



October 4, 2021

Occupational Safety & Health Standards Board
Chair, David Thomas
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

Christina Shupe, Executive Officer
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Dear Chair Thomas and Executive Officer Shupe:

On behalf of the California Retailers Association (CRA), I want to thank you for the opportunity to participate in the Cal/OSHA Advisory Committee on the COVID-19 permanent regulation. Below are CRA's comments on the staff draft of the regulation and the committee discussion last Thursday, September 23rd.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which prior to the pandemic operated over 400,000 retail establishments with a gross domestic product of \$330 billion annually and employs over 3 million people—one fourth of California's total employment.

We first want to acknowledge and appreciate the efforts of staff in crafting of this regulation such that it will be more durable as the fight against COVID-19 evolves. Notably, this draft provides greater flexibility in defining key terms like "infectious period" and "close contact" that will allow enforcement of the regulation to evolve along with scientific understanding of the virus. It also eliminates the requirement for a separate COVID-19 plan and training, allowing employers to address those issues as part of their Injury and Illness Prevention Program (IIPP).

CRA supports the draft's proposed removal of "exclusion pay" from the regulation as it is more appropriately a legislative issue. We reject any notion that the Board should assume jurisdiction because the Legislature is unable to act on its own or act in a timely manner. As a closely related example, upon its return in January of this year the Legislature considered and passed SB 95 reinstating the COVID-19 paid sick leave benefit by March 19th.

CRA has the following concerns about the draft language at present:

- We are concerned with the proposed two-year duration of this regulation. It is impossible to say with certainty when COVID-19 will cease being the urgent public health threat that it is today, but we do know that the landscape can look very different within a few short months. Extending COVID-19 workplace regulation another 2 ½ years (six more months of the ETS plus two years of the permanent regulation) may well prove unnecessary. We encourage the Board to consider establishing a metric or metrics which would sunset the permanent regulation prior to 2024 if it is demonstrated that the virus has become endemic and is no longer a threat to hospital capacity or health care utilization.
- The definition of “fully vaccinated” in Section 3205 (b)(9) should acknowledge the extensive work already done to confirm and record employee vaccination status under the ETS. As currently written, it would require employers to collect electronic or physical copies of vaccination records themselves, which by extension would require employers to establish within days or weeks entire new databases that were previously constructed over many months. This would be extremely burdensome, impractical, and would penalize employers for compliance with the ETS and current health orders. It may also create a substantial and unnecessary administrative burden on the medical community to respond to document requests from workers who may have misplaced their vaccine records.

This change will allow many employers to maintain consistency with existing records of employee vaccination. In addition, many business owners also continue to express concern about handling and security for the long term their employees’ sensitive personal health documents. Employer review has the additional benefit of keeping more of these documents out of cyberspace.

- Section 3205 (c)(5)(A) perhaps unintentionally defines vaccinated, asymptomatic workers within the exclusion requirement for COVID-19 close contacts. CRA endorses a return to the standard provided in the ETS. Retailers agree that vaccination is the clearest path to ending the pandemic but treating vaccinated and unvaccinated employees essentially the same would reduce the incentive for employees to receive and employers to encourage vaccination.
- The air filtration requirements in Section 3205.1(e) are inappropriate as they are not indicative by themselves of deficiencies in current workplace controls. Particularly in larger work areas, the outbreak threshold can often be achieved through community spread. The costly requirements of this section include the rental of HEPA filters at approximately \$300 per week and the installation and energy consumption costs of MERV-13 filters. These requirements should be limited instead to major outbreaks where workplace controls are more clearly a factor in transmission.

In addition, we have the following concerns with points raised at the Advisory Committee meeting:

- CRA would oppose any revisions to the draft that expand surveillance testing beyond what is already required by the ETS for outbreaks and major outbreaks. The ETS and subsequent FAQ’s provide appropriate balance in defining where surveillance testing is appropriate and to which groups of employees it applies. Any suggested changes to the definition of “exposed group”

that would expand surveillance testing beyond the employee's work area, or similar revisions would prove impractical for numerous reasons, not the least of which is the additional pressure on overall testing capacity that is already being pushed to its limits. Expanded surveillance testing is likely not the best use of these resources. The existing definition provides a better balancing of risk and a much clearer path for employer compliance.

- We appreciate that the requirements for providing N-95's are limited to employee request and would encourage the Board to maintain the draft's requirement of a physician's note as a condition of employer's duty to provide an N-95. This practice follows precedent in other labor law such as reasonable accommodation for disabilities.

Thank you again for convening this Advisory Committee and for your consideration of our comments.

Sincerely,

A handwritten signature in black ink that reads "Steve McCarthy". The signature is written in a cursive, flowing style.

Steve McCarthy
Vice President, Public Policy