Contacts: The employer “shall exclude employees with COVID-19 exposure from the workplace for 14 days after the last known COVID-19 exposure to a COVID-19 case.” § 3205(c)(10)(B).</p>	<p>“Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, referral to their LHD.” <i>Employer Playbook</i> at 12.</p>
<p>Exclusion Pay and Benefits: For excluded employees whose exclusion is not work-related and who are otherwise able and available to work, “employers shall 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.” “At the time of exclusion, the employer shall provide the employee the information on benefits.” § 3205(c)(10)(C).</p>	<p>No requirement to provide exclusion pay beyond paid sick leave and supplemental paid sick leave benefits or workers’ compensation.</p> <p>The employer shall “[p]rovide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 if required to by the Families First Coronavirus Response Act.” <i>General Guidelines</i>.</p> <p>“Employers should support workers time away from work for the protection of others through flexible leave policies.” <i>Employer Playbook</i> at 21.</p>
<p>Return to Work Criteria: COVID-19 cases cannot return to work until certain criteria are met. “A negative COVID-19 test shall not be required for an employee to return to work.” § 3205(c)(11).</p>	<p>“Employers should consult with the LHD and most recent CDC guidance for when a confirmed case may be released from home isolation and return to work.” <i>Employer Playbook</i> at 15. The Employer Playbook contains return to work criteria matching that of the ETS. <i>Employer Playbook</i> at 16.</p>
<p>Outbreak – COVID-19 Testing Required: “The employer shall provide COVID-19 testing to all employees at the exposed workplace except for employees who were not present during the period of an outbreak identified by a local health department or the relevant 14-day period(s) under subsection (a), as applicable. COVID-19 testing shall be provided at no cost to employees during employees’ working hours.” § 3205.1(b).</p>	<p>No requirement to provide testing to all employees at the exposed workplace during an outbreak.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Outbreak – Exclusion of Confirmed COVID-19 Cases and Close Contacts: The employer “shall ensure COVID-19 cases and employees who had COVID-19 exposure are excluded from the workplace in accordance with subsections 3205(c)(10) and (c)(11) and local health officer orders if applicable.” § 3205.1(c).</p>	<p>“When employers identify a worker who has tested positive for COVID-19 or a worker who has symptoms, they should make sure the worker does not remain at work.” <i>Employer Playbook</i> at 21.</p> <p>“Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, referral to their LHD.” <i>Employer Playbook</i> at 12.</p>
<p>Outbreak – Investigation of Workplace COVID-19 Illnesses: “The employer shall immediately investigate and determine possible workplace related factors that contributed to the COVID-19 outbreak in accordance with subsection 3205(c)(3).” § 3205.1(d).</p>	<p>The IIPP shall include the employer’s “procedure to investigate occupational injury or occupational illness.” § 3203(a)(5).</p>
<p>Outbreak – Investigation, Review and Hazard Correction: “[T] the employer shall immediately perform a review of potentially relevant COVID-19 policies, procedures, and controls and implement changes as needed to prevent further spread of COVID-19.” The investigation and review shall be documented and include the investigation of new or unabated COVID-19 hazard. The review shall be updated every thirty days the outbreak continues when necessary. “The employer shall implement changes to reduce the transmission of COVID-19 based on the investigation and review.” § 3205.1(e).</p>	<p>The IIPP shall include the employer’s “procedure to investigate occupational injury or occupational illness.” § 3203(a)(5).</p> <p>The IIPP shall “[i]nclude methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard: (A) When observed or discovered; and, (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards. § 3203(a)(6).</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Outbreak – Reporting to Local Health Department: “The employer shall contact the local health department immediately but no longer than 48 hours after the employer knows, or with diligent inquiry would have known, of three or more COVID-19 cases for guidance on preventing the further spread of COVID-19 within the workplace.” “The employer shall provide to the local health department the total number of COVID-19 cases and for each COVID-19 case, the name, contact information, occupation, workplace location, business address, the hospitalization and/or fatality status, and North American Industry Classification System code of the workplace of the COVID-19 case, and any other information requested by the local health department. The employer shall continue to give notice to the local health department of any subsequent COVID-19 cases at the workplace.” § 3205.1(f).