

September 4, 2020

Mr. Michael Wood
Oregon OSHA Administrator
350 Winter St NE, 3rd floor
Salem, OR 97301
tech.web@oregon.gov

RE: Proposed COVID-19 Temporary Standard

Dear Mr. Wood:

We appreciate the time Oregon OSHA has taken to be available to the construction industry at the beginning of and throughout the COVID-19 pandemic. Our members generally understand the challenges all organizations are facing as we collectively adjust to new and changing information.

I. Background of the Construction Industry and COVID-19

As you know, the construction industry has taken several proactive actions to implement COVID-19 safety protocols from the outset. We developed unique partnerships with our peers, our trades partners, and local and state government to reduce the spread of the virus. Like many businesses, construction sites are unique – work tasks are different site to site and our sites are generally outdoors and not open to the public. The construction industry has a long history of understanding safety controls, task analysis, work plans and the correct use and application of PPE.

Based on the data and our overall employment footprint, we believe our industry has been a model of success. Our response to the pandemic could be characterized in phases: first, early and robust training education and protocols to get in front of the disease; then, sharing of best practices, and expanded partnerships; and finally, refinement of our work practices and public information. Our formal rulemaking comments for the proposed infectious disease rules is in the context of our proactive work and the work practices we all have discussed and implemented thus far.

We ask that you consider our work to-date, the baseline work and partnerships we have established and our unique, generally non-public facing business practices. We do not believe we should be lumped into the general rules potentially creating new confusion for our programs and members when we are confident we have adequate existing standards and a commitment to maintain safe worksites.

II. Construction Industry is Unique

Oregon's construction industry is unique. Unlike other industries that are based on customer interactions, Oregon's construction work happens largely on closed jobsites. This results in far less contact with members of the public, and in a controlled environment. Therefore there is far less risk for virus spread.

Also unique is the outside nature of many construction jobsites. While most of Oregon's workers find themselves in office buildings, shops or other indoor locations, much of Oregon's construction work is done outside. The free moving air afforded by an outdoor location helps further prevent virus spread and keeps jobsites safer. Also, in guidelines given across the state, nation, and world, there have been distinctions made for the different virus spread inside versus outside. However, these rules make no such differentiation. Instead, outdoor construction sites are treated the same way as an indoor store would be treated, despite the different risk factors associated with closed spaces. We request that these rules take into account these risk factors and provide different guidance for outdoor locations.

Construction is already a safety sensitive industry; we are used to looking at situations critically and making sure that our employees are safe. Our associations and members have taken steps from the very beginning of the pandemic to ensure the safety of our employees, their families, and our jobsites. Because of this, we request that you consider the construction industry differently than other work environments in other industries.

III. Specific Issues for Construction Industry

These rules create a variety of concerns for the construction industry:

Medical Removal. This provision of the rules would require that an employer reassign any employee who has been recommended to isolate by a medical provider or public health officer. We believe this should be a licensed and regulated occupational medical physician making these decisions. The reassignment must be to duties that do not require in-person contact with another worker or member of the public. If there is no such reassignment available, the employer must allow workers to use leave to which they are entitled under the FFCRA. If the employee is not entitled to FFCRA, the employer must provide two weeks of paid reassignment leave.

The drafting of this rule leaves many questions unanswered. As this creates an entirely new paid leave program for all employers, there are many technical details that need to be accounted for. How many times will employees be able to use this leave? How does the determination that there is no reassignment available work? How to ensure that the

employee is actually isolating? How does this language align with CDC guidelines for employers? Most importantly for our industry: who pays for this leave in a multi-employer situation? As detailed below, there have been conversations at the OSHA comment sessions about general contractors being responsible for the employees of the subcontractors for these rule provisions. If this is the case, are the general contractors responsible for the paid leave of their subcontractors' employees?

Given the complexity of this new rule, it does not belong in a temporary rule where there has not been sufficient opportunities to vet potential issues and make determinations of the actual application of the rule. We therefore request that the medical removal portion of these temporary rules be removed.

We also question the legal authority and appropriateness of OSHA creating such a paid leave program. OSHA's charge is one of prevention and consultation, as laid out in the workers' compensation reforms in the 1990s. Its purpose is to help keep workers safe in their workplaces. The creation of a paid leave program does not fit within the scope of OSHA's usual purview. As such, we do not support the adoption of a paid leave program through these temporary rules at OSHA.

Section 2(b)(E) – Forceful Exertion. This portion of the rules requires a new distancing requirement never discussed before: face coverings must be worn when individuals are engaged in forceful exertion when they are not separated from other individuals by at least 12 feet. The first issue is a definitional one: it is unclear, and there is no definition given for, what is meant by "forceful exertion." It seems that this could encompass construction work, as would the shouting portion of this rule. We doubt this is your intent due to the unique nature of construction. Again, this rule fails to take into consideration the unique nature of the construction industry. When the work is occurring outside, this 12-foot measurement may be excessive. Also, construction work can include occasional exertion, or continuous exertion, depending on the worksite and type of work being done.

The forceful exertion portion is also problematic because what is forceful is entirely employee dependent. This point was made by OSHA staff during one of the question sessions, where it was noted that forceful exertion would be a case by case determination. It is difficult for an employer to be able to assess what will be considered forceful exertion for each individual employee. Because of this, we request that either the forceful exertion language be removed, or that construction be exempted from this portion of the rules.

