November 18, 2020

Cal/OSHA Standards Board Members
Occupational Safety & Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
oshsb@dir.ca.gov

Christina Shupe, Executive Officer
Occupational Safety & Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
cshupe@dir.ca.gov

Douglas Parker
Director, Division of Occupational Safety and Health
1515 Clay Street
Suite 1901
Oakland, CA 94612
DParker@dir.ca.gov

RE: Draft COVID-19 Emergency Standard, Released November 12, 2020

Dear Members of the Standards Board, Ms. Shupe, and Mr. Parker:

We, the undersigned organizations (Coalition) write with concerns regarding the draft emergency regulation on COVID-19 resulting from Petition 583. We represent the breadth of California employers, across all regions and sectors of California, public and private, large and small, from agriculture to manufacturing to tourism. We write to comment on the draft regulation text released on November 12, 2020, which the Cal/OSHA Standards Board (the "Standards Board") will consider during the November 19th Board meeting (the "Draft Regulation").[1]

At the outset, we want to emphasize that we appreciate the seriousness of COVID-19's threat to the people of California. We are committed to addressing COVID-19 and complying with the legion of already-existing state, county, legal mandates, and local guidance – including Cal/OSHA's guidance documents, as well as the new legislative mandates which will come into force on January 1st of 2021, including **AB 685**, **AB 1867,** and **SB 1159**. We also appreciate the haste with which the Division of Occupational Health and Safety (the "Division) has worked to prepare this Draft Regulation. It was a complicated task to create a regulation that was consistent with all of the existing guidance documents, as well as applicable to virtually all workplaces in the state. In support of that effort, we offer this letter to identify concerns with the Draft Regulation that must be addressed either before passage by the Standards Board or with all haste after its passage.

Procedural Concerns and the Need for an Advisory Committee.

We firmly believe the best regulations are a result of close communication between agency staff and stakeholders. When all sides bring knowledge and experience, the resulting regulation more accurately addresses the targeted concern(s), is more clear in its requirements, and is more applicable to California's workplaces.

With that in mind, we have serious concerns about the lack of stakeholder input during the two-month development of this Draft Regulation, and the short time period allowed for comment prior to the anticipated vote on November 19, 2020. Representatives for both employers and labor have had insufficient opportunity

[1] Draft Regulation text available here: https://www.dir.ca.gov/OSHSB/documents/COVID-19-Prevention-Emergency-txtbrdconsider.pdf

to review and comment on this lengthy and significant emergency regulation. To be clear, we do not contest the legal sufficiency of the five business days of notice provided by the November 12, 2020 release of the Draft Regulation's text, but instead believe that a regulation of this broad scope merits at least some advisory committee process and stakeholder input, similar to the process utilized for the Wildfire Smoke Emergency Standard (Section 5141.1) which was approved in 2019. As the Standards Board voted against any such advisory process in its September Adopted Decision on Petition 583, we hope that the Standards Board and the Division will move expeditiously to schedule and commence an advisory committee if the Draft Regulation is approved by the Board. In addition, for all future emergency regulations, we would urge at least one advisory committee meeting to gather stakeholder input. We are also concerned about the extent to which the Standards Board may be relying too heavily on the emergency regulatory process to promulgate regulations that could, and should, be undertaken through the normal non-emergency regulatory process. While the regulatory process can be lengthy and deliberative, we believe this process results in clearer, safer, more effective regulations because of the input from all stakeholders.

Workplaces Must Be Allowed Time for Compliance.

The Draft Regulation is a sweeping document, necessitating significant changes in workplaces across California. Some of these changes will not be feasible to implement in the short time window between the Board's potential passage of the Draft Regulation on November 19th and the anticipated potential compliance date of November 29th. This is particularly true where obligations may remain somewhat vague at the time of passage. To that end, we would urge the Standards Board and the Division consider a staggered implementation, giving employers of all sizes – large and small, rural and urban – time to come into compliance with some of the more significant portions of the Draft Regulation.

Substantive Concerns Regarding the Draft Regulation.

Broadly speaking, we believe the Draft Regulation appropriately focuses on performance-based standards, as opposed to the prescriptive details included in the initial draft accompanying Petition 583. With that said, we have substantial concerns regarding the clarity of the regulation and the feasibility for California's employers to comply with its provisions in the time period permitted before it goes into effect.

Clarity is particularly important in a regulation such as this one, where employers of all sizes and all industries will need to rapidly move into compliance. Small businesses, without the benefit of an in-house counsel, will need to read this regulation and figure out how to comply. With a particular eye towards these small businesses, we would urge an over-arching review for clarity and organization. For example – the Draft Regulation's text has multiple areas where one subdivision contains a requirement (for example, physical distancing in § 3205(c)(6)), but the exceptions are held in a different subdivision, pages later (see § 3205(c)(8) – "where it is not possible to maintain physical distancing …"). Therefore, in addition to the specific concerns outlined below, we urge a review and revision towards clarifying the organization of the Draft Regulation as soon as possible.