</p>	<p>“In non-healthcare or non-residential congregate setting workplaces, an outbreak is three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period. As of July 28, 2020, employers are required to report outbreaks to the LHD in the jurisdiction where the workplace is located and the LHDs of residence of employees with COVID-19.” <i>Employer Playbook</i> at 9.</p> <p>“Employers must notify the LHD where the workplace is located and where the workers live” when there is an outbreak. <i>Employer Playbook</i> at 10-11.</p>
<p>Major Outbreak – COVID-19 Testing Required: The employer “shall provide twice a week COVID-19 testing, or more frequently if recommended by the local health department, to all employees present at the exposed workplace during the relevant 30-day period(s) and who remain at the workplace. COVID-19 testing shall be provided at no cost to employees during employees’ working hours.” § 3205.2(b).</p>	<p>No requirement to provide twice a week testing to all employees at the exposed workplace during a major outbreak.</p>
<p>Major Outbreak –Exclusion of Confirmed COVID-19 Cases and Close Contacts: The employer “shall ensure COVID-19 cases and employees with COVID-19 exposure are excluded from the workplace in accordance with subsections 3205(c)(10) and (c)(11) and any relevant local health department orders.” § 3205.2(c).</p>	<p>“When employers identify a worker who has tested positive for COVID-19 or a worker who has symptoms, they should make sure the worker does not remain at work.” <i>Employer Playbook</i> at 21.</p> <p>“Close contacts of cases should be given instructions on home quarantine and symptom monitoring, information regarding the closest COVID-19 testing sites, referral to their LHD.” <i>Employer Playbook</i> at 12.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Major Outbreak – Investigation of Workplace COVID-19 Illnesses: “The employer shall comply with the requirements of subsection 3205(c)(3).” § 3205.2(d).</p>	<p>The IIPP shall include the employer’s “procedure to investigate occupational injury or occupational illness.” § 3203(a)(5).</p>
<p>Major Outbreak – COVID-19 Hazard Correction: In addition to the requirements of subsection 3205(c)(4), the employer shall meet certain filtration requirements, determine the need for a respiratory protection program or changes to an existing respiratory protection program under section 5144, and evaluate whether to halt some or all operations at the workplace until COVID-19 hazards have been corrected. § 3205.2(e).</p>	<p>The IIPP shall “[i]nclude methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard: (A) When observed or discovered; and, (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards. § 3203(a)(6).</p>
<p>Major Outbreak – Reporting to Local Health Department: The employer “shall comply with the requirements of section 3205.1(f).” § 3205.2(f).</p>	<p>“In non-healthcare or non-residential congregate setting workplaces, an outbreak is three or more laboratory-confirmed cases of COVID-19 among employees who live in different households within a two-week period. As of July 28, 2020, employers are required to report outbreaks to the LHD in the jurisdiction where the workplace is located and the LHDs of residence of employees with COVID-19.” <i>Employer Playbook</i> at 9.</p> <p>“Employers must notify the LHD where the workplace is located and where the workers live” when there is an outbreak. <i>Employer Playbook</i> at 10-11.</p>
<p>Employer-Provided Housing – Assignment of Housing Units: The employer shall ensure that shared housing unit assignments are prioritized for family members, followed by employees who work in the same crew or at the same worksite. § 3205.3(b).</p>	<p>Fed/OSHA, <i>Additional Considerations for Workers Who Reside in Communal Living Arrangements</i> (“<i>Fed/OSHA Communal Living Guidance</i>”), https://www.osha.gov/coronavirus/control-prevention/workers-in-shared-housing.</p> <p>The employer should “[c] Consider grouping healthy workers together into cohorts that include the same workers each day. This can increase the effectiveness of altering normal shift schedules by making sure that groups of workers are always assigned to the same shifts with the same coworkers. Effectiveness is optimized if it is aligned with shared living quarters and shared transportation.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i> (Nov. