MEMORANDUM

To: Michael Wood, OR-OSHA Administrator
Sent via email: tech.web@oregon.gov

From: Oregon Manufacturers and Commerce (OMC)
Shaun Jillions, sjillions@oregonmanufacturers.org

Date: September 7, 2020

Re: COVID-19 Temporary Standard

Thank you for the opportunity to provide comments on the draft OR-OSHA COVID-19 Temporary Standard. As a reference, Oregon Manufacturers and Commerce (OMC) is an association dedicated to promoting, protecting, and advancing Oregon manufacturers and their allied partners.

First and foremost, the parts of Section 2(g) of the rule pertaining to paid leave and benefit continuation should be deleted from the proposed standard. While OMC appreciates and supports the underlying goal of the proposed emergency standard, pursuant to the Oregon Safe Employment Act (OSEA), which is Oregon OSHA's enabling legislation, that goal must be limited to protecting employees from work-related exposures to COVID-10.[1] OR-OSHA has consistently agreed that its authority is so limited. However, it has also consistently refused to recognize that section 2(g) of the proposed standard simply has no link to that goal nor is it consistent with the limitations imposed by OSHA's enabling legislation.

OR-OSHA has attempted to justify its inclusion of section 2(g) by claiming that paid leave and benefit continuation will incentivize employees who might otherwise not disclose they have tested positive for, or been exposed to, COVID-19, to be honest. OR-OSHA's assumption is that such employees might not be honest because, absent paid leave and benefit continuation protection, disclosure would mean they would be off work for at least two weeks with no pay.[2] By requiring that such employees be paid, this would supposedly encourage timely and complete disclosure, which in turn would reduce the risk that an otherwise healthy employee would be exposed to COVID-19 at work. It is that reduction of risk which OR-OSHA has identified as bringing the rule

[1] ORS 654.003: "The purpose of the Oregon Safe Employment Act is to… reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, **that is created by occupational injury and disease**."

requiring paid leave and benefit continuation within its statutory mission of protecting employees from work-related injury or illness.

There are numerous problems with this tenuous theory, starting with the fact that, with the exception of the health care industry, employees are potentially more at risk of exposure to COVID-19 while off the job than they are while at work.[3] If there is no risk tied to the type of work being done, the injury or disease is simply not work-related. What this means is that employees who get the virus do not have an OSHA recordable disease because there is no way to link the illness to a cause that arose out of the nature of the work being performed. OR-OSHA has no authority to issue rules pertaining to a health condition which is neither an occupational injury nor an occupational disease.

In addition, OR-OSHA's reduction of risk theory is entirely speculative. This is particularly true as all Oregon employers with fewer than 500 employees are required to provide up to 80 hours of paid leave pursuant to the FFCRA for COVID-19 related conditions, and all workplaces with 10 or more employees (six or more within the City of Portland) must provide 40 hours of paid sick leave pursuant to ORS 653.601 to 653.661 ("OR Mandatory Sick Leave").[4] The assumption that the vast majority of otherwise honest employees would not be forthcoming about being ill, or having been exposed to COVID-19, unless they are given two weeks of paid time off has no factual basis and is inconsistent with the experience of our employers. On the contrary, our employers have been diligent about investing significant resources directed at creating a positive safety culture in the workplace. These investments, tracking leading and lagging indicators, and other collaborations, including with OR-OSHA through its workplace guidance programs, have been proven effective. The suggestion that employees would not be forthcoming is contrary to our experience. There is simply no evidence to support OR-OSHA's hypothesis. What has substance, however, is the truism that section 2(g) will incentivize dishonest employees to claim non-existent exposure to COVID-19 so they can obtain a free two-week paid vacation. Our employers' experience following the implementation of OR Mandatory Sick Leave which removed employee accountability from a benefit that most employers already provided, is an example of abuse that should be expected should section 2(g) be implemented.

