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Via Email:
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350 Winter Street NE
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Re: Comments on Oregon OSHA's Proposed Permanent Rules Addressing COVID-19 Public Health Emergency in All Workplaces

Dear Mr. Kaiser:

The Oregon Restaurant & Lodging Association ("ORLA") would like to provide commentary and express our opposition to the rule changes proposed on January 29, 2021, by the Oregon Occupational Safety & Health Division ("OR-OSHA"). We greatly appreciate having had the opportunity to formally participate as a part of the rulemaking process and also appreciate the opportunity to submit these comments as part of the public record.

We oppose 'OR-OSHA's proposed Permanent Rules Addressing COVID-19 Public Health Emergency in All Workplaces' ("Permanent Rule"). The Permanent Rule is unnecessary and imposes permanent burdens on employers to address a temporary hazard which is dissipating with over one million Oregon residents having already been inoculated against the disease with all signs pointing to our current suite of vaccines having high success rates against variants and the need for hospitalization. While OR-OSHA has attempted to reassure the regulated community by indicating the Permanent Rule will be repealed in part or in whole when it is no longer "necessary," OR-OSHA has admitted it has not even identified any criteria or benchmarks it will use to make that determination. The Permanent Rule is unnecessary given the improving situation in Oregon related to COVID-19 and the distribution of vaccines which have been demonstrated to prevent serious health consequences for those vaccinated and which slow the spread of serious disease relating to COVID-19.

OR-OSHA originally adopted an emergency temporary rule addressing COVID-19 in Oregon workplaces in October 2020, which took effect on November 16, 2020 ("Temporary Rule"). At the time, Oregon was in the middle of the worst surge of new COVID-19 cases and associated deaths since the beginning of the pandemic. Since the adoption of the Temporary Rule, three COVID-19 vaccines have been approved for use in the United States by the FDA and a fourth is

under consideration. Vaccinations have increased from zero to close to 3,000,000 per day in the United States, and approximately 28,000 per day in Oregon. Vaccination numbers have increased steadily as supply from the three manufacturers has increased. According to the Oregon Health Authority ("OHA"), 1,806,528 vaccinations were given as of March 30, 2021 (this includes 683,818 fully vaccinated and 473,077 in progress). By April 26, 2021, all Oregonians will be eligible to receive the vaccine in some counties. Assuming a continued steady increase in the supply and thus the vaccinations provided each day, Oregon will have approximately 2,848,155 vaccinated citizens by the time the Temporary Rule expires on May 4, 2021, and approximately 3,800,000 vaccinations by the end of May 2021. Considering the estimated population under 16 years of age and those who will likely refuse the vaccination, approximately three million Oregonians are expected to actually get vaccinated. Depending on supply and Oregon's ability to ramp up its administration of vaccinations, the entire population of eligible and willing Oregonians could reasonably be vaccinated by the end of May 2021. Indeed, Governor Brown announced on March 26, 2021, that she anticipates anyone who wants the vaccine should be able to receive their first dose by the end of May 2021.

Given the above, the question becomes "is the Permanent Rule necessary at all?" As a participant in the rulemaking conversations, ORLA realizes this written correspondence differs from feedback provided earlier in 2021 as part of the rulemaking process but the changing dynamics of both vaccine supply and inoculation rates simply put do not align well with the amount of time needed to thoroughly vet the ramifications of agency rulemaking. Given the rapidly changing environment and the time at which members of the business community participated in rulemaking conversations, OR-OSHA should take a hard look at all the new data and available movement on supply and vaccination rates before adopting what we feel is now an unnecessary permanent rule. Employers already implemented the requirements of the Temporary Rule. Employers purchased masks for employees. They implemented new cleaning and disinfecting protocols. Some employers altered schedules, installed barriers, and implemented social distancing guidelines. Employers improved ventilation in workplaces. These measures will not magically disappear on May 5, 2021. In fact, most of the requirements of the Temporary Rule were required by the Governor's Executive Orders and mandatory OHA guidance before implementation of the rule and will continue to be required after it expires. Before some of the new requirements of the Permanent Rule go into effect, all Oregonians who desire to receive a vaccination will have been able to do so. There appears to be little question that Oregon workplaces are implementing COVID-19 protections and will continue to do so without adoption of the Permanent Rule. Given this reality, the Permanent Rule is unnecessary to protect workers at all and should therefore not be adopted.

