Department of Consumer & Business Services May 28, 2021

Revision and Extension of Oregon COVID-19 Workplace Rules

Explanation of Rulemaking, Final Action

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Executive Summary

This document provides the rulemaking history, rationale and explanation for Oregon OSHA's decision to adopt OAR 437-001-0744 Addressing COVID-19 Workplace Risks.

Although Oregon OSHA did not have specific rules addressing COVID-19 at the outset of the pandemic, the various general obligations to ensure workplace safety and health did have a bearing, particularly in the context of the executive orders directing certain businesses and other workplaces to take specific actions to protect both the public and their workers. Oregon OSHA had begun to receive complaints raising issues related to COVID-19 in February, 2020, almost entirely focused on health care. The week that began with the "Stay Home, Stay Safe" order, the total number of complaints rose to unprecedented levels, with 1,392 complaints received, of which more than 95 percent were related to COVID-19. Although the complaint volume has varied in the weeks and months since then, it has remained well above any pre-pandemic level.

Oregon OSHA had not seriously considered rulemaking in the earliest days of the COVID-19 pandemic, but on March 20, 2020, several farmworker advocates submitted a formal petition requesting immediate rulemaking to address COVID-19 in Field Sanitation and Agriculture Labor Housing. Oregon OSHA declined to take immediate action, but the petition was circulated for review and comment by affected stakeholders. After considering the totality of the record, Oregon OSHA responded on April 28, 2020, with the adoption of a temporary rule addressing both field sanitation and worker housing.

In conversations with worker advocates who had been pursuing potential legislative solutions to workplace COVID-19 risks prior to the First Special Session of 2020 in June, Oregon OSHA advised them that the agency had sufficient authority to address COVID-19 workplace hazards through rulemaking and was prepared to do so on a temporary basis until the full rulemaking process could be completed. On June 26, 2020, Oregon OSHA announced it would begin both temporary and "permanent" rulemaking to address the risks of airborne infectious diseases in Oregon workplaces. Ultimately, after many meetings and the circulation of four drafts for varying levels of public and stakeholder comment, the temporary COVID-19 workplace rule was finalized and adopted on November 6, 2020. The press release announcing the temporary rule's adoption ended with the statement that "Oregon OSHA continues to pursue permanent rulemaking that would provide a structure for responding to potential future disease outbreaks" and directing readers to the Oregon OSHA Infectious Disease Rulemaking page for more information.

Based on the November 6 adoption date, it was now clear based on ORS 183 (Administrative Procedures Act) that the temporary rule could remain in place through May 4, 2021, and the agency began working in earnest with the two 25-member Rulemaking Advisory Committees (RACs) that had been empaneled to assist with the permanent rulemaking process (and who had ultimately been involved in reviewing the later drafts of the temporary rule as well). The two groups worked in parallel, with Oregon OSHA staff working with both committees, in an effort to develop a permanent rule that both would provide for ongoing COVID-19 protections and could function on an ongoing basis to address infectious disease in the future.

Following discussions about the scope of the rule and whether the timeframe could be met in both RACs the first week of January, both RACs recommended the rule be limited to COVID-19 and encouraged Oregon OSHA to use the existing temporary rule as the starting point for its proposed rule. From this point forward, Oregon OSHA was no longer working on a rule that was expected to be genuinely permanent (although the rulemaking process remained identical to that required of a truly permanent rule). Instead, the rule would be limited to addressing the COVID-19 pandemic in Oregon workplaces and would be repealed when it was no longer necessary for that purpose.

Ultimately, and as discussed elsewhere in this document, the rule Oregon OSHA proposed included a limited number of suggested changes from the temporary COVID-19 rule. The rule as adopted excludes some of those proposed changes but includes a number of other changes, particularly within Appendix A in response to public comment and evolving public health guidance. In any case, the temporary rule certainly provided the foundation of Oregon OSHA's proposal, and the proposal was focused on addressing COVID-19 in the workplace as the members of both RACs had strongly recommended. Based on that recommendation and

further discussions, Oregon OSHA proposed the rule that is the subject of this document on January 29, 2021.

