



September 3, 2020

Comments on Infectious Disease Rulemaking

The League of Oregon Cities (LOC) and the Association of Oregon Counties (AOC) begin by pointing out that we and our members, Oregon's 241 cities and 36 counties, have gone to great lengths to protect the public and their employees during the COVID-19 pandemic. Indeed, we are the providers of many essential public services that Oregonians rely on, especially during times like the present.

A. Overall Concerns

We have a number of concerns with the draft rules, as detailed below, and in the following general areas:

- The implementation date is approximately a week from the comment deadline and will require the purchase and installation of protective equipment that may not be readily available on the open market in the timeframe allowed;
- The rules apply to all workplaces regardless of whether or not current regulations and practices suffice to prevent the spread of COVID-19;
- Face covering requirements are inconsistent with current OHA and CDC guidance;
- The proposed rules impede efforts to provide services to vulnerable populations; and
- The requirement to provide paid leave for non-work related exposures exceeds OSHA's legal authority and conflicts with the federal statute referenced in the draft.

B. Specific Concerns

The following are some additional comments on specific sections:

Section 2

- **Section 2(a):** Public employers have already made adjustments to operations in accordance with the CDC and OHA requirements and guidelines, as well as Governor Brown's Executive Orders, and purchased Personal Protective Equipment (PPE) and face coverings accordingly. The installation of droplet barriers has not been previously required and will take time to install. The materials and services to meet this requirement will have to be procured on the open market while all other employers are attempting to do so as well. Expecting this to be accomplished by September 14 is not reasonable. Additionally, the Federal Emergency Management Agency (FEMA) issued guidance narrowing the eligibility of public agencies to be reimbursed for sanitation, PPE and face coverings effective September 14. Entities eligible for FEMA reimbursement will be rushing to complete their purchasing arrangements prior to that effective date, thus adding pressure to an already taxed market.

- **Section 2(b):** This language is largely duplicative, while simultaneously contradicting, of existing requirements in Governor Brown’s Executive order related to face coverings and masks. It was also not written with public agencies in mind. It is not possible for a city or county to “ensure” that the public wear masks in parks and other open spaces. No city or county has the resources to meet this requirement. Additionally, there have been numerous incidents of abusive, threatening and violent individuals resisting masking requirements. We ask that employers be required to make a reasonable effort to require non-employees wear a face covering but that we not be required to place non-enforcement employees in potentially dangerous situations.
- **Section 2(e):** As written, this paragraph requires building operators to adjust layout to minimize the spread of COVID-19. This is not reasonable or possible, especially within one week. Requiring building owners and operators to direct traffic flow, designate entrances and exits, and provide appropriate signage to discourage people congregating in common areas are more reasonable objectives.
- **Section 2(g):** OSHA should provide the legal authority to impose these requirements. When asked during a virtual meeting on September 1, 2020, OSHA staff were unable or unwilling to answer what legal authority the agency is relying upon to establish a paid leave plan for a non-workplace related COVID-19 exposure. It appears such legal authority does not exist. We are reluctant to offer specific comments as to language as that might imply that we think OSHA can “fix” the language, which we don’t think can be fixed. However, in an attempt to illustrate the challenges presented by the proposed language we will describe some of the difficulties.
 - ◆ 2(g)(A) provides that whenever a medical professional recommends that an employee isolate or quarantine that the employer shall provide them the ability to work without contacting others. However, the rule does not describe how the communication between the employer and the medical professional will take place. We refer OSHA to this [poster](#) produced by the Oregon Health Authority that says specifically that contract tracers will not mention the subject’s name when tracing contacts. In the aforementioned virtual meeting, OSHA staff stated that the process would be initiated by a healthcare professional. How? Additionally, the employer is required to continue the reassignment until the need for isolation has passed as per the guidance of a healthcare professional or contact tracer. This is information the employer isn’t allowed to seek and healthcare providers aren’t allowed to share.
 - ◆ 2(g)(B) requires the employer to provide paid leave, but differentiates between Families First Coronavirus Relief Act (FFCRA) employers and non-FFCRA employers. The FFCRA expires on December 31, but the rules will remain in effect for 180 days after adoption. This discrepancy is not addressed in the draft rules. Further, the FFCR allows for a total of 80 hours at full rate of pay but the draft rules appear to be per occurrence.
 - ◆ 2(g)(C) prevents an employer from taking an adverse action against an employee who is provided a work accommodation or paid leave. A strict reading of this language would inhibit an employer from disciplining an employee who violated social distancing at work. The employer would also find it difficult to address an employee who abused these provisions, experienced an exposure while violating

OHA advice or failed to isolate while on paid leave or work accommodation. We have no interest in taking adverse actions against employees that become ill but irresponsible behavior that jeopardizes other employees and the public should have consequences.