The bottom line is that the Agency's rule-making authority is limited by statute in two key respects. First, pursuant to ORS 654.003 the scope of the OSEA is restricted to, in pertinent part, reducing "…the substantial burden, in terms of lost production, wage

[3] Sabatier, J. and Miller, D. (2020, July 16). *Gov. Kate Brown: Social Gatherings Are Fueling Oregon's COVID Rise*. OPB. https://www.opb.org/news/article/oregon-gov-kate-brown-coronavirus-covid-19-social-gatherings-rise/

[4] Note that Federal OSHA did even not attempt to implement an emergency rule authorizing paid leave and/or benefit continuation. This issue was correctly left to Congress to deal with in a manner not linked to OSHA's jurisdiction.

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loss, medical expenses, disability compensation payments and human suffering, **that is created by occupational injury and disease**."

Second, ORS 654.003(3) requires that all rules adopted by OR-OSHA be "reasonable." A rule which is entirely based on speculation as to a possible increased risk of infection not related to the nature of the work being performed is *per se* unreasonable. In addition, a rule which is protecting employees from a possible hazard that is not "created by **occupational** injury or disease" is simply outside the reach of the statute.

OR-OSHA's authority is limited to protecting employees from work-related hazards. COVID-19 is no more a work-related hazard than the measles or flu. Medical and emergency responders aside, contagious diseases in general, and viruses in particular, are not an occupational injury or disease. Requiring paid leave and/or continuation of benefits in the hope of protecting employees from exposure to a virus is simply outside of the scope of the OSEA.

Further, OMC respectfully requests that OR-OSHA consider the fact that section 2(g) of the proposed standard will almost certainly result in immediate and costly court action. This type of litigation could impact the enforceability of the rest of the proposed standard for an indefinite period of time. To the extent the rest of the proposed standard relates to reasonable efforts to enhance workplace safety, having the entire rule tolled pending court action on a limited section that on its face is beyond the agency's authority would be counterproductive. OR-OSHA should consider weighing the speculative benefit it believes this section of its rule will achieve against the virtually certain difficulties it will create.

After reviewing the requirements outlined in the COVID-19 Temporary Standard, OMC also asks that OR-OSHA delay enactment of these temporary rules for 90 days after they are promulgated. As written, the COVID-19 Temporary Standard will require employers to make a significant investment in time and money, and in additional staff resources, to comply. Relative to the provisions regarding paid leave and benefit continuation, assuming they are even enforceable, a delay in enforcement alone is not sufficient. Employers will be subjected to three enforcement mechanisms immediately upon enactment relative to medical removal in Section 2(g). Those are: (1) OR-OSHA penalties, (2) BOLI penalties, and (3) a private right of action. In addition, as noted above, it can be expected that if Section 2(g) goes into effect as written, action will quickly follow in circuit court to seek judicial relief from this section of the proposed standard. Delaying enactment 90 days following promulgation will allow such court action to proceed before enforcement efforts create multiple contemporaneous tracks of litigation.

OMC also requests that OR-OSHA change the wording of the rules which, as currently written, seemingly require employers to redesign various work areas to achieve social distancing goals. "Redesign" will require remodeling in many if not most circumstances. OR-OSHA should make clear that it is not purporting to require employers to tear out

existing work areas and then to rebuild them so as to facilitate social distancing best practice guidelines. Indeed, OR-OSHA should make clear that it is not suggesting that retailers and manufacturing plants are required to expand existing aisles or production lines to achieve social distancing goals.

