September 8, 2020

Michael Wood, Administrator Oregon OSHA
C/O Technical Section (tech.web@oregon.gov)
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RE: Draft Infectious Disease Rules

The Special Districts Association of Oregon (SDAO) serves over 900 local governments in the state of Oregon representing 37 types of districts. These districts are diverse in function and provide services to the citizens of Oregon including airports, domestic water and sewer, drainage and irrigation, health services, library, mass transit, parks and recreation, people's utility districts, public safety, roads, soil and water conservation, and weather modification. SDAO administers the Special Districts Insurance Services (SDIS) insurance pool which provides all lines of insurance coverage to the members of SDAO. SDAO also administers the Property and Casualty for Education (PACE) insurance pool for all K-12, many public charter schools, all education service districts, and all community colleges.

Our member districts serve the entire population of the state and provide many essential services. During this COVID-19 pandemic, our members have been actively working in their communities to ensure the public has the services that they require. Most of our districts only slowed down but did not stop providing service. They found ways to protect their employees and moved forward providing these essential services.

SDAO increased efforts to support districts in navigating the pandemic. We assigned staff members to be the contact for members' COVID-19-related questions and regularly engaged with Oregon OSHA staff to answer questions and create solutions to problems that did not exist prior to the pandemic. Jason Jantzi took the bulk of the questions about the virus and risk management processes, including participating in statewide teams for the creation of quarantine guidance for the fire service. Tonya Grass received the questions related to

administration of public meetings and legal questions, and Monica Harrison took on employment, FFCRA and BOLI-related questions. Gina Wescott was the point of contact for workers' compensation questions, and Jens Jensen was the point of contact for general liability. This team continues to handle member inquiries.

As the large share of re-insurance providers have begun to exclude infectious diseases, this has left the SDIS and PACE pools without any type of insurance for infectious disease liability. The notable exception is in the workers' compensation insurance for a workplace exposure. At the beginning of the pandemic, SDAO developed an internal policy consistent with workers' compensation law regarding the processing of COVID-19 claims. "*Our claims protocol for COVID-19 will follow our current infectious disease protocols. If a district employee is exposed, or has a confirmed diagnosis of COVID-19, and files a workers' comp claim, we will go through our investigation process to determine if there is a causal connection between the exposure and the employee's work activities. This includes obtaining all available information from the employee, district, and source patient. We may also require a medical expert opinion. Once we have evaluated all the evidence, we would then make a determination of whether to accept or deny the claim. All claims will be determined on a case by case basis, based upon the evidence intrinsic to that claim."* Our claims department continues to apply this policy to all current and future claims. At this point, SDIS has received 41 workers' compensation claims for exposure to SARS-COV2. Only two claims lead to a positive test result.

When we were notified that Oregon OSHA was planning to implement an infectious disease rule, we created a committee to represent SDAO and the needs of the 37 types of local governments we represent; this committee has 33 member representatives. This document has the broad support of over 900 member districts and their respective elected officials.

With the current decline in COVID-19 cases both in Oregon and worldwide, we believe that the adoption of these temporary rules is unnecessary and overly costly to Oregon employers. During this time of the public health emergency, financial challenges have arisen for everyone, including local governments. With the reduction in the case numbers and the trend heading downward, we believe that maintaining the status quo is appropriate, currently.

We understand the agency's desire for additional clarity; however, we believe that could be accomplished with letters of interpretation and policy memos. Our combined associations would be willing to assist the agency, and already do, in promoting these clarifying messages. There are serious concerns about how these rules would affect our local government members regarding the enforcement of these standards on the general public by an employer and not by the state.

Many of our members are considered essential workers and have been frontline since the beginning. We have all worked together to find the most appropriate protective measures to not only keep our staff safe, but the public at large as they utilize our services. As noted above,

our membership has seen very low exposure numbers at the workplace. This is due to the diligence of all parties involved, workers, management, board members, patrons, and associations, not because of the threat of citations and monetary penalties. We request the agency defer any temporary rulemaking. If you are unable or unwilling to stop, please consider the following comments and concerns we share with you:

1. Move the enforcement date back at least 60 days from adoption. This will allow employers to prepare and ensure that measures are in place prior to Oregon OSHA seeking enforcement action. During the Governor's August 21st press conference, she repeated this phrase multiple times, education first then enforcement. Oregon OSHA's consultative services should be engaging with employers specifically for COVID-19 due to the entirely new requirements to all but healthcare employers.