§ 3205(a). Scope.

Generally, we believe the exemptions to the scope could use clarification to better address the flexible working situations that COVID-19 has made much more common.

1) **"Employees working from home" should be clarified.** The present definition fails to address two additional situations related to the home: splitting time between home and the workplace, and working from home-like environments, such as a hotel room or other non-"place of employment" that would fall outside of exception (B). To address both of these situations, we would urge the exemption be changed to "Employees *when they are* working remotely outside the employer's workplace."

2) **"Exemption for employees who do "not have contact with other persons" should correspond to later exemption for fleeting contact.** The exemption for employees who do "not have contact with other persons" should be clarified to include the same exemption as utilized in § 3205(c)(6), such that workplaces with momentary contact would not be covered. For example, a security guard's post where one employee sits alone at a post, then, at the end of the shift, switches places with an employee, who then sits alone at a post. This might also apply if an employee is

working while traveling and under temporary two-week quarantine at a hotel – though they may pass individuals in the hallway of the area they are quarantining, they have essentially no contact.

§ 3205(b). Definitions.

1) **Testing or diagnosis must not be required to end a "COVID-19 case."** – There is an apparent conflict between the definition for a "COVID-19 case" in § 3205(b), and the "Return to work criteria" guidelines in § 3205(c)(11). To no longer be considered a COVID-19 case, a person must be certified by a licensed health care professional, in accordance with recommendations made by the California Department of Public Health or local health department. In effect, this requires an affirmative determination for a person to no longer be considered a "COVID-19 case" under the Draft Regulation. Conversely, the "Return to work criteria" specifically note that "[a] negative COVID-19 test shall *not* be required for an employee to return to work." Instead, the return to work criteria rely on a time period after a COVID-19 case's test and/or symptoms, pursuant to CDC guidelines. Though we do not believe this ambiguity is the intent of the Division, functionally, this ambiguity will have two results. First, it will be confusing to employers and workers. Second, it creates absurd compliance requirements because an employee who has fully recovered from COVID-19 (but not received a diagnosis of recovery from a doctor) will continue to qualify as a "COVID-19 case" for purposes of the regulation. Consequentially, all obligations that are triggered by the presence of a COVID-19 case[2] will be perennially triggered by this employee, regardless of whether they have now recovered and present no risk. This includes: §§ 3205(c)(3)(A), (B), and (c)(9)(E). This unintended conflict could be resolved by adding a provision to the definition of a "COVID-19 case" noting that any COVID-19 case who meets the requirements of § 3205(c)(11) regarding returning to work will no longer be considered a "COVID-19 case" for purposes of this regulation.

2) **The definition of a "COVID-19 case" should consider multi-state employers. –** The definition of COVID-19 case presently fails to consider that a doctor outside of California may be monitoring or treating an employee of a multi-state employer, who travels among facilities. As an example: under the present text, an out-of-state doctor could not determine that the employee did not have COVID-19, and therefore was no longer a COVID-19 case. To address this situation, we would request a recognition of doctors outside of California be added to the definition of COVID-19 case.

3) **"Exposed Workplace" should correspond as precisely as possible to AB 685's language. –** Multiple provisions in this regulation seem designed to correspond with **AB 685**, including the definition of "exposed workplace" and § 3205(c)(3)(B) related to notice. To ensure that employers can feasibly comply with both, we would urge that the definitions and provisions of the regulation be kept as consistent with **AB 685** as possible.

4) **"Face Covering" should correspond with CDPH guidance. –** The Draft Regulation's provisions regarding face masks should track CDPH guidance regarding face coverings.[3] As drafted, differences exist in a few areas, but particularly in the definition of what is considered a "face covering" between CDPH and the Draft Regulation.

5) **"High-risk exposure period" should reference a "COVID-19 case."** – Throughout the regulation, this term is only used in reference to the exposure period of a COVID-19 case,[4] but the definition itself fails to refer to a COVID-19 case, creating ambiguity as to the potential for a symptomatic person who fails to meet the definition of a COVID-19 case qualifying as having a "high-risk exposure period." To address this ambiguity, we would urge that the definition be altered to include a COVID-19 case being a necessary component.

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[2] This unintended "trigger" would be all locations in the Draft Regulation where "COVID-19 case" is mentioned without reference to the "high-risk exposure period," which corresponds to the return to work guidelines and prevents application to the fully recovered cases.

[3] https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx

[4] See §§ 3205(c)(3)(B)(2)/ (3), and (c)(8)(C)(3).

§ 3205(c). Written COVID-19 Prevention Program.

