



April 1, 2021

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**RE: Proposed Permanent COVID-19 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 K-12, public charter schools, 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.

As you are aware from past correspondence, 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 stated in our previous comments to the agency, most 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 workers' compensation insurance for a workplace exposure. However, the trend to remove infectious disease from re-insurance carriers' coverage is troubling and could affect workers' compensation coverage.

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 workers' compensation claims department continues to apply this policy to all current and future claims.

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 currently has 33 member representatives and is still active. This document has the broad support of over 900 member districts and their respective elected officials.

With the creation and distribution of multiple vaccines, medical treatments (Mayo Clinic, 2021), and the continuing decline in COVID-19 cases both in Oregon and the United States, we believe that the adoption of these permanent rules is unnecessary and overly costly to Oregon employers. In addition, it places employers at further risk for citations and significant monetary penalties for a health risk that appears to be shrinking. At the Governor's press conference last month, it was estimated that Oregonians who want to be vaccinated, will all have received a first dose by the end of May, just a few short weeks after the adoption of these rules. At the time of writing this letter, the state has surpassed 1/4 of the state population having been vaccinated.

During this time of the public health emergency, financial challenges have arisen for everyone, including EMS providers, local governments, and their contractors. With the significant reduction in the case numbers and the trend heading downward, we believe that allowing the temporary rule to expire is appropriate.

We understand the agency's desire for additional clarity as this was stated during the rule making process for the temporary rule. Unfortunately, this has largely not occurred as CDC and OHA guidance continues to change. We continue to believe this could be accomplished with letters of interpretation and policy memos versus a rule with specific details. Our combined associations would be willing to assist the agency, and already do (Oregon Office of the State Fire Marshal, 2020), in promoting these clarifying messages. There are still 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 (Centers for Disease Control , 2020) that we will outline more in our comments.

OAR 437-001-0704 requires all Oregon employers to report hospitalizations and fatalities that are work related to Oregon OSHA. Based on the agencies own data reporting provided to SDAO staff on March 29, 2021, of the roughly 1.9 million workers in Oregon (U.S. Bureau of Labor Statistics , 2020) there were 12 workers hospitalized as positive or presumed positive COVID-19 cases and seven worker fatalities, with varying degrees of certainty about work relatedness as noted in the agency's narratives. Additionally, three of the 24 reported events were the result of adverse reactions to the COVID vaccines.

Many of our members are considered essential workers and have been frontline since the beginning of the pandemic response. The SDIS pool provides workers' compensation insurance for 552 special districts including 201 Oregon fire districts (out of the approximately 305 fire districts and departments around the state); that equates to approximately 8,000+ covered employees. 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.

Since March 1, 2020 to this date, SDIS has received 70 workers' compensation claims for exposure to SARS-COV2. Twelve of these claims have led to a positive COVID test result with zero individuals receiving any level of hospitalization. Much of this timeframe was prior to the adoption of the temporary rules in November 2020. The incredibly low exposure and infection rates are due to the diligence of all parties involved, workers, management, board members, patrons, and associations, not because of the threat of citations and substantial monetary penalties. As a result of this data, we request the agency suspend any permanent rulemaking.

If you are unable or unwilling to cease, please consider the following comments and concerns our combined associations share with you. At the very least, these proposed rules must be updated to reflect the most current OHA guidance on quarantine for individuals who are fully vaccinated. The rules must also be updated to reflect CDC guidance around gatherings without masks, for those who have been fully vaccinated, and new guidance around distancing. The rules need not, and should not, expand further than the temporary rules. Additional requirements around infection control plans, exposure risk assessments, PPE crisis management plans, 30-year record keeping requirements, and other expansions pose a significant administrative burden, with no promises to increase workplace safety or reduce

spread—especially for workplaces that are largely already vaccinated, or other frontline workers who will be vaccinated by the time that these rules are adopted.

1. Foremost, we share a concern that the mission of Oregon OSHA as defined in ORS 654 is becoming overly entangled with the separate mission of public health agencies (State of Oregon, 2019). First case in point, the agency's rules on face coverings versus respiratory protective measures. There is no debate that to provide the most effective respiratory protection to employees, the employer must insist on a proper fit test of equipment. N95 filtering facepieces are notoriously difficult to get a proper fit test, while cloth face covers (Anna Davies, 2013) would be impossible. An elastomeric half-face respirator is much easier to fit to an individual and would therefore provide effective protection to the user. Unfortunately, the agency has chosen to prefer a public health approach by effectively banning the use of the traditional tight and loose-fitting respirators due to the fact it has an exhalation valve and has a slight potential to expose the public (Portnoff, et al., 2020) if an infected employee encounters them.

