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Administrator Wood:

On behalf of the thousands of Oregon small business members of NFIB, many being the smallest of small businesses, I am contacting Oregon OSHA today in response to the agency's draft rules for a COVID-19 Temporary Standard, dated August 17, 2020.

Oregon's small businesses have been asked to play a critical role in stopping the spread of COVID-19. Many were required to shutter their doors at the beginning of the pandemic. More have since seen a drastic drop in sales. Nearly every business is now required to enforce public health and safety mandates, applicable to both their employees and their customers. Each of these factors have had significant financial impacts. Combined, the effects on our economy have been unprecedented and severe.

While we appreciate the agency's desire to minimize exposure to the novel coronavirus in workplaces across the state, which is a goal that businesses share, it is NFIB's position that a temporary standard is not the best course of action at this time for a number of important reasons:

- The proposed temporary standard does not demonstrate that current enforceable standards, including new mandated standards issued by federal OSHA, in addition to its General Duty Clause, are insufficient to protect the employees of Oregon businesses.
- Oregon's elected leaders and public health officials have regularly stated that current mandates, guidance, and best practices issued by the CDC, OSHA, OHA and the Governor's Office are working to reduce the spread of the virus.

- Executive Orders and guidance documents have routinely been updated by state and federal authorities as scientific understanding of the virus continues to evolve. This approach provides for flexibility and responsiveness – and provides specific industries with guidance that best addresses their unique challenges and needs.
- The proposed temporary standard would impose regulations that, at best, attempt to mitigate the effects of the virus in Oregon workplaces with a one-size-fits-all, snapshot-in-time perspective on how best to minimize exposure.
- This issue was already adjudicated at the federal level. On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied a petition filed by labor groups seeking the adoption of an emergency temporary standard for COVID-19 by federal OSHA.

Specific to the proposed draft, NFIB has additional concerns:

- With a comment period deadline of Monday, September 7, 2020 and a proposed effective date of Monday, September 14, 2020 for the proposed temporary standard, there would be a very short timeline for employers to comply. While it is unclear when Oregon OSHA would begin enforcement of the temporary standard under the current draft, we would suggest at least a 90-day period from the time the temporary standard takes effect to the time the agency begins enforcement.
- Although Oregon OSHA mentions "feasibility" in Principle 4 of the "Oregon OSHA Decision-making Framework on COVID-19 Temporary Rulemaking" document, the draft rules do not actually assess feasibility; the "financial and technical ability of an industry – or any group of employers – to collectively implement the rule being considered." The draft may assume feasibility in certain sections but does not provide even an "abbreviated" assessment where key provisions have been proposed.
- "(1) Scope and Application" is confusing. If "(2) COVID-19 Requirements for All Workplaces" applies to all employers, and "(3) COVID-19 Requirements for Workplaces at Heightened Risk" always includes the requirements of (2), the rule should clearly state that. Likewise, if "(4) COVID-19 Requirements for Workplaces at Exceptional Risk" always includes the requirements of (2) and (3), the rule should clearly state that.
- (2)(a)(A) allows for the use of face coverings in accordance with (2)(b) to satisfy social distancing requirements to "the extent that the employer determines and can demonstrate that such separation is not a practical option." It is unclear how employers would determine practicality – or demonstrate it.
- (2)(a) is unclear regarding "droplet buffer" requirements. If the agency, as staff has suggested during numerous stakeholder forums, is proposing that barriers are an option for satisfying (2)(a), but never a requirement, the rule should clearly state that.
- (2)(b)(A)-(E) seems to be redundant. (2)(b) already establishes the face covering requirement. (A)-(E) should be removed.

- If (2)(c) is intended to require cleaning of "high-contact" or "high-touch" surfaces before being used by another employee, the rule should clearly state that. The "each shift" language insufficiently describes a large number or workplaces.
- However, this requirement is not "practical" or "feasible" for common areas, including bathrooms, unless the rule intends to expressly allow employers to require all their employees to clean the "high-contact" or "high-touch" surfaces those employees come in contact with before and after such contact.
- (2)(d) should clearly state that a social distancing officer can be an existing employee and have other job duties and responsibilities.
- (2)(d) should also clarify that the 25-or-more employees threshold is applicable to each specific workplace, and at any given time.
- Employers that appoint a social distancing officer under (2)(d) should expressly be able to appoint "one or more employees" of the employer's choice to fill the role of social distancing officer(s), including all employees, otherwise employees may object to the assignment, leaving the employer unable to satisfy the requirement.
- It is unclear what is meant by an "explanation" in (2)(f)(C). Employers should not be expected to explain why employees must follow state mandates. The agency should provide that reasoning. If (2)(f)(C) is attempting to require employers to communicate to their employees how to report signs and symptoms of COVID-19, the rule should clearly state that.
- (2)(f)(D) should be removed. State and federal laws always require this type of employee communication.