We appreciate the clarity regarding employers' ability to integrate the COVID-19 Prevention Program into their existing Injury and Illness Prevention Program or maintain it in a separate document, as well as the clarity regarding its required provisions, but do have some outstanding concerns.

First, we are concerned with the feasibility of putting into place all of the identified requirements for the written COVID-19 Prevention Program within the short timeline before the Draft Regulation may go into effect, if it is passed on November 19th, 2020. Though we are of course aware of the existing requirement to have a COVID-19 plan, as laid out in the Governor's "Employer Playbook,"[5] the details of this Draft Regulation may require revisions to employers' existing COVID-19 plans and practices, and such revision will take time and the assistance of counsel to draft, and additional time to put into practice. We hope such practical considerations are not lost on the Standards Board or Division in enforcement – particularly when stakeholders truly have not had the opportunity to review and prepare for these requirements for more than a few days. This is in stark contrast to stakeholders' ability to prepare for compliance if, as with a traditional advisory process, the text (or some approximation of it) had been publicly released months before the Standards Board vote.

1) **§ 3205(c)(1)(B). Employer's obligations to COVID-vulnerable employees should be clarified. –** The Draft Regulation requires that employers must "Describe procedures … for accommodating employees with medical or other conditions that put them at increased risk of severe COVID-19 illness." This is problematic for a number of reasons. First, there is no such requirement to *have such a policy,* so compelling employers to describe such procedures is confusing. Second, employers should not be put in the place of gathering and analyzing their employees' health conditions to identify such vulnerabilities. Third, this language utilizes the term "accommodation" – like the California Fair Employment and Housing Act – which raises the issue of whether Cal/OSHA has the authority to regulate such accommodations. Putting that aside and accepting disability accommodation as a model for this discussion – the conditions that might increase susceptibility to COVID-19 are not necessarily disabilities, so treating them as such will create confusion for employers.[6] For example, age, while not inherently a disability, could influence one's risk vis-a-vis COVID-19. Such a requirement is particularly problematic where, as here, the scientific community's understanding of COVID-19 is constantly evolving. To resolve this ambiguity, we would recommend adding a caveat that "Such procedures or policies are not required but, should they exist, they should be communicated effectively to employees."

2) **§ 3205(c)(1)(C). Employer's obligations to inform of possible consequences should be clarified. –** The Draft Regulation requires the employer to inform employees of the possible "consequences" of a positive test. This language is unclear as to what "consequences" must be trained on and should be clarified to ensure employers can comply by providing effective training. To this end, this section should be altered with examples to assist employers in compliance. For example, such language could read: ". . . consequences of a positive test, such as the need to isolate, the health risks of COVID-19, and the potential for asymptomatic spread."

3) **§ 3205(c)(2)(A). Employee participation should be clarified. –** As written, the Draft Regulation's section regarding "Identification and evaluation of COVID-19 hazards" requires employers to "allow for employee and authorized employee representative participation in the identification and evaluation of COVID-19 hazards." We are not opposed to employee participation and agree that it is important for ensuring a safe workplace. However, we would like to request some clarity be provided in the Draft Regulation about the potential forms this employee participation may take. We would request an addition that: "Such participation may take the form of a suggestion box, phone line, e-mail account, or any other method of soliciting and receiving employee feedback. This does not allow an employee or authorized representative to disrupt the workplace or involve third parties in efforts to identify and evaluate COVID-19 hazards."

[5] Available here: https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf.

[6] The Fair Employment and Housing Act defines a disability as, generally, a physical or mental impairment that limits a major life function, such as working.

4) **§ 3205(c)(2)(D). Treatment of employees as "potentially infectious" should be clarified. –** As written, the Draft Regulation's section regarding "Identification and evaluation of COVID-19 hazards" requires employers to "treat all persons, regardless of symptoms or negative COVID-19 test results, as potentially infectious." We would ask that the phrase ". . . for purposes of this workplace-specific identification" or "For purposes of this subdivision . . ." be added to the end of the final sentence of this subdivision, to clarify that employers only need to assume all employees are infectious for purposes of this provision.

5) **§ 3205(c)(2)(E). Analysis of outdoor air maximization and air filtration should include consideration of alternative restrictions, such as safety or control. –** As written, the Draft Regulation repeatedly references considering maximizing outdoor air, but fails to acknowledge multiple settings where countervailing interests may make such actions infeasible. For example: for businesses who rent buildings, the employer may have limited control over the structure. Alternatively, certain safety-sensitive workplaces may not be able to simply open windows, as allowing direct, open-air access poses unique security concerns. These sections do not, however, acknowledge these countervailing interests.[7]

6) **§ 3205(c)(3)(A). Employers cannot monitor and "verify" COVID-19 case status.** The Draft Regulation requires employers have procedures "for verifying COVID-19 case status . . ." This is problematic because it suggests employers should monitor the changing medical status of their employees. Employers cannot, and do not want to, place themselves in the place of constantly seeking medical information and verifying the medical status of their employees. Similarly, HIPPA issues may prevent healthcare providers from distributing such information to employers. To clarify, we would request this language be clear that employees need a procedure to investigate and receive information regarding COVID-19 test results and symptoms, but do not need to "verify" such status.