As OR-OSHA is aware, Oregon manufacturers are already subject to enforceable COVID-19 guidelines and have taken proactive steps to comply with Governor Brown's executive orders. Since the COVID-19 emergency was declared on March 8, 2020, OMC members have invested significant resources in sanitation supplies, face coverings, daily temperature checks, barriers, employee education, and social distancing practices to comply with CDC and Oregon Health Authority (OHA) requirements for all workplaces. As drafted, the COVID-19 Temporary Standard will require additional investment in personnel and infrastructure to comply with the new requirements, a number of which are over broad, poorly described, and appear to clearly exceed the statutory authority of the Agency. The proposed standards provide no grace period during which employers could make the necessary investments in time, materials and training relative to the many aspects of the proposed rules, which are not likely to be the subject of an attack in circuit court. It also seems the Agency has not recognized many real-world obstacles which employers currently have to confront on a daily basis. For example, the barrier requirements in the COVID-19 Temporary Standard seemingly assume that adequate Plexiglass shields will be available for purchase so that employers can install them in their work areas as required by the emergency standard. That assumption has dubious validity in light of real questions concerning whether a reliable supply of acrylic to manufacture those shields is present in the marketplace. Acrylic is currently in short supply. It is primarily sourced in China. The current supply chain likely could not accommodate the barrier requirements outlined in the proposed emergency Standard. At the least, OR-OSHA's rule concerning the implementation and use of such barriers should be conditioned by something like "to the extent practicable."

OR-OSHA also should make clear that the COVID-19 Temporary Standard only applies to the current COVID-19 pandemic. While "COVID-19" is mentioned in a couple of places throughout the 11-page rule, it would be helpful for OR-OSHA to include in the Scope and Application Section overt confirmation that the new "emergency" rules are linked specifically to, and limited to, Governor's declaration of a state of emergency regarding COVID-19. After all, the COVID-19 pandemic is the "emergency" to which the Agency is responding by proposing emergency rules, so it only makes sense to clearly acknowledge this link in the opening sections regarding limits on the scope of the rule. Additionally, the emergency rules' short implementation period is another part of this rulemaking process which is unrealistic. The Governor has already renewed her emergency declaration on at least three occasions. Yet it is only now, after employers have already taken steps to safeguard their workers and premises, and after there is already a downward trend in COVID-19 cases in Oregon, resulting in part from the timely and effective response from employers to slow the spread of COVID-19, that OR-

OSHA is attempting to push through an expedited rule making process that is overreaching in scope. During this economic downturn, these rules will further burden the Oregon business community.

Section 1: Scope and Application

In Section (1)(b), OR-OSHA should provide a clear definition of "heightened risk Workplaces", not just examples of "heightened risk" jobs. "Heightened risk" should be defined, in plain and simple English, in the definition section of the standard and should not apply outside of a healthcare setting.

In section (1)(c), OR-OSHA should also define, in plain and simple English, "Exceptional Risk Workplaces" and limit the scope and application to healthcare.

Section 2: Requirements for All Workplaces

Directives in Section (2)(a)(A) are confusing and contradictory. Excluding "individuals" from coming within the recommended 6-foot distance minimum is beyond the authority of the Agency, not to mention the power of employers. OR-OSHA's jurisdiction is limited to safety and health issues pertaining to employees, not to individuals. The word "worker" also has no place in an OR-OSHA rule. Contrary to OR-OSHA's stated belief, "worker" and "employee" are not synonyms. Only employees should be referenced, as only employee exposure can be regulated by the Agency. The opening sentences should be modified in several respects. First, the requirement that employers "ensure" certain things needs to be tempered by "to the extent practicable." Similarly, requiring that "work activities must be designed" should also be conditioned by "to the extent practicable under the circumstances." Requiring design modifications to the "worksite" beyond just rearranging existing furniture and movable equipment is, again, beyond the jurisdiction of the Agency and is completely impractical. This too is an area where litigation is virtually inevitable absent appropriate amendments to the language of the proposed rules. The references to design modification should be deleted entirely or explained in detail as not requiring tear downs and remodeling of existing work places. Rather the rule should be limited to "existing workplaces should be arranged, to the extent feasible, in a manner consistent with the 6-foot social distancing guidelines."

If the intent in (2)(a)(A) is to require face coverings for all employees working in an area where, from a practical point of view, 6-feet of social distancing cannot be maintained, then the standard should simply say just that. Such a standard is straight-forward, easy to understand and enforce, and, for the most part, practical.