SDAO staff has contacted the major respirator manufacturers and NIOSH, and they both will not allow an employer to modify the respirator by placing cloth or filter materials over or around the valve due to concerns it will affect the operation of the valve. This effectively deemed these illegal for use as respiratory protective equipment for these rules, denying the employee superior protection.

Second case in point, agency rules requiring an employer to control the actions and behaviors of the public related to guidance from the CDC or OHA such as, OAR-437-001-0744(3)(b). An employer should not be held responsible by this agency for the actions and behaviors of non-employees if other measures are in place to protect employees. This would be the same consideration shown as when an employer is not held responsible for a non-employee driver who disregards properly designed and placed traffic control. This is a tectonic shift in enforcement practices for the agency and does not match with the clear language and legislative intent of ORS 654. Multiple times in this statute, the terms employee, worker, and employment are used to define the scope of Oregon OSHA's authority and responsibility. There must be an allowance in these proposed rules to allow for the use of superior employee protections even though they may not align perfectly with current public health guidance for the protection of the general public which falls on public health agencies. (State of Oregon, 2019)

2. These proposed rules appear to create a conflict with other federal and Oregon OSHA standards. Most specifically, the PPE standard when there is an identified hazard. OAR 437-002-0134 and 29 CFR 1910.134 both require the employer to " *...select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.*" " *The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.*" If an employer prefers to provide a higher level of protection for their

employees such as a cartridge style APR, they are not allowed to consider that protection due to the fact it has a slight potential to create a situation where the public could possibly be exposed to an asymptomatic individual. In a healthcare situation where a known positive patient is being treated, the employee must be allowed access to the appropriate and higher level of protection of an APR without fear of penalty by the agency. The agency must allow this selection to occur for the express mission of the agency is to protect workers from hazards. This should also be allowed when there are alternative methods of protection of employees outside the face covers and distancing. With the increase in disinfection technology, infection control expertise, and numerous vaccines there must be an allowance for the use of the hierarchy of hazard controls, specifically engineering controls and not a pure reliance on lesser protective PPE and user created source controls. The current PPE standard does this effectively.

3. We also have serious concerns with how the agency will update these permanent rules as guidance continues to change regarding face covers, physical distancing, medical removal, quarantining, and providing vaccines. When the temporary rule was being discussed and adopted, the Oregon OSHA managers touted the need for the rule to provide a singular source for guidance. Oregon OSHA stated that this rule would become a “one-stop-shop” for employers. Unfortunately, it appears that this is not the case and employers must still research multiple areas of COVID guidance including Oregon OSHA, Oregon Health Authority, CDC, and other agencies. This needs to be done more so now that new scientific evidence has begun to change health guidelines. With specifics set in permanent rule language the agency would need to follow the rule making process every time these guidelines changed. Currently, the CDC and several other organizations are changing the six-foot physical distance to three feet or eliminating it entirely. The proposed rules are also in conflict with current OHA guidance on quarantining of fully vaccinated individuals and guidance on masks during gatherings of fully vaccinated individuals. It appears the best course of action would be the agency refers to the CDC/OHA guidance or remove the section entirely. Otherwise, the agency adopts an outdated rule and creates a continually moving goal post for employers who want to follow the most effective and current guidance. This would become increasingly burdensome for employers from a financial and staff time point of view.
4. Our final concern is that agency must provide a timeline for ending and removing this rule. It would be difficult to justify continuing all these items when the public health emergency has concluded. The agency should include clear language in the rule that indicates when the rule will conclude and be removed. Comments made by agency staff during meetings, that this rule is only for COVID-19, does not give a clear end as the virus will exist in nature without a quantifiable conclusion, only a level of immunity that renders the virus ineffective. Clear language tying the rule to the expiration of the governor’s executive orders or the declared public health emergency must be used not simply language indicating a promise to do so.

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

Oregon Fire Chiefs Association  
Oregon Fire District Directors Association  
Oregon State Ambulance Association  
Oregon Volunteer Firefighters Association  
Oregon Association of Conservation Districts  
Oregon Recreation & Park Association  
Oregon Water Resources Congress

Sincerely,

A handwritten signature in black ink that reads "Frank Stratton". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Frank Stratton  
SDAO Executive Director

## References

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