



Oregon

Kate Brown, Governor

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May 3, 2021

Representative Christine Drazan
Senator Fred Girod

Subject: Oregon OSHA COVID-19 Proposed Rules

Dear Rep. Drazan and Sen. Girod:

We received your letter dated April 27, 2021, requesting review pursuant to ORS 183.335(16) by the House Committee on Business and Labor and the Senate Committee on Labor and Business of Oregon OSHA's proposed *Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces* (COVID-19 rule).

In this letter, you also ask the agency to suspend adoption of the COVID-19 rule until the process set forth in ORS 183.335(16) is complete. Although ORS 183.335(16) does not require an agency to postpone adoption of a rule, extend a public comment period, or take any other related actions, we have considered your request. For the reasons outlined below, we intend to file the COVID-19 rule for adoption on May 4, 2021, as has been contemplated since last year.

On Nov. 6, 2020, after months of discussion and engagement with stakeholders, Oregon OSHA adopted a temporary rule to protect workers throughout the state during the current public health emergency. Under the Oregon Administrative Procedures Act, a temporary rule cannot be renewed or extended beyond 180 days. Therefore, in order to extend protections for workers against the coronavirus, which remains a significant concern, Oregon OSHA made clear as early as last summer that a new rule would likely be needed, and that it would need to be in place when the temporary rule expired, which is May 4, 2021.

On Jan. 29, 2021, Oregon OSHA filed the proposed COVID-19 rule with the Secretary of State and initiated the public comment period. Notice was provided to the public and interested stakeholders through multiple channels. On the same day, in fulfillment of our obligation to inform the legislature under ORS 183.335(1), (3), and (15), notice of the proposed COVID-19 rule was delivered via electronic mail to every member of the legislature.

In all notices, including to the legislature, the agency (1) identified April 2, 2021, as the end of the public comment period and (2) stressed its intention to adopt a COVID-19 rule by the time the temporary rule expires on May 4, 2021, to ensure workers remain protected in light of the ongoing public health emergency.

Oregon OSHA received close to 5,500 comments during the public comment period, including from several legislators and signatories to your letter, and has been working hard to revise the rule based on these comments, as well as in response to all new or revised public health guidance

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or rules. For example, one of the most significant comments received concerns the length of time the COVID-19 rule will remain in place and the confusion caused by the technical necessity it be called a “permanent rule,” even though it will not be left in place permanently.

As we have maintained from the start, the purpose of the COVID-19 rule is to address the COVID-19 pandemic in Oregon workplaces and it will be repealed when it is no longer necessary to address that pandemic, a commitment we have repeated without hesitation or change since last year.

In furtherance of this commitment, the COVID-19 rule will include bi-monthly stakeholder discussions to review the circumstances requiring the rule, which will afford multiple opportunities to discuss repealing all or part of the rule as circumstances continue to evolve. We welcome your and your colleagues’ participation in these discussions.

Against this background, and especially in light of the coronavirus surge the state is experiencing, we believe the public health emergency demands that workplace protections continue uninterrupted. Therefore, we are unable to suspend the long-anticipated adoption of the rule on May 4, 2021, for an unknown period of time while the process set forth in ORS 183.335(16) unfolds.

Finally, returning to ORS 183.335(16), as recognized in your letter, committee review under that section appears to be limited to whether a proposed rule complies with the legislation from which the proposed rule results, in other words, whether an agency has the legislative authority to adopt a rule it is proposing. Oregon OSHA’s legislative authority to adopt workplace safety rules is quite broad and the proposed COVID-19 rule falls squarely within this authority. For your benefit, we have attached a discussion of the agency’s rulemaking authority as applied to the COVID-19 rule.

Please feel free to contact us with any additional questions or concerns, or if you or any of your colleagues want to participate in the regular meetings to advise us about when to repeal parts or all of the rule.

Sincerely,



Andrew R. Stolfi
Director, DCBS



Michael Wood, Administrator
Oregon OSHA, DCBS

Cc: Rep. Daniel Bonham
Rep. Shelly Boshart Davis
Rep. Bill Post
Rep. Vikki Breese Iverson
Sen. Bill Hansell

Sen. Bill Kennemer
Speaker Tina Kotek
President Peter Courtney
Rep. Paul Holvey
Sen. Chuck Riley

Appendix 1. Oregon OSHA’s rulemaking authority

The COVID-19 workplace rulemaking falls well within Oregon OSHA’s statutory authority, and Oregon OSHA has fulfilled all its related obligations under the Oregon Safe Employment Act and the Administrative Procedures Act.

Throughout the public comment period, several individuals have raised objections to Oregon OSHA’s authority to adopt these rules. In considering the issue, it is important to realize that this rulemaking, although it addresses the pandemic, applies Oregon OSHA’s existing statutory authority. Oregon OSHA claims no exceptional authority as a result of the Governor’s emergency declarations or other Executive Orders.

Summary of Oregon OSHA’s Statutory Authority and Obligations under the OSEA

The purpose of the Oregon Safe Employment Act (OSEA) and of all rules adopted under that law is found in ORS 654.003, which describes the law’s general purpose as:

...to assure as far as possible safe and healthful working conditions for every working person in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, that is created by occupational injury and disease.