Similar to Section (2)(a)(A), if the intent of (2)(a)(B) is to allow for partitions in lieu of face coverings to establish a "false 6-foot social distance space," then OR-OSHA should make that clear. However, as written, Section 2(a)(B) is so obtuse as to be virtually unintelligible. The rule as written should be eliminated. If there is something in this rule

that the Agency believes would further its goal of dealing effectively and reasonably with the potential for workplace exposures to COVID-19, it should start over, and pay attention to writing a rule that the regulated community and OR-OSHA's compliance officers can understand, implement and enforce.

The Agency should delete Section 2(a)(B), and all notes and examples which follow it. Requiring employers to measure distances between the mouths of employees is simply absurd. Mouths are always moving (up/down, side to side,) along with the heads they are attached to; therefore, the distance is always changing. Putting tape measures from the mouth of one employee to the mouth of another on a repeated basis throughout a work day is obviously an unrealistic requirement.

OMC appreciates the Agency's use of OHA guidelines regarding face coverings in Section 2(b). We ask that OR-OSHA's entire proposed standard be drafted so as to be consistent with applicable OHA guidelines. OMC also asks that "paper disposable masks" be added to the definition of "face covering." OMC notes that the intent statement for the underlying purpose of masks is unnecessary and could further confuse and or frustrate the enforcement of the rule. "Face shields" is a defined term in Section 5. It is unnecessary to duplicate efforts to define the term in the text.

OMC also requests the deletion of Section 2(b)(A)-(E) entirely. Section 2(b) establishes requirements for face coverings, and, as suggested by OMC, face shields, when employees are within 6 feet of other people. (Of course, this rule should be limited to when employees are within 6 feet of other employees, and potentially to how employees should react when non-employees come within 6 feet of where they are working, as those are the only actions that OR-OSHA 's rules can legally impact.) Section 2(b), standing alone, applies across all workplaces. Once clarified to be limited to covering just the actions of an employer's employees, it will be a simple and straightforward requirement that is easy to apply. Subsections (b)(A-E), however, provide conflicting and confusing face covering examples, including a 5-minute standard with no clarity as to how and when to calculate that time period, and a 12-foot social distancing requirement that may or may not apply in any given workplace at any given time. All of this verbiage is completely unnecessary in light of the all-encompassing first part of the section. Any face covering requirement should be simple to understand and easy to apply. Sections (A)-(E) detract from any concept of clear meaning.

Section 2(c) presents numerous problems. To start, OR-OSHA needs to provide a usable definition for "high-contact" or "high-touch" surfaces. In Section 5, OR-OSHA defines "shared equipment" but Section 2(c) does not use that term. Rather it uses the undefined terms "high-contact surface" and "high-touch surface." OR-OSHA should either remove those two terms in the rule or define them in Section 5.

In several places, the Agency uses modifiers that are too subjective, and so again leave employers vulnerable to non-expert compliance officers second guessing their

reasonable efforts. What does it mean to "thoroughly clean" a surface at the beginning of each shift? That language should be deleted in favor of something like "employers must make reasonable efforts to disinfect shared equipment during the work day." In Section 2(c)(B), what supplies are deemed necessary? Sanitizers? Industrial cleaning solutions? Alcohol cloths? If the Agency intends to require that employers purchase individual sanitation supplies for all employees, or each work station, then it must also take into account the ability of the supply chain to meet that demand as well as the cost impact to employers. The rule should be amended to include language such as, "Employers must take steps to see that employees have reasonable access under the circumstances to sanitizing supplies in their work and break areas."