2. Current OHA guidance for specific sectors gives adequate advice as shown by the decreasing case numbers, the agency needs to ensure consistency throughout the rules with these sector specific documents. There are many places that seem to conflict or create confusion about enforceable items. Many of the references to face covers and distancing appear to create confusion about which takes precedent. The CDC makes a statement that "…the mask is not a substitute for social distancing" (Center for Disease Contol, n.d.). This would lead most to presume that social distance is the true protection and a mask may be an optional add-on item.

3. Generally, Oregon OSHA creates rules that have a trigger mechanism that tells the compliance officer what hazard to address. These have been, to this point, a specific hazard that can demonstrably be shown to exist in the workplace; hazards like falls of over ten -feet, electrical hazards, specific chemicals, bloodborne pathogens where an employee is required to interact with the bodily fluid, and heat stress.

   With COVID-19, the agency is presuming that the individuals entering the workplace are carriers of the SARS-COV2 virus. This is a departure from the previous direction of the agency related to enforcement. Text from the agency's own FIRM manual under "potential exposure" says an exposure to an employee must be "reasonably predictable". In some workplaces, like a healthcare setting, it can be reasonable to predict that SARS-COV2 could be present in the workplace in a sufficient amount that could present a hazard to employees. If the virus is present in all individuals and workplaces, as Oregon OSHA is presuming, then case numbers and outbreak numbers should be currently at high levels and they should be active across all parts of the state. Historically, it has been Oregon OSHA's obligation to prove the hazard exists, not the employer's obligation to prove it does not. It is our belief that the agency should not be promulgating these temporary rules where it is presumed that all individuals create a hazard. The agency can look to the California Aerosol Transmissible Diseases standard

to develop language to trigger this rule in a more reasonable manner. Language such as *"Occupational exposure. Exposure from work activity or working conditions that is reasonably anticipated to create an elevated risk of contracting any disease caused by ATPs or ATPs-L if protective measures are not in place. In this context, "elevated" means higher than what is considered ordinary for employees having direct contact with the general public outside of the facilities, service categories and operations listed in subsection (a)(1) of this standard. Occupational exposure is presumed to exist to some extent in each of the facilities, services and operations listed in subsection (a)(1)(A) through (a)(1)(I)."* (State of California Department of Industrial Relations, 2009) This would be more acceptable language as it acknowledges there is a level of community spread of disease that cannot be controlled through any rules or regulations.

4. **Education Exemption Note.** We would request that the agency allow the use of the Oregon Office of State Fire Marshal's guidance for response and the March 2020, Quarantine Guidance for Fire and EMS Responders (Oregon Office of the State Fire Marshal, 2020) document used by the Oregon Public Safety Service as a good faith effort to comply with the provisions of this temporary rule. This has been the standard for operations since March 2020 and the Oregon public fire and EMS service has remained relatively unharmed by the virus; especially as compared to the rest of the country. This guidance document and other operating guidelines, such the "module of one", were created in conjunction with labor, management, insurance, and OHA. It reflects all aspects of the situation from protective measures, legal considerations, workers' compensation, isolation of exposed individuals, and financial and mental health of the employees and family. Changing protocols at this time could result in exposure to responders as new training and protocols are adopted. Both fire service management (OFCA, OFDDA, SDAO) and labor (OSFFC) agree that the current guidance documents in place are sufficient and effective and should not be changed unless new research or technology make such changes necessary.

5. **(2)(a) Social Distancing** appears to provide conflicting guidance. The most glaring incongruity appears to be the distances allowed by these rules. If distancing is the primary form of protection, there should be clear guidance about the measurements. The measurements appear to be very subjective as they change from three feet to twelve feet based on activities. Is there repeatable scientific data that informs the decisions related to the agency choosing these measurements? If there is none, the agency should provide information as to how this distance was arrived at and show that this measurement used by enforcement for the purposes of civil penalties is not an educated guess. If the virus can be reasonably predicted to travel a certain distance, this should be the minimum distance that is enforceable as the protective measure. Since the minimum distance referenced in these rules is three feet, and the World

Health Organization (WHO) has chosen one meter, this should be the minimum distance that Oregon OSHA enforces.