7) **§ 3205(c)(3)(B)(3). Employers' notice obligations should match those of AB 685. – AB 685**[8] (Reyes – 2020) requires employers to provide notice of COVID-19 workplace exposure, and we understand that the Draft Regulation was intended to include some rulemaking related to **AB 685**. However, it appears the Draft Regulation differs from **AB 685** in multiple aspects, which should be made consistent.

   a) **AB 685** requires employers provide ***written*** notice to employees of potential exposure, whereas the Draft Regulation does not specify written notice.

   b) **AB 685** identifies a different population of employees to receive notice than the Draft Regulation. The Draft Regulation provides that notice should be given to all employees who "may have had COVID-19 exposure and their authorized representatives." As an initial point, "may have had" an exposure is problematic, and should be altered to "were exposed" if it is retained. Assuming this is addressed, then pursuant to the definition of "COVID-19 exposure," this means all employees who were "within six feet of the COVID-19 case for a cumulative total of 15 minutes or greater in a 24-hour period." In contrast, **AB 685** requires notice to "all employees, and the employers of subcontracted employees, who were on the premises at the same worksite as the qualifying individual."[9] To create consistency, we would urge that the Draft Regulation's notice provisions utilize the **AB 685** definition (or the closest version in the regulation, the "exposed workplace"), and the Draft Regulation's testing requirements remain based on the "COVID-19 exposure" definition.

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[7] See § 3205(c)(2)(E)(3).

[8] See Labor Code § 6409.6 (a)(4).

[9] Notably, **AB 685** also provides for two other populations to receive notice ("all employees who may have been exposed" and "all employees") in subsequent provisions, but we anticipate these definitions may be brought into alignment in pending clean-up legislation during the 2021 session.

c) Regarding notice to independent contractors, **AB 685** again differs from the Draft Regulation. **AB 685** requires that employers "[n]otify all employees, and the employers of subcontracted employees and the exclusive representative." In contrast, the Draft Regulation requires notice to all "independent contractors and other employers present at the workplace . . ." To address this dichotomy, we would ask that the Draft Regulation be revised to require notice to all *employees and independent contractors of the employer* in subdivision (3)(a), then to all other "employers of subcontracted employees or independent contractors" in (3)(b). This would prevent employers from having to locate independent contractors who passed through their worksite pursuant to a contract with another employer.

8) § 3205(c)(3)(B)(4). Employers' testing obligations appear infeasible and should be clarified. – The Draft Regulation provides that employers must "offer" COVID-19 testing to "all employees who had potential COVID-19 exposure in the workplace." But what is required by "offering" testing? This raises multiple independent issues:

a) It is unclear whether employers must provide such testing at the worksite (personally or via a third party), or whether employers rely on other sources of testing. For example, many employers provide health insurance to their employees, and employees can acquire free testing via that insurance. Or, alternatively, free testing is available statewide via Project Baseline.[10] Do these situations satisfy the requirement that employers' COVID-19 plans "offer" testing? As drafted, this point remains unclear – and must be rectified. We would urge that the regulation be clarified to expressly allow employers to rely on their health insurance, or on publicly available community testing. The alternative – that each employer must provide onsite testing – would be a considerable cost burden for California's businesses, as individually administered tests can cost between $80-230.

b) Does such testing need to be provided at the workplace? The Draft Regulation provides that such testing must be available "at no cost . . . during their work hours . . ." but is not clear on whether offsite testing (which requires the employee to leave the worksite and travel to a testing location) is acceptable. This also fails to consider abnormal working hours, such as night shifts, where guaranteeing testing "during work hours" may be infeasible.

c) We have feasibility concerns for smaller employers in more remote portions of California. Though Project Baseline has many locations throughout California, a number of areas (such as the County of Santa Cruz, California) appear to have no Project Baseline facilities for testing. These feasibility concerns are particularly acute in areas with less healthcare infrastructure.

d) The Draft Regulation utilizes the phrase "offer COVID-19" testing § 3205(c)(3)(B)(4) but utilizes "provide COVID-19 testing" in § 3205.1(b). What difference is intended between these two verbs? If none, then we would ask one verb be used to delineate when an employer is required to provide testing.

9) § 3205(c)(5)(G). Clarify training obligations for face coverings. The Draft Regulation requires employers to train employees that "face coverings are not respiratory protective equipment." As phrased, this is somewhat ambiguous and will likely lead to confusion among workers. If the intent is to require employers train that face coverings are not *filtration* and will not filter COVID-19 out of the air as other respiratory protection such as N95 might, then that should be clarified to ensure that the resulting training is effective.