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Employer-Provided Housing – Physical Distancing: The employer shall “[e]nsure the premises are of sufficient size and layout to permit at least six feet of physical distancing between residents in housing units, common areas, and other areas of the premises.” The employer shall “[e]nsure beds are spaced at least six feet apart in all directions and positioned to maximize the distance between sleepers’ heads,” or at least arranged to minimize face to face sleeping. § 3205.3(c).</p>	<p>“Employers who house workers are encouraged to be proactive in making physical distancing possible.” Cal/OSHA, COVID-19 Infection Prevention for Agricultural Employers and Employees” (Oct. 27, 2020), https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Agriculture.pdf.</p> <p>“Efforts to eliminate the hazard from shared living arrangements may include: . . . using single unit housing (e.g., trailers/recreational vehicles, hotel or motel rooms) rather than dormitory/bunkhouse style housing.” <i>Fed/OSHA Communal Living Guidance</i>.</p> <p>“Examples of engineering controls in shared living arrangements that may be useful for protecting workers from COVID-19 include: Configuring common living areas (e.g., kitchens, bathrooms, living rooms) to support social distancing of workers spaced at least six feet apart and to minimize the need for workers to be face-to-face and in close proximity to one another . . . Extending the minimum separation distances between beds and minimizing or avoiding the use of bunk beds so that a minimum of six feet is achieved between each bed, with workers sleeping in opposite directions (head to toe) to keep heads as far away from each other as possible.” <i>Fed/OSHA Communal Living Guidance</i>.</p> <p>The employer should “[s]upport social distancing during the entire time farmworkers are housed, including while recreating, cooking, and sleeping.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i>.</p>
<p>Employer-Provided Housing – Face Coverings: The employer “shall provide face coverings to all residents and provide information to residents on when they should be used in accordance with state or local health officer orders or guidance.” § 3205.3(d).</p>	<p>“Examples of administrative controls and safe work practices in shared living arrangements that may be useful for protecting workers from COVID-19 include: . . . Encouraging use of cloth face coverings in shared spaces, especially when it is difficult to maintain social distancing.” <i>Fed/OSHA Communal Living Guidance</i>.</p> <p>Encourage residents to wear cloth face coverings in shared spaces. <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i>.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Employer-Provided Housing – Cleaning and Disinfecting: Employers shall ensure that housing units, kitchens, bathrooms, and common areas are effectively cleaned and disinfected at least once a day to prevent the spread of COVID-19. Cleaning and disinfecting shall be done in a manner that protects the privacy of residents.” “Employers shall ensure that unwashed dishes, drinking glasses, cups, eating utensils, and similar items are not shared.” § 3205.3(e).</p>	<p>Enhanced sanitation measures include the following: “Provide disposable gloves, soap for hand washing, and household cleaners to help residents and staff implement personal preventive measures. Develop and implement enhanced sanitation and cleaning plans that address frequency of sanitation and cleaning, and identify a responsible person. Do not share dishes, drinking glasses, cups, or eating utensils. Non-disposable food service items used should be handled with gloves and washed with dish soap and hot water or in a dishwasher.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers.</i></p>
<p>Employer-Provided Housing – Screening: “The employer shall encourage residents to report COVID-19 symptoms to the employer.” § 3205.3(f).</p>	<p>“Efforts to eliminate the hazard from shared living arrangements may include: . . . screening workers moving into employer-furnished housing for symptoms of COVID-19 before they enter (e.g., using mechanisms for worker self-reporting of symptoms).” <i>Fed/OSHA Communal Living Guidance.</i></p> <p>The employer should “[c]onsider instituting daily health checks (e.g., symptom and/or temperature screening) and daily reporting to supervisors prior to and during the housing period to identify illnesses early.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers.</i></p>
<p>Employer-Provided Housing – COVID-19 Testing: “The employer shall establish, implement, and maintain effective policies and procedures for COVID-19 testing of occupants who had a COVID-19 exposure, who have COVID-19 symptoms, or as recommended by the local health department.” § 3205.3(g).</p>	<p>No guidance on testing.</p>

