OREGON FARM BUREAU

Locally Grown and GROWING STRONG

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Department of Consumer and Business Services/Oregon OSHA
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VIA EMAIL: tech.web@oregon.gov

Thank you for the opportunity to comment on OR-OSHA's Draft COVID-19 Temporary Standard and control measures. By way of background, the Oregon Farm Bureau (OFB) is the state's largest agricultural trade association, representing nearly 7,000 farm and ranch families from across the state. As evidenced by our consistent engagement with OR-OSHA, Oregon Health Authority, Oregon Department of Agriculture, and the Office of the Governor, OFB and its members are committed to protecting agricultural employees. At the same time, we firmly believe there is a way to mitigate the spread of COVID-19 without causing further economic harm to Oregon's farm and ranch families. Unfortunately, these draft rules fail to strike this important balance and need significant technical and policy changes to be workable for agricultural businesses in Oregon.

As discussed in more detail below, we strongly urge OR-OSHA to make necessary technical changes, consider the economic impacts of these rules on Oregon's small businesses, and to end the rulemaking process after the temporary rules go into effect. There is no mandate or unified request for a permanent infectious disease standard. Any COVID-19 related rules should end when Oregon's state of emergency ends, and should not be the basis for permanent control measures.

I. OR-OSHA must make substantial technical changes to the proposed language in order to provide needed clarity and workability for Oregon employers:

Social Distancing: On principle, OFB agrees that maintaining proper social distancing in the workplace is important to mitigating the spread of COVID-19. While maintaining a minimum 6ft distance between employees will not be difficult during some aspects of farm operations, it will be very difficult for certain integrated facilities and harvest activities. Thus, agricultural employees will generally need to be separated by either impermeable barriers or be wearing face coverings for a large portion of the workday, and generally, impermeable barriers are

going to be impossible to integrate into in-field activities. Therefore, (2)(a)(B) needs to be amended to make clear that the 6-foot distancing requirement of (2)(a)(A) has been met when employees are either separated from other individuals by an impermeable barrier or are wearing face coverings.

Examples: The examples provided throughout the draft standard are confusing, convoluted, and generally not helpful. They should be removed, and better examples should be included in a separate FAQ document so that they are not confused with regulatory requirements outlined in the temporary Standard.

Social Distancing in Employer-Provided Transportation: This proposed rule is substantially similar to the distancing requirement of OR-OSHA's temporary rules for Agriculture during COVID-19. While we recognize the need for control measures while transporting employees, this requirement has proven to be immensely expensive for agriculture thus far. As evidenced by our industry-wide survey, a summary of which was provided to Administrator Wood, agricultural employers have had to spend upwards of $10,000 to obtain new vehicles to be able to meet these requirements. OR-OSHA should strongly reconsider the implementation of this rule, as the expense to businesses around the state will be tremendous and the benefit to workers is not well documented. In the alternative, OR-OSHA should consider extending the "household" exemption to those employees who live in the same farmworker housing unit, or work within the same cohort. At any rate, there should be no effort by the agency to make the transportation distancing requirements permanent; this is not sustainable as a long-term workplace measure.

Face Coverings: This entire rule section should be rewritten to ensure consistency with the state's current mask requirements. As written, this section runs counter to existing mask requirements that contain exceptions for customers in certain circumstances. Oregon's businesses have already made substantial changes to comply with existing mask mandates. Any proposed rules should be as consistent with existing mandates to make adoption of these control measures as seamless as possible. Additionally, subsections (A) and (B) are duplicative, and subsection (E) should be removed. There is no contemplated definition of "forceful exertion," and likely any activity involving manual labor or physical action could be considered forceful exertion.

Sanitation: The requirement that any high-touch surface or shared equipment be cleaned prior to use by another individual is completely unreasonable and does not align with scientific community's current understanding of how COVID-19 is transmitted. As evidenced in the letter sent to Administrator Wood after the agricultural roundtable discussion, the cleaning and sanitation requirements of OR-OSHA's existing rules for agriculture during COVID-19 are incredibly burdensome and expensive. Currently, our members have indicated that they are spending roughly $500 a week in just cleaning supplies to keep up with the rules. Additionally, our members have needed to assign or hire entire staff just to do custodial work to comply with the temporary Agricultural rules. Neither of these costs of covered by OWEB's Food Security & Farmworker Safety (FSFS) program.

The proposed rule language will increase the cost of sanitation at the workplace by tenfold and could require the cleaning of surfaces countless times a day. That is neither workable nor enforceable for many employers, especially farmers during harvest who have large crews working over vast amounts of open space. OR-OSHA should remove this language and allow businesses to clean surfaces regularly in a way that makes sense for their individual operations, especially since contact with surfaces is no longer considered a major transmitter of COVID-19. **OR-OSHA should not impose arbitrary costs on Oregon's businesses when there is no clear health benefit from the control measure in question.**

Medical Removal: A medical removal program for COVID-19 is completely inappropriate and should not be a part of the Infectious Disease Standard. Medical removal has historically only been used where workplace exposures to hazardous substances require employee removal in order to prevent material harm, such as lead poisoning or beryllium exposure. This language does not focus on workplace exposures, and it is unclear why OR-OSHA feels it is necessary to implement this concept, especially when employees have ample access to the FFCRA, Oregon Worker Quarantine Fund, and the Oregon Legislature just authorized $30 million in CARES dollars for employees who need to quarantine because of COVID-19.