[10] Project Baseline provides free testing at numerous locations across California and was developed in collaboration between the California Department of Public Health and Rite Aid. Information available here: https://www.projectbaseline.com/study/covid-19/.

10) **§ 3205(c)(6). Provision regarding "physical distancing" should not mention changing production speed.** The Draft Regulation suggests "reducing production speed" as a method of physical distancing. Changing production speed at a facility is not required by this regulation and, unlike the other suggestions contained therein,[11] does not clearly relate to spacing among workers. Because it does not fit this category of precaution and will lead to confusion, it should be removed.

11) **§§ 3205(c)(6) & 3205(c)(7). Physical distancing and masking requirements should recognize that engineering controls, such as dividers, can serve as an adequate substitute.** The Draft Regulation's requirements regarding physical distancing fail to consider engineering controls, such as plastic dividers, which can make separation of less than six feet much safer. Without adjustment, this language will require employers to keep workers six feet from all other persons *even if a plastic shield completely separates them . . .* unless it is not possible to do so under § 3205(c)(6)(B) or § 3205(c)(8)(A). We believe this provision should recognize physical dividers and other engineering solutions as potential alternatives to six feet of distancing. Similarly, we believe the masking obligation of § 3205(c)(7)(C) should take into account that an employee, separated by a divider or alternative engineering control, might not need to wear a mask, and that twice-weekly testing of such an individual would be unnecessary.

12) **§§ 3205(c)(6) & 3205(c)(7). In suitably large spaces, mask wearing should not be required if alternative controls are used.** At present, the Draft Regulation requires face coverings whenever an employee is not alone in a room, subject to limited exceptions. However, this fails to consider the size of some "rooms" – such as an open warehouse setting – where a worker may be 30 or more feet from the nearest coworker and may be separated by barriers. To accommodate these workspaces, we ask an exemption to be allowed to face coverings where physical distancing and engineering controls provide commensurate protection.

13) **§ 3205(c)(7). Clarify obligations regarding employee's own face masks.** The Draft Regulation does not expressly permit the use of employees' own face coverings. This should be permitted, as many employees have their own face coverings and would prefer to wear them. This section also should clarify that employers are not required to reimburse such purchases of face coverings that were made without employer's pre-approval. Similarly, do employers have an obligation to purchase and provide alternative facial coverings for employees with disabilities or conditions that prevent them from wearing a mask? Finally, if an employee who cannot wear a face covering and therefore must be "tested at least twice weekly for COVID-19" – does the employer have the obligation to provide this testing?[12]

14) **§ 3205(c)(8)(B). Employers' obligation to constantly monitor air quality should mirror the Wildfire Smoke Emergency Regulation**. Notably, last year's emergency standard regarding wildfire smoke includes guidance on resources that employers may rely upon to monitor air quality, including a list of suitable resources. (See § 5141.1(c)). Due to differences in calculation methods used by different sources – which could lead to different resources indicating just above or below the "100 AQI" threshold referenced in the Draft Regulation – we would ask that a similar list of compliance methods be included here.

15) **§ 3205(c)(8)(B). Certain workplaces must be temperature controlled**. The Draft Regulation fails to consider that certain workspaces must maintain certain temperature ranges. This applies differently in different industries, but as two brief examples: computer servers and workplaces involving biological materials may require a lower temperature. The Draft Regulation does not appear to consider these workspaces when it requires employers to "maximize" the quantity of outside air. Requiring open ventilation could render the necessary temperatures impossible to

[11] "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 . . . to allow greater distance between employees."

[12] Presumably, if the inability to wear a face covering relates to a pre-existing disability, then that might create an accommodation issue. But, if no such pre-existing disability exists, the question remains as to obligation.

maintain. To address this conflict, we would request a clarification that, where necessary for the functioning of the workplace, outside ventilation may be replaced by other methods.

16) **§ 3205(c)(8)(D). Requirements regarding rest breaks should be left to the Labor Commissioner.** The Draft Regulation provides that employers must "allow time" for employee handwashing. This vague obligation is concerning because rest breaks and similar allowances of employee time are generally left to the Labor Commissioner and are outside the purview of Cal/OSHA.

17) **§ 3205(c)(8)(E)(1). Employers' obligation to provide PPE.** The Draft Regulation's requirement that employers "evaluate" the need for personal protective equipment implies that employers could, under this Draft Regulation, be required to provide protection beyond face coverings or shields, such as N95 respirators. With N95 availability an ongoing issue, requiring such broad purchase would pose cost and feasibility concerns. To address this, we would ask that an addition to the present language specify that employers are not required to provide N95 respirators by this standard.

