OREGON FOREST & INDUSTRIES COUNCIL
SUSTAINABILITY. SCIENCE. INNOVATION. GROWTH.

PO Box 12826
Salem, Oregon 97309
(503) 371-2942
Fax (503) 371-6223
www.ofic.com

August 31, 2020

Department of Consumer and Business Services/Oregon OSHA
P.O. Box 14480
Salem OR 97309

VIA EMAIL: tech.web@oregon.gov

RE: Draft COVID-19 Temporary Standard

Dear Director Wood,

On behalf of the Oregon Forest & Industries Council ("OFIC") and the more than 45 timber companies that our organization represents, we are submitting the following comments regarding Oregon OSHA's ("OR-OSHA" or the "agency") Draft COVID-19 Temporary Standard.

Before we wade into the particulars of the draft rules, please allow us to thank you and your staff for engaging industry groups through listening sessions in the weeks leading up to publication of the draft rule. We appreciate you spending time on July 30 to address the forestry industry, specifically, and hope that you take the level of participation at that meeting as a clear demonstration of both our seriousness in addressing the ongoing society-wide struggle against COVID-19 and our commitment to engaging with your agency and contributing a perspective that will enable OR-OSHA to craft rules that are reasonable and workable. With that goal in mind, we would like to express a number of concerns that we have with the rules as drafted.

Section (2)(a):

First, regarding Section (2)(a), we have several concerns with how the distancing requirement has been framed. Though it is doubtless incumbent on employers to institute reasonable technical safeguards within the workplace, we are disquieted by how the first sentence of Section (2)(a) has been stated and the resulting burden that it places on employers to "*ensure*" that a 6-foot distance "*is implemented*" between "*all* individuals" in the workplace. Many of our member companies have reconfigured their workplaces, installed additional safety equipment, and implemented mandatory practices such as masking in an effort to avoid workplace exposure to COVID-19. What these companies cannot do is to ensure that in all instances employees are utilizing those tools and following implemented protocols. Indeed, it would be unrealistic to expect them to be able to do so. Therefore, we would suggest reframing the first sentence as follows: "The employer shall take all reasonable precautions to facilitate appropriate social distancing in the workplace in the following manner."

Likewise, we are concerned with subsection (2)(a)(A) and the burden it places on employers to prove that the mandated 6-feet of separation is not capable of being met. It is unclear what an employer would have to be capable of demonstrating in the agency's eyes to affirmatively show that separation is not "practical." In fact, in the absence of a clearer definition, it is not even self-evident what would be considered impractical in the context of this mandate. Is practicality determined based on cost of implementing distancing? Technical feasibility in re-designing the workplace? A combination of these and other factors? In an effort to avoid this confusion and to

reduce the burden on employers, we would recommend removal of the phrase "and can demonstrate" from subsection (2)(a)(A).

Finally, we would recommend amending the language of subsection (2)(a)(B) to avoid the interpretation that installation of physical barriers is a necessary condition to meeting the distancing requirements of (2)(a)(A). We would suggest stating that: "An employer may satisfy the distancing requirements in subsection (2)(a)(A) through the installation of impermeable barriers that create a 'droplet buffer' of at least six feet between individual employees and/or between employees and other individuals." We would further recommend that the rule better clarify that installation of impermeable barriers is but one option that employers may implement to meet distancing requirements, and that the masking guidelines in Section (2)(b) are equally acceptable when strict distancing is not practical.

Section (2)(b):

We urge the agency to review this section in light of the state's current mask guidelines and re-write it where there are discrepancies with those established guidelines. Our members, like all businesses in Oregon, have dedicated significant time and effort to instituting operational changes to comply with existing mask mandates, and these rules should not pull the rug out from under the feet of companies that have undertaken to implement such measures.