As written, these proposed rules are ripe for abuse, and there are no limits in place that would prevent an employee from taking multiple weeks or months away from work, even though the necessary quarantine time period of COVID-19 is only two weeks. Any new medical removal concept should include consideration of existing paid-leave programs already available to employees and should be reduced by benefits already being provided to the employee through other state, federal, or employer-funded compensation programs. It also must be made clear that this is a <u>one-time benefit</u>. As such, if OR-OSHA moved forward with inserting a medical removal provision (which it should not) it must include the similar language to OAR 437-002-2035(4) into the Standard:

> *Your obligation to provide medical removal protection benefits to a removed employee must be reduced to the extent that the employee receives protected leave, and/or compensation for earnings lost during the period of removal from a publicly or employer-funded compensation program, or receives income from another employer made possible by virtue of the employee's removal.*

If Oregon OSHA is going to adopt a medical removal provision, *which it should not*, then the rule should only apply when a board-certified medical provider or representative of a state or local public health agency has made a written finding that it is more probable than not that the employee has been exposed to an infectious disease at work, and as a result of that exposure, requires isolation or quarantine. If the exposure is determined to be workplace-related, then the employers' workers compensation insurance should be the exclusive remedy for the worker. If the reason for the isolation or quarantine is not based upon a demonstrated workplace exposure, the employer should not be responsible to medically remove the employee.

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II. OR-OSHA should not create a permanent Infectious Disease Standard for COVID-19 or similar airborne infectious diseases:

OR-OSHA states on the webpage for the Infectious Disease Standard Rulemaking that is in response to a "request" that the state adopt an enforceable workplace health rule on an emergency basis, "to be replaced by a permanent rule." It is unclear what request OR-OSHA is referring to when stating that there was a request for a permanent rule. From our knowledge, HB 4212, which was introduced during the First Special Session of 2020, was the only public discussion of an infectious disease standard prior to OR-OSHA initiating rulemaking. Despite initial inclusion in HB 4212, the infectious disease standard was quickly stricken from the base bill and removed from the legislative agenda prior to final passage. Moreover, the only public testimony given on the concept during the First Special Session was in strong opposition to the adoption of an infectious disease standard.

Furthermore, federal OSHA rejected the creation of an infectious disease standard just a few months ago. Specifically, in May 2020, the United States Department of Labor denied a Petition filed by AFL-CIO demanding an emergency national infectious disease standard. [1] US-DOL determined that not only would it be "inappropriate" and "damaging to pandemic response effort" to adopt such a standard, but the best approach for responding to the pandemic is to enforce existing OSHA requirements that address infectious disease hazards, while also issuing detailed, industry-specific guidance that can be quickly amended and adjusted as its understanding of the virus grows. [2] This is the same regulatory approach US-DOL used during SARS, MERS, H1N1 and Ebola.

Additionally, on June 11, 2020, the U.S. Court of Appeals for the District of Columbia Circuit rejected an AFL-CIO lawsuit calling on the US-DOL and OSHA to issue an emergency temporary infectious disease standard amid the evolving COVID-19 pandemic.[3] According to the U.S. Court of Appeals:

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

OSHA denied a similar petition by unions during the 2005 avian flu pandemic and chose to not complete rulemaking prompted by a 2009 Petition from AFL-CIO. It is important to note that the 2009 rule concept found only a recognized risk of occupational exposure to infectious agents for

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[1] https://www.safetyandhealthmagazine.com/articles/19945-osha-denies-afl-cio-petition-calling-for-an-emergency-standard-on-infectious-diseases

[2] https://drive.google.com/file/d/1rxlZnTDUwQxlNHJFCQy_bXEmufURd1AR/view (page 3)

[3] https://www.bloomberglaw.com/public/desktop/document/InreAFLCIODocketNo2001158DCCirMay182020CourtDocket/4?1591894225

workers generally providing direct patient care in medical and healthcare settings.[4] All other workplaces, including farms, ranches, and agricultural processing facilities, were not identified by OSHA as needing an infectious disease standard and not even considered to be covered by the proposed rule.

For similar reasons, OR-OSHA should absolutely not move forward with any permanent standards related to or motivated by COVID-19 at this time. The science and knowledge of COVID-19 is constantly changing. A permanent standard for COVID-19 or future infectious diseases would be inappropriate and damaging to pandemic response efforts. The best approach for responding to future pandemics or infectious diseases is to enforce detailed, industry-specific guidance that can be quickly amended. As such, we strongly urge OR-OSHA to not move forward with a permanent rulemaking at this time.

III. OR-OSHA must repeal Agriculture's temporary rules for in-field sanitation and farmworker housing when the temporary COVID-19 Standard comes into effect:

Last, when OR-OSHA's temporary COVID-19 standard comes into effect, the agency must repeal the temporary COVID-19 rules for in-field sanitation and employer-provided housing that were issued for agriculture in May. These rules would be duplicative in some cases and conflicting with each other, and there is no need for agriculture to have specific rules when a general rulemaking exists covering the same subject. We support OR-OSHA's goal of creating clear and objective workplace rules that apply across all businesses in Oregon, and as such, the temporary rules for agriculture during COVID-19 must be phased out when these infectious disease control measures come into effect.

Thank you for the opportunity to comment. Please do not hesitate to reach out with any questions or concerns.

Sincerely,

Samantha Bayer
Policy Counsel
Oregon Farm Bureau

[4] https://www.osha.gov/dsg/id/OSHA-2010-0003-0239.pdf (page 1)