The filing for the proposed rule announced four virtual public hearings between February 23 and March 4, 2021. This included two evening hearings, one of which was held in Spanish. In addition, the record was open to receive written comment through April 2, 2021, which provided nearly nine weeks for public comment following the proposed rule's publication by the Secretary of State on February 1.

The record of public comment on this rule, either in writing or in testimony recorded at one of three hearings, is extensive. Although Oregon OSHA has not yet been able to fully resolve the uncertainty created by duplicate comments submitted by a single individual to different agency e-mails, it appears clear that more than 5,000 comments were received as part of the rulemaking, considerably more than any previous Oregon OSHA rule. The overwhelming majority of those comments opposed the rule, either in whole or in part, although many comments did not provide any detail about the reasons for their opposition. In evaluating those comments and the record as a whole Oregon OSHA, as always in such rulemaking, focused on the substance of the arguments made rather that the number of people supporting one position or another.

Oregon OSHA ultimately adopted a revised version of the proposed rule on May 4, 2021, the day that the temporary rule was set to expire.

The rule adopted included a number of changes based on the public comments received, including a revised approach to the mandatory appendices that reduced the length of the overall rule by at least 50 pages. However, the agency also concluded that the key components of the rule as proposed – issues such as physical distancing, the use of facial coverings, modest sanitation, ventilation, and the notification of employees when they may have been exposed – were both based on the best available scientific evidence and reflected sound public policy from the standpoint of worker protection.

One of the largest items of discussion concerned the rule's timing. The rule addresses a hazard that is temporary in nature, at least to the degree it justifies the current action in response to it. Oregon OSHA believes that, if realistically possible, a rule that is intended to be temporary should include either a sunset date or a clear and objective trigger for the rule's repeal. Oregon OSHA considered several such options in relation to this rulemaking but ultimately discarded them as unworkable.

Many commenters suggested that the rule's repeal should be connected to the Governor's emergency declaration; however, the emergency declaration itself is based on a number of factors. It is certainly possible to imagine situations where the rule would no longer be necessary but for one reason or another the public health emergency would need to remain in place, just as it is possible to imagine situations where the rule – or at least parts of it – should be left in place for a few months after the need for the public health emergency had ended. Oregon OSHA determined that it would be inappropriate to tie the rule to the emergency declaration in such a way. It would obviously be an unfortunate outcome if the governor were forced to extend the emergency for no reason other than to leave the rule in place.

Oregon OSHA also considered factors such as vaccination levels and infection rates. While important factors in the final decision about whether to repeal, no such indicator could be used alone to assess the continuing risk of the pandemic in Oregon workplaces. And the relationship between them is both complicated and uncertain enough to make it impossible to develop some sort of precise algorithm that would consider all the relevant information before producing a mathematical "yes or no" answer.

The final rule – which will be repealed when it is no longer needed – reflects a measured and thoughtful approach. Oregon OSHA has adopted it in full awareness that the measures it requires will have a cost, and they will certainly present continued challenges. Employers and employees in the state have already shouldered a considerable burden in the fight against this pandemic. But Oregon OSHA is also convinced that the rule is necessary to protect workers. The hazards created by the COVID-19 pandemic in Oregon workplaces have not passed, and thus require continued action.

I. History of the Current Rulemaking

Oregon OSHA – the Occupational Safety and Health Division of the Oregon Department of Consumer and Business Services – has historically applied its workplace health and safety jurisdiction, described broadly in the Oregon Safe Employment Act,[1] to both safety and health hazards in the workplace. In doing so, Oregon OSHA has at times collaborated with other agencies in addressing workplace health hazards that also represent threats to public health (involving the Oregon Health Authority (OHA) and local public health jurisdictions) or environmental hazards (involving the Oregon Department of Environmental Quality, the Unites States Environmental Protection Agency, and various local agencies with jurisdiction over such issues). In the past, this has even included issues related to airborne infectious disease, particularly in relation to health care workplaces, often based on guidance from the United States Centers for Disease Control (CDC).