18) **§ 3205(c)(8)(E)(2). Employers' obligation to potentially comply with the Aerosol Transmissible Disease Standard should be clarified.** By requiring employers to "evaluate the need for respiratory protection in accordance with Section 5144 when the physical distancing requirements of subsection (c)(6) are not feasible or are not maintained", the Draft Regulation seems to suggest that a wide new swath of employers might fall under the complicated purview of Section 5144, including creating a respiratory protection program, conducting fit testing, and more. This would be a massive burden to businesses across California, and this issue – difficulty maintaining social distancing – would be better addressed via engineering controls, as noted above.

19) **§ 3205(c)(9)(E). Employers' log requirements related to COVID-19 pose privacy concerns.** The Draft Regulation requires employers to keep a log of all COVID-19 cases, then release that information to employees "with personal identifying information removed." This provision will be illusory protection, as in many workplaces, even removing COVID-19 cases name and contact information will not protect their privacy. With only the location, occupation, and last day worked, it will be easy to identify the sick employees. In addition, the maintenance of this log itself poses concerns under California's California Consumer Privacy Act (CCPA), including liability in the event of a data breach.[13]

20) **§ 3205(c)(10)(C). Employers' obligations to excluded employees should be clarified.** The Draft Regulation requires employers to "continue and maintain an employee's earnings . . . as if they had not been removed from their job." This appears to be creating a new obligation for employers to provide paid time off if an employee is excluded from the workplace due to being a "COVID-19 case" or "COVID-19 exposure". To be more precise: if an employee had exhausted their paid time off, and was excluded from the workplace due to COVID-19 exposure or qualifying as a COVID-19 case, then this language appears to guarantee that their "earnings" be maintained, and thereby creates additional paid time off be provided for the duration of the exclusion.

    As an initial matter, such leave is outside the purview of Cal/OSHA and is more properly a matter to be handled by the legislature (via legislation) and Labor Commissioner. In fact, the legislature has just recently spoken on this matter – and that legislation demonstrates the flaws in this provision. **AB 1867** (which was signed just two months ago) created a similar category of supplemental sick leave and includes provisions detailing: (a) what rate of compensation is applicable to any given worker; (b) how many total hours of sick leave are provided; and (c) the maximum benefits any given employee may receive. In contrast with that legislation, the Draft Regulation contains *absolutely no* discussion of these practical concerns, or how it interacts with

[13] Furthermore, as COVID-19 cases may also be included on the Form 300 log, the subsequent "Note" that providers an unredacted copy of such a log may still be distributed creates a potential conflicting policy. Without addressing this issue, redacting cases on the COVID-19 log may render the entire provision moot.

existing leave. And where **AB 1867** applied only to larger employers (those with over 500 employees), the Draft Regulation applies even to California's smallest businesses. With that in mind, the difficulty and cost of this provision to California's struggling small and medium businesses cannot be overstated. We would urge this provision be entirely removed and handled via the recent legislation regarding COVID-19-related leave.

If this provision should it remain in the Draft Regulation, this provision should also expressly permit excluded employees to continue to work (from home or isolation) where feasible, so that employers are not compelled to pay employees who are perfectly capable of working from home and are not showing any COVID-19 symptoms.

In addition, both exceptions to this section need clarification. "EXCEPTION 1" provides that the guarantee of benefits in subdivision (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." We would ask this text to be clarified. Presumably this includes workers who are unable to work due to some independent ground – such as injury. However, its application remains unclear in certain scenarios. For example, if an asymptomatic worker is excluded due to a positive test, they would appear to be entitled to this "earnings" guarantee. However, if they become more ill and are now bedridden, such that they truly are "unable to work for reasons other than [transmission risk]", are their benefits cut off? In addition, how are employers to determine when such a threshold has passed, and cease providing paid time off? Employers would, effectively, be forced to monitor the employee and quiz them on the severity of their symptoms on a regular basis. This is not feasible, as well as posing privacy issues, and employers should not be put in this situation. If this is not the intent, we would ask for clarification.

Similarly, Exception 2 provides that employers can avoid providing this new paid time off by demonstrating that exposure is not work related – but to whom and how must it be demonstrated? To address this issue, we would ask the exception to be revised to require the employer "determine" the exposure was not work related and maintain documentation evidencing that determination.

21) **§ 3205(c)(11). Return to work criteria regarding "improved" symptoms should be clarified.** Return to work criteria must be clear, and while subdivision (11)(A)'s first and third requirements are objective, the requirement that "COVID-19 symptoms have improved" is vague. For example, if an employee's more severe symptoms (loss of taste, chest pressure) have resolved, but the employee has a lingering cough and headache, is that "improved" sufficient to allow them to return to work?

22) **§ 3205(c)(11). Return to work criteria related to an order to isolate or quarantine should be clarified.** The Draft Regulation provides for two potential periods of isolation, without clarifying which shall take priority. In the event no period of isolation is specifically ordered, it shall be "10 days from the time the order … was effective, or 14 days from the time the order … was effective." To clarify: which shall take priority?