For many manufacturers, shifts are often staggered, and fall outside the typical 9-5 workday. Requiring cleaning of all "high-contact surfaces" at the "beginning" of each shift is therefore something of a non-sequitur. It is unclear whether the Agency intends to require employers to hire additional staff to clean surfaces or shared equipment as each individual employee working in a staggered shift system begins his/her workday. If so, this is another area where the Agency's rule likely exceeds its statutory authority. OR-OSHA should simplify the requirement in Section 2(c), and give employers the flexibility to sanitize "shared equipment" at reasonable intervals during any given workday.

Of further concern is the fact that Section 2(c)(A) presents directions to employers that are simply not feasible. As it currently reads, an employer would be required to clean a door handle or bathroom after every use. This is an impossible standard to meet. It would be cost-prohibitive for any employer to even try to comply with this rule, and it ignores the fact that recent CDC guidelines and studies have concluded that transmission through touch is not the main way the virus spreads.[5][6] Given that, there is no "emergency" need for this rule at all. Under 2(c)(A) employers would be forced to hire additional employees to follow existing employees around and clean any "shared equipment" or "high-contact surface" after every touch. In this context, the section is nonsensical. Considering that current public health guidelines deemphasize surface sanitation and emphasize facial coverings and distancing to help prevent the spread of COVID-19, this impractical rule also appears to be of little real value. OR-OSHA rules should follow the best available science and federal guidelines as opposed to creating unrealistic standards which have little worth in terms of avoiding exposures to COVID-19. Employers should be provided with a clear and effective standard that is tied to compliance with science-based sanitation guidelines.

In Section 2(d), it is unclear whether this requirement applies to an entire worksite or to individual structures within a worksite. For a manufacturer with multiple buildings at one

[5] CDC – Coronavirus Disease 2019 – How COVID-19 Spreads. https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. September 4, 2020.
[6] CDC – Coronavirus Disease 2019 – FAQ. https://www.cdc.gov/coronavirus/2019-ncov/faq.html. September 7, 2020.

location, OR-OSHA should clarify that the mandate to appoint one social distancing officer applies to the entire worksite. OMC also asks that the Agency make it clear that Section 2(d) does not require that employers of over 25 employees create a new position of "social distancing officer." It needs to be clear that this position can be filled by an existing employee who has other responsibilities and/or roles. Additionally, OR-OSHA should not purport to require that employers give all social distancing officers, including those who are hourly employees with no supervisory authority, the power "to take prompt corrective action." It is up to the employer to identify how best to enforce all of its safe work rules. OR-OSHA has no authority to dictate specific discipline powers be given to hourly employees. This language should be deleted.

Section 2(e) requires that "the basic requirements of this rule are posted…in any common areas, including but not limited to shared entrances, waiting rooms, corridors, restrooms and elevators." Manufacturers often have 3rd party vendors on site and as literally interpreted this requirement could lead to needing hundreds of postings. This should be limited such that manufacturers only need to post the necessary information in a conspicuous common-use location.

OMC requests that OR-OSHA also delete Section 2(f)(C) entirely. This language requires an explanation for all policies and procedures an employer adopts "for employees to report signs or symptoms of COVID-19." This information is already inherently a part of the preceding sub-section, 2(f)(B). OR-OSHA should not layer redundant and therefore unnecessary regulations on employers.

Section 2(f)(D) is existing law under the federal Families First Coronavirus Relief Act (FFCRA). This language is unnecessarily duplicative and subjects employers to multiple enforcement mechanisms relating to the same mandate. In addition, and most importantly, OR-OSHA exceeds its statutory authority every time it purports to regulate anything to do with employee leave, especially when such leave is not tied to an occupational injury or disease.

As noted above, OR-OSHA's proposed rule creating a paid leave and benefit continuation requirement under Section 2(g) is outside its statutory authority. Consistent with this limitation, a cursory review of USDOL policies reveals that Fed-OSHA has not attempted to implement medical removal with paid leave for airborne infectious diseases, blood borne pathogens or noise risks that may be present inside or outside of the workplace. It is bears repeating that federal OSHA has made no attempt to engage in emergency rule-making to require paid leave and/or benefit continuation in any of these areas. It would seem that Fed-OSHA has recognized that employee leave triggered by non-occupational causes has nothing to do with regulating work-related employee safety and health issues. Oregon OSHA should do the same.