<p align="center">Cal/OSHA’s COVID-19 Emergency Temporary Standards</p>	<p align="center">Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)</p>
<p>Employer-Provided Housing – Isolation of Confirmed COVID-19 Cases and Close Contacts: Employers shall effectively isolate COVID-19 cases from all occupants who are not COVID-19 cases and effectively isolate close contacts from all other occupants. § 3205.3(h).</p>	<p>“Employers who house workers are encouraged . . . to take affirmative steps to quarantine any housed worker exhibiting symptoms.” Cal/OSHA, COVID-19 Infection Prevention for Agricultural Employers and Employees” (Oct. 27, 2020), https://www.dir.ca.gov/dosh/Coronavirus/COVID-19-Infection-Prevention-in-Agriculture.pdf.</p> <p>“Efforts to eliminate the hazard from shared living arrangements may include: assigning workers who have been tested for COVID-19 and do not have the virus to reside in designated employer-furnished housing, separate from those who have not yet been tested (i.e., cohorting workers); screening workers moving into employer-furnished housing for symptoms of COVID-19 before they enter (e.g., using mechanisms for worker self-reporting of symptoms); assigning workers who are ill or exhibiting signs and symptoms of COVID-19 to reside in designated employer-furnished housing away from healthy workers (quarantining workers); and using single unit housing (e.g., trailers/recreational vehicles, hotel or motel rooms) rather than dormitory/bunkhouse style housing.” <i>Fed/OSHA Communal Living Guidance</i>.</p> <p>The employer should “[e] Establish isolation plans for responding to farmworkers with COVID-19.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i>.</p>
<p>Employer-Provided Transportation – Assignment of Transportation: : The employer shall prioritize transportation assignments for the same housing unit, followed by employees who work in the same crew or at the same worksite. § 3205.4(b).</p>	<p>“Owners/operators should maximize opportunities to place farmworkers residing together in the same vehicles for transportation and in the same cohorts to limit exposure.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i>.</p> <p>The employer should “[g]roup (or cohort) workers in the same crews and/or those sharing living quarters together when transporting.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers</i>.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Employer-Provided Transportation – Physical Distancing and Face Coverings: The employer shall ensure the following “[p]hysical distancing and face covering requirements of subsection 3205(c)(6) and (c)(7) are followed for employees waiting for transportation;” “[t]he vehicle operator and any passengers are separated by at least three feet in all directions during the operation of the vehicle, regardless of the vehicle’s normal capacity;” and “[t]he vehicle operator and any passengers are provided and wear a face covering in the vehicle as required by subsection 3205(c)(7).” § 3205.4(c).</p>	<p>The employer should “[g] Provide as much space between riders as possible” and “[i]ncrease the number of vehicles and the frequency of trips to limit the number of people in a vehicle.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers.</i></p>
<p>Employer-Provided Transportation – Screening: The employer “shall develop, implement, and maintain effective procedures for screening and excluding drivers and riders with COVID-19 symptoms prior to boarding shared transportation.” § 3205.4(d).</p>	<p>No specific guidance on screening for transportation.</p>
<p>Employer-Provided Transportation – Cleaning and Disinfecting: The employer shall ensure that all high-contact surfaces are cleaned and disinfected before each trip and between different drivers. The employer “shall provide sanitizing materials and ensure they are kept in adequate supply.” § 3205.4(e).</p>	<p>“Transportation vehicles should be cleaned and disinfected in accordance with CDC guidelines for non-emergency transport vehicles before and after each trip, or daily at minimum.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers.</i></p>
<p>Employer-Provided Transportation – Ventilation: The employer “shall ensure that vehicle windows are kept open, and the ventilation system set to maximize outdoor air and not set to recirculate air.” Windows do not have to be kept open if certain conditions are met. § 3205.4(f).</p>	<p>No specific guidance on ventilation for transportation.</p>