If there is an acceptable level of concentration of virus particles, then there would be protective measures that could be designed. This would be consistent with Oregon OSHA rules for welding and brazing ventilation 1910.252(c)(2), Lead 1910.1025(c)(1), and other hazardous material standards. Since this item could result in a citation with monetary penalties the agency should choose to use a recognized minimum standard like the WHO guidance of one meter. Unless there is an objective standard based on a reasonably predictable potential exposure, we believe that the standard should reflect the minimum distance recognized health experts are providing as guidance. If an employer wanted to provide additional protections to their employees, they could adopt a higher level of care.

6. **(2)(a)(C) Social Distancing** there needs to be consideration for all public safety agencies related to the three-foot distance rule in vehicles as it is not always feasible to maintain that physical distance. For example, many fire engines have a bench seat for a rear seat. To maintain proper numbers for safe operations districts, four to five individuals are sent on an engine. There is no feasible way to maintain the necessary numbers of responders while maintaining a three-foot distance. These are specialized vehicles and it would not be practical to purchase or rent additional units to space responders out. They also cannot respond in their personal vehicles and maintain a cohesive unit arriving expediently and safely.

   Police and park ranger vehicles often need to have a field training officer riding with a trainee. There may not be appropriate spacing between these officers. It is not feasible to rent additional vehicles and create a proper training environment. With added retirements occurring at a rapid pace, the need for training officers to be in the vehicle is paramount currently. Face coverings can be worn during non-emergent times; however, communication is hindered by face coverings and would become an additional serious hazard due to unclear communication with other responders and the public. See our comments for face coverings. We request that the agency issue an exemption or policy guidance for enforcement purposes, allowing all public safety agencies to maintain as much practical physical distance as possible when operating emergency vehicles or to consider them as a stable cohort (module of one) and treated as such.

7. **(2)(b) Face Coverings** has many problems if it is to be used for enforcement and civil penalties. The **main problem** is that there is no accepted standard used to create these face coverings. To become enforcers of this rule would be exceedingly difficult for an employer. Employees and other individuals in the workplace currently can create these cloth face covers without any type of designs or specifications, and these rules require

an employer to enforce an ambiguous guideline. If this is to be used in the infectious disease rules, Oregon OSHA must provide specifications that can be easily understood and enforced.

8. **(2)(b) Face Coverings**, according to the OHA's Frequently Asked Questions webpage, "Cloth face coverings **may** help prevent people who have COVID-19 from spreading the virus to others." (Oregon Health Authority, n.d.) According to CDC, face coverings "… **may** help prevent people who have COVID-19 from spreading the virus to others…" (Centers for Disease Control, 2020) and the comparative study they relied on came to the conclusion that "…a homemade mask should only be considered as a last resort… (Anna Davies, 2013) This shows that even though coverings are recommended, they are not certain to prevent the spread of the virus. If Oregon OSHA is going to enforce the wearing of cloth face coverings with civil penalties, there needs to be repeatable scientific data that shows the use of face coverings indeed reduces the spread of the virus particles to a level that leads to acceptable numbers of illnesses or severity of illnesses. Currently, there is contradictory discussions both for and against the wearing of cloth face coverings. If Oregon OSHA has such scientific data showing the efficacy of the cloth face coverings, they should share that information before enforcement and levying civil penalties or remove the requirements.

9. **(2)(b) Face Coverings**, this standard increases the likelihood of workplace violence by requiring an employer to enforce the cloth face coverings requirement on the general public. There is so much concern over this that CDC has given guidance to employers to not engage with people related to wearing face coverings (Centers for Disease Control , 2020). SDAO is aware of healthcare employees being accused of physical harassment by members of the public over enforcing public health guidance. Those employees were placed on administrative leave pending investigations which reduces the workforce and places employees in peril of negative employment action. Under ORS 654 Oregon OSHA does not have jurisdiction over actions of the public. By stating, "The employer must ensure that everyone in the workplace or other premises subject to the employer's control wears face coverings…" Oregon OSHA appears to be attempting to force an employer, under threat of civil penalty, to enforce compliance by the public with public health orders. In essence, requiring the employer to become an agent of the State of Oregon. In many states this forced compliance has resulted in physical altercations, and in at least one instance, a workplace shooting (The Associated Press, 2020). This seems to be a risk that is not worth it. The guidance document that Oregon OSHA provided earlier about dealing with the public wearing face coverings should remain guidance without the threat of civil penalties (Oregon OSHA Staff, 2020) If an employer finds it acceptable to enforce face coverings though a corporate policy, that is their decision. It is our position that the wording of these rules should be changed to reflect enforcement of these standards on subject workers only.