Droplet buffer: Droplet buffers have been used throughout the construction industry during this pandemic, often in creative ways to keep employees safe for specialized tasks. However, the guidelines for droplet buffers in this proposed rule draft do not account for

the unique situations where droplet buffers may be needed in the construction industry. We have some members who have figured out ways to make droplet buffers function on aerial lifts and in trenches. By putting these new distance restrictions, these droplet buffers will no longer be able to be used for construction work.

There are also broader issues with the droplet buffer sizing requirements, including concerns of different sized employees. For example, an employee who is 5'2" will require a different barrier placement than an employee who is 6'2". These rules do not account for the impracticality of having such large barriers needed to cover all employees. Such restrictions and impracticality could result in the droplet barriers being unused altogether, which would be unfortunate given the added protection they can provide.

Face coverings. The main concern for our industry here is what is considered within the "employers' control." Whether employees of subcontractors are considered to be within the general contractors' control is the primary issue here. In further conversations, OSHA has commented that general contractors should be responsible for their subcontractors with respect to these rules. Our concern here is the ability of a general contractor to monitor all the employees of subcontractors on their jobsites for something that can be as quick to change as mask wearing. A mere mask slipping off the nose of an employee of a subcontractor would be nearly impossible for a general contractor to detect on a large jobsite. However, under these rules, a general contractor could be found in violation of the rule due to that slip. It should be the employer-employee relationship here that matters for face coverings.

Sanitization. Given the changing science on the spread of COVID-19, we are unsure whether such intense sanitization requirements should be necessary. It is becoming increasingly clear that contact spread is less likely than person-to-person spread. As a result, we may be spending more time than necessary on the sanitization, at the expense of other, more effective protocols. AGC and OHBA have outlined sanitization best practices in the documents we have provided to our members. We suggest that the sanitization requirements outlined here be framed as best practices, including adequate signage for workers to locate materials and supplies, rather than requirements. Do we clean surfaces that we contact generally or occasionally "touch?" What if we required gloves? Is there consideration for the fact that some equipment may be damaged by repeat sanitization?

Another issue that arises with these sanitization requirements is the issue of overlapping shifts. The current drafting of the rule requires wiping down at the end of each shift. However, if the shifts are staggered, this may not be as clear. It would be clearer to have a guideline in terms of actual time, rather than shifts.

Social Distancing Officer. It should be made clear whether the social distancing officer needs to be an employee hired specifically for this role, or whether it may be a role given to a current employee. If it is a newly hired position, this is problematic to add a new position for companies who are already struggling. Even if a company is not having any financial difficulties as a result of COVID-19, the cost of a new employee for this purpose is not one that employers will have anticipated or planned for. It is also unclear if the SDO is required per company with 25 employees at each site or how multiple sites are covered.

There is also a question of what this means for multiemployer jobsites, like construction sites often are. It is unclear whether the general contractor's SDO is responsible for ensuring compliance of all employees of subcontractors. If so, this becomes a monumental task on a large jobsite. Each employer's SDO should be responsible for their own employees' compliance, and this responsibility should not be shifted to the general contractor.

IV. Industry Requests from OSHA

Our organizations have several suggestions and requests to ensure better compliance and make the implementation fairer to the members of our organizations who have already gone above and beyond to ensure the safety of their employees.

Uniform safety plan. We request the ability to create a general safety plan, in consultation with OSHA, to distribute to our members. This type of template would allow our members to clearly comply with the rules, while being sensitive to how time intensive creating these plans can be. Instead of having each company create their own plan, we could provide one that clearly comports with the requirements and is standard across the industry. AGC and OHBA would be very appreciative for the opportunity to work with OSHA on such a plan.

Grandfathering of past approved safety protocols. We request that those safety protocols that have been previously approved by OSHA be grandfathered in, even if they do not meet the specifics of the protocols set forth in this proposed rule. Our members have put a great deal of effort and resources into the creation and implementation of new safety standards, protocols, and methods. With these rules, some of these previously approved protocols will no longer be considered in compliance with OSHA standards. However, since they were sufficient in the past, we request that these employers be allowed to continue to use them.

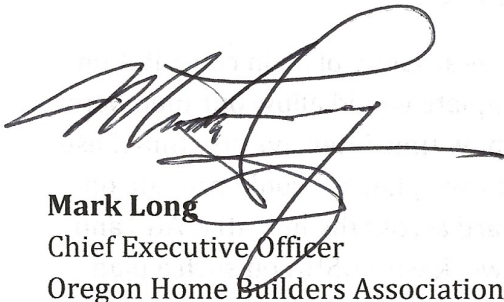
If there are concerns about the efficacy of the protocols approved in the past, we recommend allowing these to be grandfathered in for employers who have not had a spread of COVID-19 among their workforce. Such guidelines would indicate that these protocols have been working and should be allowed to continue.

Workable timeline. Another concern for our industry is creating a workable timeline. Our industry has spent the last six months continuously working on keeping our jobsites safe. As a result, we request that industries who have already put protocols in place, like construction has, be allowed a longer timeframe to put these new protocols into place. In some instances, it will require that our members undo certain safety precautions to put in place new ones. This will all take time, and we request that OSHA ensure our members have sufficient time to comply.


Thank you for your time and for your consideration of our concerns and requests. Given the unique nature of our industries and the work we have already done, AGC and OHBA request the opportunity to have a construction work group to continue to define these rules.

We thank you again for your support of our industry in these past six months. They have been filled with unprecedented issues and difficulties, and we are thankful for your partnership.

Best Regards,



Mark Long
Chief Executive Officer
Oregon Home Builders Association



Mike Salsgiver
Executive Director
Associated General Contractors
Oregon Columbia Chapter