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Additional comments if section 2(g) is eventually found to be enforceable:

As a matter of policy, it is counter-intuitive to require employers to provide paid leave to employees who disregarded the Governor's public health orders and, as a result, either were potentially exposed to COVID-19, or actually become ill due to such exposures. Indeed, an incentive that Section 2(g) does create relates to employees choosing to not follow face mask and social distancing policies because they know that if they become ill, they will get two weeks of paid leave. This new requirement for medical removal and paid leave, including benefits, if enforceable, is also an unfunded mandate on Oregon employers at a time when revenues are decreasing and markets are upside down. Again, the OSEA limits OR-OSHA to regulating issues pertaining to occupational injuries and diseases, meaning ones that arise due to the nature of the work being performed. Requiring paid leave and benefit continuation while workers are off-work due to a non-occupational disease is, by definition, not connected to an occupational disease. As noted above, this provision of the proposed rule is beyond the statutory authority of the Agency. In addition, it is irresponsible of the Agency to advance this policy without consideration of the significant economic impact it will have on existing workplaces and without authorization from the legislature. If the politics are such that the Governor or the legislature wants employees who have COVID-19, or have been exposed to the virus, to automatically get two weeks of compensated time off, then the funds to pay that cost should come from the government. Cost-shifting such a liability from the state government to Oregon's employers, both private and public, through purported OR-OSHA emergency rule-making may make political sense, but it is legally insupportable.

Lastly, this provision of the rule potentially creates unnecessary workers' compensation exposure for employers. Workers' compensation benefits are by statute limited to compensating employees for medical benefits and disability that results from uniquely work-related exposures/injuries. Outside of the health care community, COVID-19 is not a risk unique to a place of employment. Yet the rule requiring paid leave may well result in affected workers arguing that such a cautionary and prophylactic step flowed from a work-related risk of exposure to COVID-19. Significant litigation within the workers' compensation system is likely to result from this section of the proposed standard.

Sections 3 and 4: COVID-19 Requirements for Workplaces at Heightened Risk and those at Exceptional Risk

As noted above, additional work needs to be done to define "workplace at a heightened risk," given the substantial requirements for compliance associated with a heightened risk which are in addition to the base rule. That said, OMC asks that the rule be amended to confirm that manufacturing businesses are not considered "workplaces at heightened risk" under this rule.

The same comment applies to workplaces at “Exceptional Risk.”

Section 5: Definitions

Section 5 needs additional attention from the Agency. We recommend moving it to the front of the draft COVID-19 Temporary Standard so that one reading the rule will have access to the definitions before encountering terms in context. We also recommend that OR-OSHA define more terms used in the Standard, so that the temporary rules will not be left to the courts to interpret.

All references in the proposed rules to “individual” or to “workers” should be removed as OR-OSHA’s authority lies in the employee-employer relationship. Please replace references to “individual” and “workers” with the term “employee.”

The Agency also did not define “high-touch surface,” “high-contact surface,” “medical provider,” “public health official,” “sanitation supplies” and numerous other terms referenced in the rules. Employers should not have to guess at the meaning of terms used in a standard. Compliance officers, on the other hand, have limited training and expertise with regard to infectious disease hazards, protective measures and compliance alternatives. They should not be left to exercising subjective judgements in areas outside of their expertise. Clear and unambiguous rules require clear and unambiguous terminology. As currently written, the draft COVID-19 Temporary Standard falls woefully short of this goal. As such, the numerous sections of the Standard with less than clear and unambiguous wording would be subject to an “unconstitutionally vague” attack, which if successful, would render large portions unenforceable.

OMC appreciates the opportunity to weigh in on the draft COVID-19 Temporary Standard. Please do not hesitate to contact us with any questions regarding these comments.