Section 4

It's worth asking, what problem is OSHA attempting to correct with the exceptional risk requirements? Emergency service agencies have been operating under CDC guidance offered specifically for police, fire and EMS. In truth, there's no shortage of guidance and advice being offered to public safety agencies, and these requirements are not in complete alignment with existing guidance. We respectfully submit that first responder agencies not be subject to Section 4 of the draft rules, or simply be required to follow existing guidance from the CDC.

Section 5

The definitions for face coverings, masks and other items are also defined in the Governor's Executive Orders issued to curb the spread of COVID 19. Local governments have been asked to enforce these orders. We ask that compliance and enforcement be based on a single definition.

C. General Statements

As representatives of Oregon's 241 cities and 36 counties, like the State, OSHA, and others, we are working tirelessly to protect the health, safety, and well-being of all Oregonians. We are balancing this with public health, economic, and other concerns that are arising related to the pandemic, while continuing to provide critical essential public services to our citizens.

We have submitted these comments today to express our concerns related to Oregon OSHA's Draft Temporary Rule Addressing COVID-19. The draft rule would apply to all workplaces and includes many requirements that would create significant challenges and barriers to cities and counties, some of which we have highlighted above. We also share the concerns of our public safety and emergency service partners, and refer you to those important comments as well. In addition, we encourage you to closely review the comments and concerns of businesses and industries that form the life blood for our state and local economies.

We acknowledge that, during the COVID-19 pandemic, it is critical to increase efforts to protect workers, which is why our emergency services have stepped up to the plate and partnered with the state to support reopening of businesses, all of which are critical to our local economies. Business owners have invested in personal protective equipment, hand sanitizer and impermeable barriers. We know these actions were crucial steps to help protect workers.

Cities and counties are also concerned that those working to comply and create a safe workplace for Oregonians are not being heard, and that those industries are suffering. OSHA's new rules are not consistent with current guidance, and there are still many theories on exactly how the virus is spread. For example, the rule requires increased sanitation of high touch surfaces, when evidence suggests surface contact is not a major transmitter; there are social distancing requirements within the rule that would make already purchased impermeable barriers obsolete, and there is no acceptable standard for face coverings, making enforceability of face coverings subjective.

Local employers are burdened by the financial impacts of the numerous protective measures being imposed on workplaces, and should at the very least have reasonable assurances that the new requirements will provide employees protection and mitigate risk of exposure. Employers should not be expected to continually expend funds for protective and sanitation measures that are constantly changing, unless science clearly indicates that the change is necessary and appropriate. Each time the rules change, already struggling businesses must expend more money in order to keep operating. Finally, a one-size fits-all approach creates an insurmountable standard for local government and businesses to meet, and does not recognize unique circumstances across types of employers. This broad-brush approach is being pursued in an expedited manner after both the state legislature and Congress have raised strong concerns and have elected not to pursue such a standard. We continue to be concerned about the impact of such a standard at such a challenging time for our crippled economy. We ask that OSHA take heed of the concerns expressed by cities, counties and all other parties who have taken the time to submit thoughtful comments to this proposed temporary rule.

We are all navigating the challenges surrounding the pandemic and trying to best support the safety, health, and well-being of Oregonians. As the direct responders in this pandemic, cities and counties ask that Oregon OSHA:

- Provide a transparent process for rulemaking that incorporates feedback from business and industry;
- Consider modifications to the proposed temporary rules; and
- Take a more collaborative approach to addressing workforce safety that takes into consideration unique employer needs and does not create a one size fits all rule.

Cities, counties, employers, workers, and the state are all partners in our response to the COVID-19 pandemic. Thank you for your partnership and your consideration of our comments.

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