Cal/OSHA’s COVID-19 Emergency Temporary Standards	Cal/OSHA’s General and Industry-Specific Guidance (Pre-Nov. 19, 2020)
<p>Employer-Provided Transportation – Hand Hygiene: The employer “shall provide hand sanitizer in each vehicle and ensure that all drivers and riders sanitize their hands before entering and exiting the vehicle. Hand sanitizers with methyl alcohol are prohibited.” § 3205.4(g).</p>	<p>The employer should “[m]ake hand hygiene (hand washing/hand sanitizer) available and encourage riders to use hand hygiene before entering the vehicle and when arriving at destination.” <i>Fed/OSHA & CDC Joint Guidance on Agriculture Workers & Employers.</i></p>

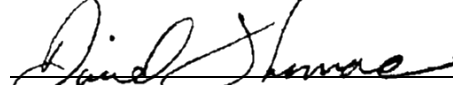
STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
(916) 274-5721

In the Matter of a Petition by:)
)
Stephen Knight, Exec. Director)
Worksafe)
)
Frances C. Schreiber,)
Labor & Employment Committee)
of the National Lawyers Guild)
)
1736 Franklin Street, Ste. 500)
Oakland, CA 94612)
)
_____)
Applicant.)

PETITION FILE NO. 583

The Occupational Safety and Health Standards Board hereby adopts the attached PROPOSED DECISION.

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD



DAVID THOMAS, Chairman




BARBARA BURGEL, Member



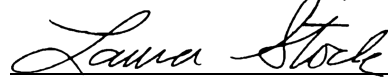
DAVE HARRISON, Member



NOLA KENNEDY, Member



CHRIS LASZCZ-DAVIS, Member



LAURA STOCK, Member

By: 

Christina Shupe, Executive Officer

DATE: September 17, 2020
Attachments

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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PETITION FILE NO. 583
PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on May 20, 2020, filed by Worksafe and National Lawyers' Guild, Labor & Employment Committee (Petitioners), requesting that the Board amend title 8 standards to create two new regulations. The first, a temporary emergency standard that would provide specific protections to California employees who may have exposure to COVID-19, but who are not protected by the Aerosol Transmissible Diseases standards (sections 5199 and 5199.1)¹. The second proposed standard would be a permanent rulemaking effort to protect workers from infectious diseases including novel pathogens (e.g. COVID-19).

Labor Code section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and render a decision no later than six months following receipt. This time frame has been extended by 120 days, by California Governor Gavin Newsom's Executive Orders N-63-20, and N-71-20, in recognition of the State of Emergency caused by COVID-19.

Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation. The Division has 60 days after receipt to submit an evaluation regarding the proposal; this timeline, running concurrently with the Board's timeline as described above, has also been extended by 120 days pursuant to Executive Orders N-63-20 and N-71-20.

SUMMARY

The Petition requests the Board adopt new regulatory requirements including, but not restricted to:

- Establishing a framework parallel to the Illness and Injury Prevention Program (IIPP) regulation, section 3203, which requires employers to create a written plan for employee protection;

¹ Unless otherwise noted, all references are to the California Code of Regulations, title 8.

- Creating procedures to identify and evaluate COVID-19 hazards, and to identify jobs categories, tasks, and procedures where employees may be exposed to COVID-19, as well as procedures to control the hazard of exposure;
- Creating procedures to respond to employees who have been diagnosed with COVID-19, who have symptoms of COVID-19, and who have been exposed to COVID-19;
- Establishing a job hazard analysis to identify modes of transmission in the workplace and adopt and implement preventative measures to minimize risk, including social distancing, ventilation systems, hygiene measures, and personal protective equipment (PPE);
- Institute a provision of employee training.

EMERGENCY RULEMAKING

The Government Code section 11346.1 provides for expedited rulemaking, under certain emergency circumstances, allowing for adoption of regulations generally remaining in effect for 180 days. The requisite “emergency” is defined as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (G.C. section 11342.545.) Per G.C. section 11346.1(b)(2), “[a] finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If 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.”

At least five days prior to submission of the proposed emergency regulation to the Office of Administrative Law (OAL) for review, notice of the proposed action is to be sent to persons having filed a request for notice of regulatory action with OAL. (G.C. section 11346.1(a)(2).) OAL guidelines specify completion of its pre-adoption review within 10 calendar days of submission. (G. C. section 11349.6(b).)

The submitting agency is not required to provide the 5 day notice if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. (G.C. section 11346.1(a)(3).)

DIVISION EVALUATION

In its report concerning the Petition, dated July 30, 2020, the Division reviewed the Petitioner’s proposed changes to title 8. The review included an assessment of the hazards associated with exposure to COVID-19, information provided in the Petition, applicable title 8 standards, federal OSHA standards, and Cal/OSHA enforcement authority.