a. This also does not consider ADA requirements to allow individual accommodations. OHA's own face covering guidance acknowledges that there will instances where an accommodation must be made. "…can request an accommodation… to enable **full and equal access** to services, transportation, and facilities open to the public." (Oregon Health Authority Staff, 2020) We suggest that Oregon OSHA seek a legal opinion regarding this area of ADA compliance prior to requiring employers to potentially bear the burden of accommodation lawsuits. As defacto agents of the state, Oregon OSHA should also provide an immunity clause for Oregon employers who are subject to such claims of discrimination if they are following these rules when the alleged discrimination occurs.
b. In the guidance that Oregon OSHA provided to employers related to enforcement of the face covering order, they called for the use of law enforcement to enforce trespassing orders. In the current anti-law enforcement climate, the use of this state and local resource seems unwise. Most law enforcement agencies have limited staff and cannot respond quickly to low level crimes such as trespassing. It is likely that this could even escalate the situation and pose a greater risk for workplace violence as well. We request that the wording in the rules be changed to reflect enforcement on subject workers only.

10. **(2)(b) Face Coverings**, for the purposes of life safety, Oregon OSHA should consider that these cloth face coverings muffle the voices of the wearers. During emergency operations, first responders, 911 telecommunicators, lifeguards, park rangers, and other positions with public safety responsibility must have the ability to remove the face covers without concern of a citation. The greater hazard in this instance would be the reduced ability of clear communication with other first responders or the general public. Certainly, in the case of medical emergencies where there is suspected SARS-COV2 exposure, there would be additional PPE required and that PPE would be determined by a written hazard assessment that is currently required by OSHA rules. Cloth face coverings or shields would not be proper PPE for these instances. We would request an exemption or policy guidance allowing the removal of the cloth face coverings or face shields for emergency operations where clear communication is required.

11. **Definition of Cloth Face Covering.** In the definition, there is a statement of "Face coverings with an exhalation valve do not meet this requirement." Since Oregon OSHA finds that a face shield is an acceptable method of compliance, it makes no sense to disallow an exhalation valve. It should be noted that the entire lower area of the face shield is open allowing any exhaled virus particles to be expelled with no restrictions, at times directly onto a surface or in the case of food service, the food. This appears to show there is no objective standard for face coverings there should be no requirements placed on employers until such specifications exist and no enforcement of civil

penalties. We believe that the current CDC and WHO guidance is adequate in this instance and should be used.

12. **(2)(c) Sanitation.** We have no objections to the rules. We do request additional definitions for the terms “high contact” and “high touch”.

13. **(2)(d) Social Distancing Officer** (SDO). We encourage the agency to remove provisions throughout the rules that require an employer, under threat of civil penalty, to enforce public health orders and to become an agent of the State of Oregon. Assuming the standards for social distancing can be agreed upon, there is no objection to the concept of the SDO. Our objection comes in expectation that Oregon OSHA may have with regards to how this individual would ensure compliance from members of the public. As with the objections over face covering compliance, there is a very real concern over workplace violence that may occur when an employee attempts to ensure compliance from the public. Oregon OSHA should provide guidance to employers regarding how far these interactions should go to ensure compliance from the public. This could be a situation where Oregon OSHA could find a violation of the infectious disease rules as well as the workplace violence rules creating a double jeopardy situation. In this instance, certain peril of violence should prevail over perceived peril of the virus.

14. **(2)(e) Building Operators** requires owners of buildings to “ensure that the building layout allows appropriate social distancing and must ensure that the basic requirements of this rule are posted…” In buildings that are leased or rented to tenants, this appears to potentially breach the contracts between parties. A property owner provides the shell of a building, in most cases, and does not have responsibility for the interior contents of the tenant. Except in the rare cases of a multi-employer workplace, each employer should be responsible to ensure these things are present in the facility. If they are not it is their responsibility to work with the building owner to secure compliance. We request that the language be made more clear to ensure building owners are not responsible for compliance in areas they do not have control over, such as a leased space, rental space, or areas that are not common areas. A contract or lease would spell out who has day to day responsibility for the space and to what degree.