The "Medical Removal" section found in (2)(g) is particularly concerning. It has been repeatedly stated during the stakeholder forum process that Oregon OSHA would not justify its statutory authority to enact a brand-new paid leave benefit program. Moreover, stakeholders were cautioned not to question Oregon OSHA's authority to create such a program during the process.

The Oregon Legislative Assembly is the only co-equal branch of government with the authority to create a new paid benefit program for Oregon workers. They have done so on several occasions just within the last few years with the enactment of Oregon Paid Sick Time law in 2015 and Oregon's Paid Family and Medical Leave law in 2019.

However, the state legislature has already met twice in special session since the beginning of the COVID-19 pandemic and has not considered such a proposal. The Oregon Legislature's Joint Emergency Board allocated $30 million to DCBS on July 14, 2020 to stand-up a Quarantine Time Loss program for similar purposes; to fill the gap of employees not covered under FFRCA, but with a much different mechanism for getting benefits to workers while they are subject to quarantine orders – having quarantined workers apply for the benefit through DCBS. Employers are not responsible for paying the benefit directly. It is unclear at this time how the Oregon OSHA's temporary standard would interact with this already legislatively approved program, but it appears to be duplicative.

Under FFRCA, employers with fewer than 500 employees are required to provide up to 80 hours of paid leave for a variety of circumstances related to the COVID-19 pandemic. However, employers are made whole by way of dollar-for-dollar federal tax credits available to employers with employees that accessed the benefit. Under current federal law, FFRCA benefits, as well as an employer's ability to recover the costs of those benefits, expire on December 31, 2020.

Because Oregon OSHA's proposed temporary standard would be in effect for 180 days, this would push the paid leave requirement well past the deadline by which small businesses would be able to recover their out-of-pocket costs for paying the benefit to employees directly (December 31, 2020).

By moving forward with this program as proposed, Oregon OSHA would be responsible for requiring Oregon's small businesses to provide up to two weeks of paid leave, per employee, for a period of over two months, with no hope of recovering those costs. To make matters worse, there is no requirement in the proposed temporary standard that an employee seeking this paid leave benefit attest to complying with state mandates and guidance relating to COVID-19, including OHA guidance and Executive Orders issued by the governor. Under the rule as written, an employee of an Oregon business could intentionally attend a large social gathering that is currently not allowed, become exposed to the virus, and then be rewarded (by their employer, not the state) for this choice with two weeks of paid leave. If the state is serious about the need for Oregonians to adhere to state-issued mandates and guidance, this program is clearly sending a contradictory message.

If the agency decides to move forward with all or a portion of the temporary standard, NFIB respectfully asks the agency to remove (2)(g) entirely. If the agency decides to deny this request, at a minimum, Oregon OSHA should apply a December 31, 2020 sunset the paid leave program.

Additionally, NFIB acknowledges and is appreciative of "Exception 2: Employers who would otherwise be required to provide paid reassignment leave who experienced a reduction of more than 20 percent (20%) in gross revenue between the 2nd (second) calendar quarter of 2019 and the 2nd (second) calendar quarter of 2020." However, a new paid benefit mandate that is not reimbursable by state or federal dollars creates a significant financial hardship for every employer experiencing any amount of lost revenue, especially for small businesses with several employees potentially being able to access the benefit at the same time.

If the agency decided to move forward with all or a portion of the temporary standard, NFIB respectfully asks that the agency reduce the gross sales loss figure to 10 percent (10%).

Specific to Medical Removal, NFIB has additional concerns:

- (2)(g) neglects to mention COVID-19 specifically. The rules should clarify that benefits are related to the current pandemic only.
- "Medical provider" and "public health official" should be clearly and narrowly defined to physicians and contact tracers that have had specific interactions with the employee seeking the benefit.
- It should be clarified that this benefit is a one-time benefit, up to 80 hours of maximum paid leave. An employee should not be eligible for two weeks of paid leave for more than one exposure event.
- Additional clarity is needed regarding "benefits" in (2)(g)(B). Employees should not accrue additional benefits while not working.
- (2)(g) is silent on required communication and documentation between employees, employers, "medical providers", and "public health officials". It is unclear how an employer should be informed that the employee intends to take the benefit.
- Either the employee or the "medical provider" or "public health official" must be required to inform the employer to avoid a no-call/no-show termination.
- If fulfilling this requirement is the employee's responsibility, the employer must be allowed to verify the authenticity of the paid leave request with the "medical provider" or "public health official".

While still experiencing uncertain and unprecedented economic conditions, Oregon's small businesses remain committed to the health and safety of their employees and customers as they reopen and attempt to return their business operations to pre-pandemic levels. Again, it is NFIB's position that Oregon OSHA already has sufficient authority and enforcement powers to address the concerns of unsafe work environments and that a temporary standard is not the best course of action for Oregon. Staying the heavy hand of government at this time will aid Oregon's small businesses in rebuilding their businesses, inviting their customers to return, and bringing their employees back to work.

Thank you for your time and consideration,

Anthony K. Smith
NFIB Oregon State Director