June 15, 2021

Office of Administrative Law

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Sacramento, CA 95814

(Sent by email to staff@oal.ca.gov)

***Re: 8 C.C.R.*** ***§ 340.7 (Definition of Normal Consumption of Personal Protective Equipment)***

To Whom it May Concern:

California hospitals take very seriously their duty to provide a safe, healthy environment for patients and staff each and every day, not just during a pandemic. As such, the California Hospital Association (CHA), which represents more than 400 hospitals and health systems, appreciates Cal/OSHA’s effort to meet the requirements of Assembly Bill (AB) 2537 (Chapter 313, Statutes of 2020) and provide guidance to health care providers on the necessary equipment levels for personal protective equipment (PPE).

To provide support and assistance in development of a workable and effective regulation, CHA respectfully offers comments on Cal/OSHA’s emergency regulations on normal consumption of PPE.

## **Definition of “Normal Consumption”**

CHA’s primary concern with the emergency regulation is the definition of “normal consumption.” As commonly defined, “normal” refers to something that conforms to a regular pattern or is “characterized by that which is considered usual, typical, or routine.”[[1]](#footnote-2) In the case of hospitals, regular health care delivery includes a wide variety of activities, such as preventive care, emergency and elective surgeries, post-operative care, and cancer treatment. Fortunately, what it does not include are once-in-a-century international pandemics of newly emerging viruses.

Unfortunately, 8 CCR § 340.7 (hereafter “emergency regulation”) requires that hospitals include all PPE consumption from the recent COVID-19 pandemic. CHA appreciates Cal/OSHA’s recognition of unprecedented PPE consumption in 2020, which prompted the 200% consumption cap, but we believe the intent of the bill was plainly stated — that the stockpile should reflect normal, non-pandemic consumption. Therefore, CHA believes that the normal consumption should be the average amount of the equipment used by employees in ***2019***, or the most recent non-pandemic year. Specifically, CHA strongly urges Cal/OSHA to adopt a definition of normal consumption based solely on 2019 consumption data, not to exceed a 90-day requirement based on a hospital or health system’s highest seven-day consecutive daily average. Once the pandemic has concluded, the regulation can be amended to be an average of the most recent previous two-year period where California’s hospitals were not engaged in fighting a pandemic, with an appropriate cap to account for unforeseen surges in any given year for PPE consumption beyond what is normal.

CHA is also concerned that the 200% cap lacks both statutory and evidentiary support. Specifically, CHA is unclear on how 200% was selected. Why not 150% or 125%? Again, CHA is appreciative of a cap, as it recognizes the need to help smooth out PPE supply calculations during abnormal surges in utilization, but we remain concerned that the 200% cap is both too high and not established by legislative intent or solid data on PPE consumption.

## **Timing of the Regulation**

As noted above, the emergency regulation is based on the use of the term “normal consumption” in AB 2537 in requiring a supply of PPE. The law requires hospitals to have formed their stockpile on or before April 1, 2021. That means hospitals were required to interpret the statute without guidance and, therefore, created stockpiles based on the plain reading of the statute: the PPE consumption in “normal” conditions, or PPE consumption in 2019. Suddenly and abruptly, many hospitals will find themselves out of compliance with the law and competing with many other hospitals (both in California and around the world) in augmenting PPE supplies. This is antithetical to the cause of justice.

To avoid such an unnecessarily adverse outcome to California’s hospitals, CHA suggests that Cal/OSHA, either through regulation or future guidance, provide hospitals with a glide path to compliance, including a grace period. Additionally, CHA suggests that such a glide path give specific direction and flexible timelines for rural and critical care hospitals that may not have the size or scale to affordably purchase large amounts of PPE in a short period of time. This will ensure that California’s hospitals reach the legally required levels of PPE quickly without unnecessary competition and undue encumbrance.

In conclusion, CHA is ready to assist Cal/OSHA as it develops regulations and enforcement policies in an effort to provide employees with a safe work environment. Thank you for the opportunity to submit this information. We look forward to continuing to work with you.

Sincerely,

Gideon L. Baum

Vice President, Labor & Employment

cc: Lisa Brokaw, Esq., Division of Occupational Safety and Health Legal Unit

1. “Normal.” Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/normal. Accessed 10 Jun. 2021. [↑](#footnote-ref-2)