Section 2(c):

We are concerned about the requirement in subsection (2)(c)(A) that all shared equipment and high-touch surfaces be cleaned before they are used by another employee. In mills, specifically, there are a variety of surfaces and equipment on the production floor that may be used or operated by multiple different employees over the course of a single shift, and it would not be practical to disinfect those surfaces after every use. In fact, there may be cases where to do so would hinder the safe and effective operation of the mill. It would also confer a minimal marginal benefit given that: (1) surface transmission has been found to play a lesser role than originally thought in the spread of the virus, (2) the risk of surface transmission is further reduced when employees are wearing masks and are thereby prevented from touching their noses and mouths, and (3) gloves are typically worn by mill employees on the production floor, which establish yet one more physical barrier to transmission from surface contact. We do not object to reasonable guidance requiring high-touch surfaces to be cleaned between shifts, but cleaning during shifts is impractical and is likely to be only marginally effective at mitigating the spread of COVID-19.

Section (2)(d):

We would recommend adding language to clarify that, for employers with more than 25 employees, the social distancing officer can be chosen from among current employees and that the duties incumbent on them as the designated social distancing officer may be performed in conjunction with their other duties and responsibilities.

Section (2)(g):

Though we agree that employees should not be disincentivized from doing the right thing and voluntarily reporting that they have contracted the virus or that they have been advised to quarantine due to potential exposure, we have serious concerns with OR-OSHA's inclusion of a medical removal requirement in Section (2)(g) of the proposed rules.

First, conditioning medical removal on the recommendation of a medical provider or public health official without qualification is problematic. It is one thing for an employee to receive communication from a contact tracer indicating that that they have likely been exposed to an infected individual or to manifest clear symptoms of COVID-19 infection. It is quite another to grant the same weight to a note from a doctor that an employee has solicited because they fear potential exposure, regardless of how attenuated that fear is.

More fundamentally, we do not believe that OR-OSHA has the authority to mandate the provision of medical removal protection benefits in this temporary rule. The agency has stated that it believes itself to be acting within statutory bounds by virtue of the fact that federal OSHA has promulgated (and the state has adopted by reference) toxic and hazardous substance standards that contain medical removal protection benefits (such as for lead, beryllium, chromium (VI), etc.). We would note, however, that there is no clear statutory grant of authority undergirding these standards (though widespread agreement as to their necessity has resulted in a dearth of legal challenges), and that even if such authorizing principle could be identified, it strains credulity to suggest that it could be applied – beyond cases of workplace exposure to known toxics and carcinogens – to an airborne pathogen that is circulating through the society, at-large.

Further, OR-OSHA's failure to limit this provision to cases of known workplace exposure to COVID-19 makes it look suspiciously like a workplace presumption.[1] The legislature has not amended the workers' compensation law to establish a workplace presumption for COVID-19, and the agency may not co-opt legislative authority to effectively do the same through this rulemaking.

We would note in closing that many if not most of our members that fall outside of the purview of the FFCRA's enhanced leave provisions have nevertheless voluntarily implemented their own enhanced leave programs and provided paid leave in addition to what employees would typically receive under their standard leave policies. We know that our industry is not unique in proactively adopting such enhanced policies during these challenging times. This is not to say that every employer is in the same boat, but it does argue against the proposition that a mandated paid medical removal protection benefit is necessary to incentivize employees to report potential exposure to COVID-19.

Again, we appreciate the opportunity to present comments on the draft COVID-19 Temporary Standard, and we look forward to continuing to work with the agency on the development of this standard as well as the forthcoming permanent infectious disease standard.

Sincerely,

Tyler J. Ernst
Policy Counsel, Manufacturing & Resources
Oregon Forest & Industries Council
O: (503) 586-1245 | C: (517) 898-0557 | tyler@ofic.com

[1] This reading is bolstered by the holding of the Oregon Court of Appeals in *K-Mart v. Evenson*, 167 Or. App. 46 (2000), where the court found that prophylactic medical treatment was enough to establish a compensable injury. Applying this holding to the current matter, if an employee has been told to quarantine and is thereby removed from the workplace, such removal could constitute a "prophylactic treatment" that would likely be enough to establish a compensable injury under the state's workers compensation laws.