In discussing that purpose, ORS 654.003(3) states that one of the Legislative Assembly’s intents is to “[a]uthorize the Director of the Department of Consumer and Business Services and the designees of the director to set reasonable, mandatory, occupational safety and health standards for all employments and places of employment.”¹

This general statement about rulemaking is further amplified by ORS 654.035(1), which indicates that the director may:

- (a) Declare and prescribe what devices, safeguards or other means of protection and what methods, processes or work practices are well adapted to render every employment and place of employment safe and healthful.*
- (b) Fix reasonable standards and prescribe and enforce reasonable orders for the adoption, installation, use and maintenance of devices, safeguards and other means of protection, and of methods, processes and work practices ...as may be necessary to carry out all laws relative to the protection of the life, safety and health of employees.*
- (c) Fix and order reasonable standards for the construction, repair and maintenance of places of employment and equipment that will render them safe and healthful.*
- (d) Fix standards for routine, periodic or area inspections of places of employment.....*

¹The Director has, in turn, used the authority of ORS 654.025(2) and (5) to delegate the authority to implement and enforce the Oregon Safe Employment Act (OSEA) to the Administrator of the Occupational Safety and Health Division (Oregon OSHA) and has specifically delegated the rulemaking authority under the OSEA to the Oregon OSHA Administrator.

(e) Require the performance of any other act that the protection of the life, safety and health of employees in employments and places of employment may demand.

The current rule explicitly addresses “safe and healthful working conditions for every working person in Oregon,”² and it represents Oregon OSHA’s determination of appropriate “safeguards or other means of protection...well adapted to render...safe and healthful”³ the affected workplaces. The rule provides direction concerning “safeguards and other means of protection, and of methods, processes and work practices”⁴ that Oregon OSHA has determined to be necessary to the protection of worker life and health. The rule also requires the performance of several acts Oregon OSHA has deemed to be demanded by “the protection of the life, safety and health of employees in the workplace.”⁵

As primary protective measures, the rule emphasizes the use of physical distancing and “source control” (in the form of facial coverings), which are both “methods” of protection and “work practices.” The required risk assessment, infection control plan, and infection control training are similarly “methods, processes and work practices” as are the sanitation, exposure reporting, medical removal, and ventilation enhancement provisions of the rule. Even to the degree one might argue that one or more of the required items are not in fact methods, processes or work practices, they clearly qualify as “other means of protection” of the sort referenced twice in the rulemaking authority quoted above.

Some commenters have suggested that Oregon OSHA’s authority is limited to physical hazards of the sort that can cause traumatic injuries. But the rulemaking authority quoted above expressly includes the protection of the “health” of employees as well as their safety. And both Oregon OSHA and its federal counterpart have a number of regulations addressing such health risks, including those involving exposure to workplace chemicals and to the long-term effects of workplace noise. Others have suggested that the scope of Oregon OSHA’s rulemaking authority does not include infectious diseases. Again, the statute includes no such limitation on the protection of worker “health,” and both Oregon OSHA and its federal counterpart already have a number of rules addressing disease-causing agents.

For example, the Hazardous Waste Operations and Emergency Response Standard⁶ defines “hazardous substance” expressly to include biological and other disease-causing agents.⁷ Similarly, the Access to Employee Exposure and Medical Records standard⁸ includes a

²ORS 654.003

³ORS 654.035(1)(a)

⁴ORS 654.035(1)(b)

⁵ORS 654.035(1)(e)

⁶29 CFR 1910.120. As is the case with a number of workplace safety and health rules, Oregon OSHA has adopted the federal rule by reference; such rules are identified using the federal regulatory numbering scheme.

⁷29 CFR 1910.120(3) defines “hazardous substance” as including, among other things, “**any biological agent and other disease-causing agent** which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any person, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations in such persons or their offspring.” [emphasis added]

⁸29 CFR 1910.1010. Again, Oregon OSHA has adopted the federal rule by reference.

definition of the phrase “toxic substance or harmful physical agent” that expressly includes biological hazards, including viruses.⁹ Perhaps most clearly, the entire Bloodborne Pathogens standard¹⁰ is designed to prevent or at least reduce employee exposure to “blood and other potentially infectious materials”¹¹ because of the possible presence of “pathogenic microorganisms,” including bloodborne viruses.¹²

The COVID-19 workplace rule explicitly addresses a health hazard present in Oregon workplaces. Therefore, it falls within the statutory authority granted by ORS 654.003 and ORS 654.035.

⁹29 CFR 1910.1010(c)(13) reads “Toxic substance or harmful physical agent means any chemical substance, **biological agent (bacteria, virus, fungus, etc.)** or physical stress (noise, heat, cold, vibration, repetitive motion, ionizing and non-ionizing radiation, hypo- or hyperbaric pressure, etc.) which: (i) is listed in the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) which is incorporated by reference as specified in Sec. 1910.6; or (ii) Has yielded positive evidence of an acute or chronic health hazard in testing conducted by, or known to, the employer; or (iii) Is the subject of a material safety data sheet kept by or known to the employer indicating that the material may pose a hazard to human health.” [emphasis added]

¹⁰29 CFR 1910.1030

¹¹29 CFR 1910.1030(a)

¹²29 CFR 1910.1030(b) defines “bloodborne pathogens” as “pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).”