The Division staff evaluation recommends the Petition be approved. The Division’s report finds that an emergency regulation is warranted by the COVID-19 public health crisis. While section 5199 provides specific protections for infectious diseases such as COVID-19, it does not cover all California workers. The Division’s report also finds that while there are general title 8

provisions that constitute a basis for Cal/OSHA to enforce the protection of workers from COVID-19, enforcement efforts would benefit from a specific regulatory mandate related to prevention of the spread of infectious diseases. Moreover, guidance currently exists from a number of authorities—including both federal OSHA and Cal/OSHA—on how employers can best protect workers from COVID-19, making development of an emergency standard feasible.

The Division’s evaluation concludes that protections similar to current guidelines could be adopted via an emergency regulation, and the adoption of such standards would create clarity for employers and assist the Division’s enforcement efforts. The Division also recommends an advisory committee be convened after the pandemic subsides to determine whether a permanent regulation should be adopted to address the protection of non-5199 workers from infectious diseases, including novel pathogens.

BOARD STAFF EVALUATION

The Board staff evaluation dated August 10, 2020, included a review of the Petition, and relevant federal, California, consensus, and other standards. The evaluation notes that as of September 8, 2020, state government website <https://covid19.ca.gov> reports there were over 453,000 COVID-19 cases in California, and over 8,000 people had died from the illness. That website, as of September 2, 2020, reports over 737,000 cases of COVID-19, and 13,758 deaths. Moreover, the overall impact of the illness has been disproportionately borne by the state’s Latino population.

The Board staff evaluation recognizes that COVID-19 exposure is a significant issue, but the evaluation is not persuaded that further rulemaking is necessary. Many of the regulatory additions requested by the Petitioner were found by the Board staff evaluation to already be required by existing title 8 regulations. The Board staff evaluation suggests that enforcement and consultative outreach, rather than new regulations, would be the most effective use of limited state resources.

DISCUSSION

According to research cited in the Division’s evaluation, organ failure and death may result from COVID-19. (Division, p. 5.) Approximately 14% of COVID-19 patients are hospitalized, and individuals with underlying health conditions being most at risk for hospitalization and death. (*Id.*) Both the Division and Board staff evaluations clearly set forth the seriousness of the COVID-19 pandemic, which is responsible for the illnesses, hospitalizations, and deaths of thousands of Californians. The Board staff evaluation, however, questions whether new regulations are necessary.

The Board acknowledges the concerns presented by the Board staff evaluation, regarding promulgation of new regulations and use of State resources. While those concerns are taken seriously, ultimately, the Board is in agreement with the Petitioners’ assessment, and Division’s assertion as the enforcement agency, that an emergency regulation would enhance worker safety. COVID-19 is a hazard to working people. The Division is well positioned, as the State agency

responsible for enforcement, to advise the Board regarding the enforceability of new safety order requirements under consideration. Accordingly, the Board also accepts the Division's assertion that an emergency regulation would strengthen, rather than complicate, the Division's enforcement efforts.

CONCLUSION AND ORDER

The Board has considered the Petition and the recommendations of the Division and Board staff. For reasons stated in the preceding discussion, the Petition is hereby GRANTED in part as follows:

The Division is requested to work with Board staff to expeditiously submit a proposal for an emergency regulation to protect all workers not covered by section 5199 from COVID-19 exposure in the workplace, for consideration no later than the November 19th, 2020 Board meeting. The proposal should include the proposed Emergency Regulatory Text, Finding of Emergency, and an Economic Impact Statement.

In the event the Board adopts an emergency regulation as a result of said proposal:

The Board requests the Division work with Board staff to convene a representative advisory committee to review any emergency COVID-19 rulemaking(s) adopted by the Board, for the purpose of establishing reasonable and necessary improvements required to avoid serious harm, as further guidance on the prevention of workplace transmission and exposure becomes available. The emergency rulemaking advisory committee should address these issues:

1. The prevailing guidance for worker protections from COVID-19 exposure in the workplace;
2. Notification for affected employers and workers;
3. Current industry best practices and guidelines; and
4. Considerations for the most vulnerable/impacted industries and professions.