At a minimum, OR-OSHA should amend the Permanent Rule to insert a sunset clause which would terminate the rule as of September 1, 2021. There is no reasonable basis for adopting the Permanent Rule with no end date to address a temporary workplace problem which is rapidly changing. If for some reason the progress we all anticipate with enhanced vaccination rates does not happen as expected, the sunset clause can easily be modified as justified by current conditions at the time.

ORLA also opposes many of the specific requirements of the Permanent Rule and suggests that such requirements be amended or removed if the Permanent Rule is ultimately adopted.

The definition of "Face Shield" in the Permanent Rule is confusing and should be amended. The Permanent Rule includes a definition of "Face Shield" which includes much more than just a definition. The Permanent Rule's definition states that Face Shields should be discouraged when more suitable alternatives are available, but they remain a compliant (although not preferred) means of "source control" in relation to COVID-19. The definition of Face Shield should just be a definition, nothing more. If they are compliant with the rule there is no justification for OR-OSHA proselytizing about what employers "should" do. OR-OSHA does not define what a "more suitable alternative" might be, and employers should not have to guess what a rule means. The portion of the definition on Face Shields discouraging their use despite it being compliant should be eliminated.

To further the confusion, the Permanent Rule also includes a "note" advising that if OHA revises its guidance regarding the use of Face Shields to be more restrictive, OR-OSHA will ignore its rule and will enforce the more restrictive requirement. If OHA guidance is the standard, then what is the purpose of this specific aspect of the Rule? Employers are already required to follow OHA guidance under the Governor's Executive Orders. There appears to be no purpose for the Permanent Rule's face covering requirements if they will be ignored should OHA amend its own requirements.

Part of the stated need for the Permanent Rule is to assure that workers are not "subject to the uncertainties of public health guidance" in favor of a more permanent rule. This purpose is entirely undermined by all the references in the rule requiring employers to follow OHA guidance. It is further undermined by the "note" contained within the definition of Face Shield. If the Permanent Rule is necessary to protect workers (and employers) from the uncertainties of public health guidance, then the rule should not instruct employers to follow the public health guidance as it changes. In reality, workers and employers alike are better served by following public health guidance as it adapts to the changing science and the changing circumstances associated with COVID-19 than following restrictions in a permanent rule that does not and cannot take such factors into account.

The Permanent Rule's requirements regarding face coverings is also concerning. Employers are required to permit workers to wear filter face piece respirators when they choose to do so. However, employers must then follow the requirements for voluntary use in the respiratory protection standard. That standard requires employers to determine whether the use of a filtering facepiece respirator is dangerous. What is an employer to do if it determines a filtering facepiece respirator would be dangerous? Violate the Permanent Rule by refusing to allow the employee to utilize such a respirator? In addition, this requirement puts a burden on many employers who never encounter the respiratory protection standard and have no experience determining whether such respirators would be safe. This section of the Permanent Rule should be amended to exempt employers from the voluntary use standards or allow employers to prohibit use of filtering facepiece respirators.

We also oppose the requirements of Section (3)(b)(D) of the Permanent Rule related to transporting workers in vehicles for work purposes. If the intent of the Permanent Rule is to ban workers from traveling together to worksites, then it should just say as much. As written, the Permanent Rule requires employers to consider eliminating the need for employees to travel together "to the degree practical." Employers will obviously have different interpretations as to what "to the degree practical" means. It will always be possible to have workers travel independently to a worksite whether arranged by the employer or not. Will it be violative of the Permanent Rule if an employer determines the cost of transporting workers individually is not practical from a cost standpoint? Will OSHA second guess what is and is not practical from a cost standpoint for a particular employer?

In addition, the same section requires workers to be separated in a vehicle "to the degree possible." Again, it is not always possible for workers to be transported individually. If an employer determines it is not practical to transport workers individually, can more than two workers be transported together in a vehicle? If a third worker is added to the vehicle, doesn't that violate the mandate that workers be separated as much as possible? Must employers mandate windows be rolled down to increase outside air intake? What does "when weather conditions permit" mean for purposes of this section of the Permanent Rule? Windows can always be lowered in any weather. Must all employees wear a filtering facepiece respirator if one employee in the vehicle exercises his or her right to do so under the rule? That appears to be required by section (3)(b)(D)(ii)(I).

Employers should not need to guess at what the Permanent Rule requires. The wording of section (3)(b)(D) of the Permanent Rule is confusing and can be interpreted in a manner which is unduly burdensome for employers. In addition, the section does not provide any exemption for situations where all workers in the vehicle are entirely vaccinated. The CDC guidance permits vaccinated individuals to gather indoors together without masks. The Permanent Rule seemingly ignores this guidance entirely. Perhaps this is because the Permanent Rule was developed in 2020 and January 2021, prior to the prevalence of vaccinated individuals, but regardless it is a reflection of the disconnect between trying to pass a permanent rule that reasonably deals with an ever-changing situation. This section of the Permanent Rule should be revised to simply require face masks/coverings for individuals traveling together in a vehicle for work purposes unless all workers in the vehicle have been fully vaccinated.