The most prominent such example is the 2009 H1N1 influenza pandemic, which was the first global flu pandemic since the 1960s.[2] However, the impact of the 2009 pandemic on the general workplace was relatively modest, and the novel H1N1 influenza strain that caused it was successfully addressed to a significant degree by vaccination, although it has remained a significant part of the annual seasonal flu burden in the years since 2009. Oregon OSHA does not, therefore, view its role in addressing COVID-19 to be unique in nature. But the scope of the pandemic's effects and of the resulting response by Oregon OSHA and other agencies is certainly unique in its scale. By historical standards, the 2009 flu pandemic was less severe than prior pandemics. Although the loss of life in 2009 was concerning, the CDC estimates that between "0.001 percent to 0.007 percent of the world's population died of respiratory complications associated with (H1N1)pdm09 virus infection during the first 12 months the virus circulated."[3] The CDC notes that "Estimates of pandemic influenza mortality ranged from 0.03 percent of the world's population during the 1968 H3N2 pandemic to 1 percent to 3 percent of the world's population during the 1918 H1N1 pandemic."[4]

February 2020: The First COVID-19 Cases Reach the United States

The first identified COVID-19 case in the United States was reported in neighboring Washington State on January 20, 2020.[5] Oregon's first case was reported on February 28, 2020.[6] By March 8, OHA had identified 14 Oregon cases, with the majority of them appearing to have resulted from "community spread" rather than from travel out of state by the individual involved.[7] That same day, Oregon Governor Kate Brown

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[1] *Oregon Revised Statutes (ORS) 654.001 to 654.295.*

Specifically, ORS 654.010 provides that "[e]very employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

Similarly, ORS 654.015 states that "[n]o employer or owner shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health."

ORS 654.022 requires employers and others to "obey and comply with every requirement of every order, decision, direction, standard, rule or regulation made or prescribed by the Department of Consumer and Business Services in connection with the matters specified in [the Oregon Safe Employment Act and other statutes]…."

Finally, ORS 654.025 states that the Director of the Department of Consumer and Business Services "is vested with full power and jurisdiction over, and shall have such supervision of, every employment and place of employment in this state as may be necessary to enforce and administer all laws, regulations, rules, standards and lawful orders requiring such employment and place of employment to be safe and healthful, and requiring the protection of the life, safety and health of every employee in such employment or place of employment."

[2] *"2009 Pandemic Timeline," United States Centers for Disease Control, https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Holshue ML, DeBolt C, Lindquist S, et al. "First case of 2019 novel coronavirus in the United States." New England Journal of Medicine, January 31, 2020, N Engl J Med. 2020;382:929—936. https://www.nejm.org/doi/full/10.1056/NEJMoa2001191.*

[6] *KEZI, May 25, 2020 https://www.kezi.com/content/news/COVID-19-cases-in-Oregon-a-timeline-of-events-568939071.html*

[7] *Ibid.*

issued an executive order declaring an "emergency due to coronavirus (COVID-19) outbreak in Oregon."[8] In addition to the emergency declaration itself, the Governor issued a series of executive orders in the coming weeks and months, addressing various specific elements of the pandemic and Oregon's response to it. Although several of those orders had implications for various workplaces, the most significant of those orders from Oregon OSHA's perspective, as well as from the perspective of many workplaces outside health care and the food and beverage industry, was the "Stay Home, Save Lives" order, issued March 23, 2021.[9] Unlike many other states, Oregon did not shut down all "non-essential" businesses, but the order did direct that certain retail businesses be closed and imposed additional requirements on most other public-facing businesses if they chose to remain open. It also further emphasized the importance of physical distancing and minimizing interaction with individuals outside one's own household.

March 2020: Oregon OSHA's COVID-19 Complaint Workload Skyrockets

Although Oregon OSHA did not have specific rules addressing COVID-19 at the time, the various general obligations to ensure workplace safety and health did have a bearing, particularly in the context of the executive orders directing certain businesses and other workplaces to take specific actions to protect both the public and their workers. In addition, even businesses not directly affected by Executive Order 20-12, such as those in construction and manufacturing, could reasonably be expected to implement physical distancing and other hazard-reducing measures in the workplaces under their control in order to meet their general obligation to provide a safe and healthful workplace.