The Petitioners should be invited to participate. Representatives for the following stakeholders should also be invited to participate:

1. California Department of Public Health
2. A representative cross-section of County and City Public Health Officers
3. A representative cross-section of Labor and Management representatives

The Division is requested to report back to the Board within 4 months, and again at 8 months, after the initial adoption of an emergency regulation, and within 4 months of any re-adoption.² The Board requests that this report include the following items at a minimum:

² Pursuant to Governor's Executive Order N-40-20, the timelines for filing, refiling, certification and/or review of regulations and emergency regulations are extended for a period of 60 calendar days. These timelines are further extended for 60 days by Executive Order N-66-20.

1. The dates of any advisory committee meetings and a list of invitees and participants;
2. A brief summary of the discussion, including participant concerns, and any available minutes;
3. Dates of future meetings, if applicable; and
4. Whether the Division is preparing to propose amendments to the emergency rulemaking, and the projected timeframe for providing the proposal to Board staff for notice of proposed emergency rulemaking.

If proposed amendments to an emergency rulemaking are being prepared, it should include the proposed updated Emergency Regulatory Text, updated Finding of Emergency (including evidence of necessity to avoid serious harm), and updated Economic Impact Statement.

Furthermore, the Board requests the Division convene a representative advisory committee after the COVID-19 pandemic subsides, as evidenced by the lifting of the State of Emergency declared by Governor's proclamation on March 4, 2020, to consider the necessity for a permanent regulation to protect workers not covered by section 5199 from airborne infectious diseases, including novel pathogens.

From: Chavez, Rosalba@EDD <Rosalba.Chavez@edd.ca.gov>

Sent: Tuesday, December 29, 2020 4:09 PM

Subject: Cal/OSHA Emergency Regulations to Protect Workers from COVID-19

Dear H-2A Employer,

We hope that this email finds you well during this challenging time. The Employment Development Department (EDD), Foreign Labor Certification Unit (FLCU), is responsible for administering the Temporary Agricultural Program (H-2A) program in California. In order to assist H-2A employers during the COVID-19 pandemic, we are sharing recently approved Emergency Temporary Standards on COVID-19 Prevention.

The California Occupational Health and Safety Standards Board adopted the [Emergency Temporary Standards](#) effective November 30, 2020. These new standards require employers to establish a written COVID-19 Prevention Program to add to your Injury and Illness Prevention Program, which addresses requirements on how to protect employees in the workplace, employer-provided housing, and transportation.

The EDD would like to emphasize the new housing requirements by including the two sections the

Division of Occupational Safety and Health (Cal/OSHA) has included in its *Model COVID-19 Prevention Program* (CPP) as examples that employers will adopt in their CPP:

Assignment of Housing Units

Ensure that shared housing unit assignments are prioritized in the following order:

- Residents who usually maintain a household together outside of work, such as family members, will be housed in the same housing unit without other persons.
- Residents who work in the same crew or work together at the same worksite will be housed in the same housing unit without other persons.
- Employees who do not usually maintain a common household, work crew, or worksite will be housed in the same housing unit only when no other housing alternatives are possible.

Physical Distancing and Controls

Ensure:

- The premises are of sufficient size and layout to permit at least six feet of physical distancing between residents in housing units, common areas, and other areas of the premises.
- Beds are spaced at least six feet apart in all directions and positioned to maximize the distance between sleepers' heads. For beds positioned next to each other, i.e., side by side, the beds will be arranged so that the head of one bed is next to the foot of the next bed. For beds positioned across from each other, i.e., end to end, the beds will be arranged so that the foot of one bed is closest to the foot of the next bed. Bunk beds will not be used.
- Maximization of the quantity and supply of outdoor air and increase filtration efficiency to the highest level compatible with the existing ventilation system in housing units.

The EDD will be following the new Emergency Temporary Standards with an emphasis on the Housing Inspections to ensure compliance within the H-2A Program.

For more information on the new Emergency Temporary Standards, contact the Cal/OSHA's Consultation Services Branch at 1-800-963-9424.

For questions regarding employer-provided housing, contact Brenda Wherry, EDD Housing Coordinator, at 916-639-0462; Cornelio Gomez, Foreign Labor and Farmworker Services Group Manager, at 916-926-9047; or email WSBHousingH2A@edd.ca.gov.

Thank you,

Rosalba Chavez

Foreign Labor Certification Analyst

Foreign Labor and Farmworker Services Group, MIC #50

Workforce Services Branch

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