§§ 3205.1 & 3205.2. Outbreak and Major Outbreak Requirements.

The Draft Regulation's mechanism of additional testing for "outbreaks" of three or more cases within 14 days (or 20 cases in a 30-day period) appears to have significant feasibility concerns and needs clarification to ensure consistency with the generally applicable obligations contained there. As an initial matter, the regulation should be clear that the outbreak provisions supersede the non-out-break provisions, when applicable. In addition, please note the following concerns with specific provisions:

1) **§§ 3205.1(b) & 3205.2(b). Outbreak testing requirements must recognize feasibility concerns.** As presently drafted, the "outbreak" and "major outbreak" testing protocols seem drafted without consideration of their effects on large employers, as well as their potential effect on the state's testing infrastructure. First: the "outbreak" protocol's trigger is sufficiently low that, for truly large worksites (such as large agricultural, industrial, or warehouse settings), potentially hundreds of workers will be present *every day*. In such massive environments, social spread alone will virtually guarantee that § 3205.1(a)'s scope is triggered, and potentially § 3205.2(a)'s scope as well. Moreover, the requirement of "no new cases" in such a large environment in a 14-day period

will be similarly impossible merely due to social spread outside the workplace. As a result, we can expect large workplaces to remain under "outbreak" protocols for month, even when no workplace spread has occurred. This will require weekly or twice-weekly testing of all worksite employees for months. The scale of this obligation, both for employers and for California's testing infrastructure, cannot be ignored. To address this scale issue, we would urge a standard similar to that utilized by this year's **SB 1159**, wherein workplace of a certain size utilize a percentage-based trigger. For example, workplaces with over 100 employees would trigger the "outbreak" protocol if they have cases equal to 4% of their workforce.

2) **§ 3205.1(a). An outbreak must be comprised of employees.** The Draft Regulation currently provides for expanded testing and exclusion if an "outbreak" occurs, which the regulation defines as occurring when identified by a local health department, or "when there are three or more COVID-19 cases in an exposed workplace within a 14-day period." This definition does not distinguish between cases *among employees* and cases among *visitors*, who likely caught COVID-19 outside of the workplace at issue. As a result, three unrelated customers passing through the same grocery store, over a two-week period, would trigger an "outbreak." California's employers should not be responsible for an "outbreak" in the workplace when there is no indication of any actual transmission in the workplace. For this reason, and in order to be consistent with **AB 685** and recent CDPH guidance, we would ask that the definition of an "outbreak" be clarified to require three cases *among employees*.[14] Notably, even our proposed definition can also be triggered by non-workplace spread – such as if a group of employees all catch COVID-19 outside of the workplace (potentially at a social gathering or major holiday event) and report for work – but we believe it is an improvement over the present text.

3) **§§ 3205.1.(a) & 3205.1.(b). Clarify the scope of outbreak provisions.** Presently, the outbreak-related provisions are missing critical information in their scope to specify when they go into effect or when they expire. Neither Sections 3205.1 nor Section 3205.2 presently identifies that it supersedes the obligations of Section 3205 once triggered. Similarly, 3205.2 does not specify that it supersedes 3205.1 once it is triggered. These provisions should be clarified to avoid confusion as to when once goes into effect, and how its obligations supersede other similar obligations at that point.

4) **§§ 3205.1(b) & 3205.2(b). The significant testing protocols prescribed for workplaces with outbreaks should be limited to employees with COVID-19 exposure.** The Draft Regulation requires weekly (or twice weekly) testing of all employees who were "at the exposed workplace" for at least two weeks, and potentially many more, depending on whether any new cases are discovered. This obligation is overbroad, as testing should be instead focused on those defined as having COVID-19 exposure (I.e., within six feet for cumulative 15 minutes). That would bring the testing radius into consistency with the prior provisions of the Draft Regulation regarding notice, testing, and exclusion.[15] This change would also made sense – those who were exposed deserve testing. Those who happen to be in the same workspace but were at significant distance from all COVID-19 cases do not merit the same attention. For example, under the present text, an employee who happens to work in the same worksite as a COVID-19 case (let's say an outdoor construction site), but is never within 30 feet of the COVID-19 case, would still be compelled to undergo repeated testing. This is unnecessary and impractical. This impracticality is particularly problematic given the relatively vague definition of "exposed workplace", which could include all of a large industrial space, despite the COVID-19 case only visiting a small portion of the structure.