The ventilation requirements of section (3)(f) of the Permanent Rule are also of concern. Employers have already been required to optimize the intake of outside air through their HVAC systems. To do this, many employers incurred the expense of hiring HVAC specialists to ensure outside air intake was maximized. The Permanent Rule eliminates the requirement that Employers follow the manufacturers recommendations for certain maintenance and service and instead comply with the Rule's generic requirements. This makes no sense. For all other equipment employers use on their premises, OR-OSHA requires employers to follow manufacturers recommendations for service and maintenance. OR-OSHA has no doubt issued hundreds if not thousands of citations over the years for employers who did not do so. Now OR-

OSHA purports to require employers to not follow manufacturer's instructions. This part of the rule is ill-conceived and likely entirely unenforceable. It should be deleted.

In addition, this section requires employers to certify that its HVAC system is in compliance with the Permanent Rule by June 1, 2021. Employers must maintain that certification as long as the Rule is in effect. While not explicitly saying so, the Rule effectively requires employers to hire HVAC experts on a quarterly basis to ensure its systems remain in compliance with the Rule. To certify compliance and maintain such certification, employers will be required to incur a quarterly HVAC inspection expense. This is an undue burden on employers which will likely be rendered unnecessary by its June 1, 2021, effective date as most of the workforce which wishes to be vaccinated will be by that date. This entire section of the rule should simply be withdrawn even if other portions of the Permanent Rule are adopted.

Section (3)(j) of the Permanent Rule are concerning only regarding the interpretation OR-OSHA added in its new "note." Employers already developed notification plans for exposed and affected employees. However, the new "note" indicates that records related to such notifications must be retained for 30 years under 29 CFR 1910.1020. This interpretation would create a large burden on employers who generally do not engage in activities covered by 29 CFR 1910.1020. It also appears to create a new requirement that notifications under the Rule be written which is not required by the Temporary Rule. Many employers have made such notifications orally in light of the sensitive and traumatic nature of such notifications. Creating a new writing requirement is unnecessary considering the increasing prevalence of vaccinated workers in the workplace. The new "note" in the Permanent Rule should be removed.

ORLA also opposes section (3)(m)(C) of the Permanent Rule to the extent it requires employers to document employee refusals to be vaccinated. While the requirement appears to apply only to vaccination events conducted on the employer's premises or at the direction of the employer, it is an invasion of our employee's rights to privacy with respect to their medical decisions. The requirement will provide little insight into who in the workplace has been vaccinated given that many might refuse because they received vaccinations outside of the work event. The necessity of section (3)(m) is questionable in any case given most workers who want the vaccine will have it by the end of May 2021, according to the Governor. Why would a public health authority or an employer even consider an on-site vaccination event in such circumstances? The employees who want the vaccination will have already received it. Those employees who do not want the vaccination will simply refuse. The ultimate result is a vaccination event under section (3)(m) that is unlikely to result in any vaccinations at all after May 2021.

Lastly, the sector-specific guidance contained in appendices A-1 through A-18, contain mask requirements which differ from the requirements in section (3) for employers generally. The Permanent Rule sector specific guidance appears to require covered employers to follow OHA guidance but if such guidance is "no longer available" (withdrawn), those employers must continue to require masks or face coverings for workers, customers and visitors. What is the purpose of this additional requirement for employers covered by the sector-specific guidance? If OHA withdraws the mask / face covering requirements, why would the Permanent Rule continue

to require such measures? The sector-specific guidance contained in the appendices to the Permanent Rule should be amended to match the requirements for all employers in this regard.

Thank you for the opportunity to comment on the proposed Permanent Rule. We urge OR-OSHA to reconsider moving forward with the proposed Permanent Rule or adopt the suggested amendments including a sunset clause. The Temporary Rule is already obsolete and will become more so with each passing day as the vaccinated percentage of the workforce grows. The Permanent Rule imposes significant burdens on employers which are already struggling to survive the pandemic-related restrictions and closures of the past year. Those restrictions should be left in place no longer than necessary to help Oregon get through this pandemic. Otherwise, they are unnecessarily punitive for employers and are therefore unreasonable.

Sincerely,

Jason Brandt
President & CEO
Oregon Restaurant & Lodging Association