15. **(2)(f) Employee Information and Training** there are no objections.

16. **(2)(g) Medical Removal**, since this section has workers’ compensation considerations, we request that the entire section match as closely as possible to current Oregon Workers’ Compensation Law and guidance from WCD as to the processing of claims in order to ensure the process be as seamless as possible in the event the worker claims a workplace exposure. In paragraph A, there is an allowance for a public health official to recommend isolation or quarantine. State public health law sees these terms as two

very distinct actions. Isolation is a voluntary removal from contact with others, where quarantine is compelled removal by a court order. (State of Oregon, 2019) Also, for consideration, not all counties in Oregon have a public health official who is a medical professional. (State of Oregon, 2020) All have a medical professional on staff or have a contract with a medical professional. If the removal is done by anyone other than a medical professional (**e.g.** MD, DO, PA, or NP, etc.) a subsequent workers' compensation claim could not be initiated until an authorized medical professional gave approval for time loss. In this instance, to improve the process, the removal should only be done by a medical professional that WCD would recognize. We request that the rule language be updated to reflect that process.

17. **(2)(g)(B) Medical Removal**. Under paragraph B, the FFCRA leave expires on December 31, 2020 unless extended by Congress. This rule would create a requirement for an Oregon specific leave. Once the FFCRA expires, there is no consideration for how this would affect employers who have volunteers as part of their workforce. Currently, under the FFCRA, there is a provision that allows an employee to use the leave when awaiting a test result under any circumstance. After the FFCRA expires, has Oregon OSHA considered how that volunteer would be provided leave while waiting out an isolation order? If the individual is in the workers' compensation system, there are provisions to accomplish this. However, claims do not come without costs to the employer. This rule should include considerations such as the number of times the removal may be done, and leave used. It appears possible that an employee could be exposed numerous times and each time be given leave time of 80-hours. This would become a financial burden that could not be absorbed. Additionally, ORS 654 does not appear to provide the agency with the statutory authority to prescribe the types of leave an employer must employ. We believe that this information is good to note but should be removed from any enforcement language.

18. **(2)(g) Medical Removal.** In multiple paragraphs, the phrasing such as… "guidance from the employee's medical provider" is used. This should be defined in order to comply with Workers' Compensation Division (WCD) guidelines to ensure the viability of the claims process. The employer should also be provided a way to rebut in the same fashion as WCD allows during the claim process. This will ensure that an employee cannot manipulate the system to provide themselves additional leave. In paragraph D, it appears that an employee's medical provider could overrule a request for testing. Has Oregon OSHA considered who is the final arbiter if an employee refuses to take an approved SARS-COV2 test but wants to utilize the leave requirement? Like in a disputed worker's compensation legal process, we believe that the rule language must reflect the ability for an employer to provide a process to return an unwilling employee to their position.

19. **(3)(a)(E) COVID-19 Requirements for Workplaces at Heightened Risk** appears to be taken from the requirements for "workplaces at exceptional risk". If true, then the heightened risk category appears to create some overlap with the exceptional risk category that would be confusing to the reader. We recommend clarifying how the agency wants the reader to use that list.

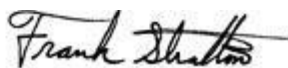
20. **(3) COVID-19 Requirements for Workplaces at Heightened Risk.** It appears that because of the types of work this group performs, they genuinely fall into a category where they should be using PPE and not homemade or non-standard equipment such as cloth face coverings for all the reasons and concerns listed for previous sections related to face coverings and face shields.

21. **(3)(c)(A) Enhanced Employee Information and Training.** The rule language does not provide a timeframe or how often the training is required to be provided. Is it an annual training like bloodborne pathogen training or is it another schedule? Does this have to occur within a certain amount of time for a new hire? Annual training seems to be too arduous for most Oregon employers as the information on SARS-COV2 doesn't change as rapidly as it did. We request that the agency define the training parameters for frequency.

In partnership with the following associations, we respectfully thank you for your time in reviewing our concerns.

Oregon Association of Conservation Districts
Oregon Fire District Directors Association
Oregon Fire Chiefs Association
Oregon Recreation & Park Association
Oregon Water Resources Congress

Sincerely,



Frank Stratton
SDAO Executive Director

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