5) **§§ 3205.1(b) & 3205.2(b). Employers do not necessarily have control of testing resources or scheduling**. Though requiring weekly or bi-weekly testing in the abstract is easy, it may not be practically feasible for employers in some parts of California. For example, if an employee is utilizing their employer-provided health insurance, they will be subject to the scheduling of that facility regarding when they can test. Similarly, if an employee is utilizing publicly available drive-through

[14] CDPH guidance limits an "outbreak" as follows: "A COVID-19 outbreak in a non-healthcare workplace is defined as at least three COVID-19 cases among workers at the same worksite within a 14-day period." See https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Employer-Guidance-on-**AB-685**-Definitions.aspx.
[15] See §§ 3205(c)(3) & 3205(c)(10)(C).

testing (the acceptability of which is discussed above), then they also will be subject to the scheduling and availability of that testing. As a result of these factors, weekly or bi-weekly testing may not be feasible, and compelling employers to acquire such testing resources is similarly infeasible. With these constraints in mind, the Draft Regulation's requirement that employers "provide" such testing becomes problematic. Small or medium-sized employers may not have the resources to retain a third-party testing company, particularly because the cost of such tests can be around $130-180 per person,[16] leading to significant aggregate costs for such overbroad testing. In light of these costs, the strict requirement that employers "provide" such testing on a weekly or bi-weekly basis for individuals who were in the workplace, but not exposed, does not make sense and should be excluded.

6) **§ 3205.1(e). Outbreak Investigation and Review provisions should not include leave policies.** As discussed above, leave policies are properly within the scope of the Labor Commissioner, and outside the scope of Cal/OSHA, and should be left out of this regulation.

§§ 3205.3. & 3205.4. Employer-provided Housing and Transportation Sections Pose Control, Feasibility, and Authority Concerns.

The final two sections of the Draft Regulation appear to overstep on multiple fronts. Employers do not have control to the extent imagined in these provisions. Employers do not necessarily have internal control of employer-provided housing, sufficient to enforce the organization of the room (§ 3205.3.(c)(2)) or require residents to keep windows open at all times (§ 3205.3.(c)(3)) or ensure that each resident does not offer their neighbor an uncleaned dish (§ 3205.3.(e)(2)). Similarly, an employer may not have control of transportation that is owned and operated by a third-party.

More importantly, such regulation oversteps Cal/OSHA's authority. Cal/OSHA is not the proper entity to regulate vehicle safety issues. The Public Utilities Commission[17] regulates ridesharing and common carriers (Cal. Pub. Util. Code §§ 5430-–45.2; 211), and the Vehicle Code identifies the Department of Motor Vehicles as handling buses and farm labor vehicles.[18] As a result, we have broad concerns about the scope of these two sections of regulation, particularly in the context of an emergency regulation.

Conclusion

We appreciate the seriousness of COVID-19 and provide these comments in the hopes of improving this regulation, should the Board approve it.

Sincerely,

Robert Moutrie
California Chamber of Commerce

Acclamation Insurance Management Services
Agricultural Council of California
Allied Managed Care
African American Farmers of California
American Council of Engineering Companies, California
American Pistachio Growers
Associated General Contractors
Association of California School Administrators
Association of Construction Employers
California Apartment Association
California Association of Breakfast & Boutique Inns
California Association of Health Facilities
California Association of Joint Powers Authorities

[16] This estimate of a per-employee test is anecdotal, as we have not had an opportunity to gather significant data due to the brief window for review of this Draft Regulation.
[17] In fact, the California Public Utility Commission website states the following: "The Commission has regulatory and safety oversight over for-hire passenger carriers . . ." https://www.cpuc.ca.gov/transportation/.
[18] Vehicle Code Section 34500.

California Association of School Business Officials
California Association of Sheet Metal and Air Conditioning Contractors, National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Automatic Vendors Council
California Bankers Association
California Beer and Beverage Distributors
California Builders Alliance
California Building Industry Association
California Cable & Telecommunications Association
California Farm Bureau Federation
California Framing Contractor's Association
California Fresh Fruit Association
California Grocers Association
California Hotel & Lodging Association
California League of Food Producers
California Manufacturers & Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California School Boards Association
California Special Districts Association
California State Association of Counties
California Travel Association
California Trucking Association
Can Manufacturers Institute
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
Engineering Contractors Association
Evans Hotels
Family Business Association of California
Flasher Barricade Association
Hospitality Santa Barbara
Hotel Association of Los Angeles
LeadingAge California
League of California Cities
Long Beach Hospitality Alliance
Los Angeles Area Chamber of Commerce
National Automatic Merchandising Association
National Federation of Independent Business
Nisei Farmers League
Pacific Association of Building Service Contractors
Residential Contractors Association
Sacramento Regional Builders Exchange
Southern California Contractors Association
Southern California Scaffolding Association
Southern California Tilt-Up Contractors
United General Contractors
Western Carwash Association
Western Growers Association
Western State Petroleum Association
Western Steel Council
Wine Institute

RM:ldl

Copy: Eric Berg eberg@dir.ca.gov
Amalia Neidhardt aneidhardt@dir.ca.gov
David Kernazitskas dkernazitskas@dir.ca.gov