Oregon OSHA had begun to receive complaints raising issues related to COVID-19 in February, 2020, although they were almost entirely focused on health care. By the week beginning March 9, COVID-19 complaints had risen to 19 percent of the overall total number of complaints.[10] The total number of complaints that week was 59, which was within the normal range of complaints although above the weekly average of roughly 40 complaints per week. The week beginning March 16 saw the percentage related to COVID-19 jump to 59 percent, and the 76 complaints of all types received that week approached twice the weekly average.[11] COVID-19 was clearly having an impact on the complaint workload even in those early days. For the week that began with the "Stay Home, Stay Safe" order, however, the total number of complaints rose to unprecedented levels, with 1,392 complaints received, of which more than 95 percent were related to COVID-19.[12] It remained near that extraordinary level – more than 25 times the normal level of complaint intakes – through the following week and then decreased somewhat by mid-April, with complaints during the weeks between the middle of April and the end of June averaging 279 per week, of which 233 (83.5%) were related to COVID-19. While still more than five times the normal average, the complaint volume appeared to have settled well below the peak levels that immediately followed the "Stay Home, Stay Safe" order.

In an analysis of the complaints completed by Oregon OSHA during this period, more than 29 percent were from complainants who could not be identified in any way. Of the remainder, whose relationship to the worksite could be determined, more than half (52 percent) were from current employees, while another 18 percent were from former employees or from individuals representing current employees. The remaining

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[8]Oregon Executive Order 20-03: "Declaration of Emergency due to Coronavirus (COVID-19) outbreak in Oregon," March 8, 2021, https://www.oregon.gov/gov/Documents/executive_orders/eo_20-03.pdf. That emergency declaration was the first of eight, with the most recent extending the emergency (unless rescinded earlier) through June 28, 2021: Oregon Executive Order 21-10, "Seventh Extension of Executive Order 20-03 and COVID-19 State of Emergency," April 29, 2021, https://www.oregon.gov/gov/Documents/executive_orders/eo_21-10.pdf

[9]Oregon Executive Order 20-12: "Stay Home, Save Lives: Ordering Oregonians to Stay at Home, Closing Specified Retail Businesses, Requiring Social Distancing Measures for Other Public and Private Facilities, and Imposing Requirements for Outdoor Areas and Licensed Childcare Facilities," March 23, 2020, State of Oregon: Administration - Executive Order 20-12

[10]Oregon OSHA internal data reports, accessed May 3, 2021.

[11]Ibid.

[12]Ibid. It is worth noting that the number of "non-COVID" complaints was more than twice the normal average, suggesting that the greater visibility of Oregon OSHA's complaint process due to media coverage and other information outlets may have had an impact separate and apart from pandemic concerns.

30 percent were from other concerned individuals, frequently customers or other members of the general public.[13]

The same analysis found that more than half of the complaints came from four broad industry sectors, with 14 percent involving retail (not including grocery stores, pharmacies, or those businesses specifically required to close under Executive Order 20-12), 11 percent involving manufacturing (not including food processing or forest products manufacturing), 10 percent involving service industries other than those specifically required to close under Executive Order 20-12, 8½ percent involving restaurants, bars and food service, and 7½ percent involving grocery stories (including convenience stores).[14]

Based on that same review of COVID-19 complaints received, Oregon OSHA reported that the most common complaint items involved one or more of the following allegations:

- business is not enforcing social distancing;
- business (particularly those involving offices) is not maximizing telework opportunities;
- business is not closed or is requiring employees to work even though "not essential;" (these have declined during reopening);
- business is failing to act or to share information about one or more people complainant believes have COVID-19.[15]

Oregon OSHA reported, "In the overwhelming majority of the cases, the employer has taken some steps to address COVID-19, but the complainant either indicates that the rules are not being enforced or that the employer's response is inadequate or was tardy."[16] Oregon OSHA further reported that the agency had "been able to resolve many of the complaints by communicating with the employer – as well as communicating with the complainant about what is and is not expected."[17] In addressing the issues, Oregon OSHA noted that at the time the 4,586 complaints that had been received had resulted in fewer than 30 inspections and that no citations had yet been issued.[18] The agency also noted that it had was making use of consultants to provide "abatement assistance" and had initiated a process of using "spot checks" to confirm complaint responses and otherwise check compliance using a "non entry, non-contact" approach rather than conducting a formal inspection.[19] The more than 1,500 such visits the agency had conducted by that date had concluded that "the employer was taking reasonably effective steps to maximize social distancing, limit interpersonal contact, and maximize cleaning/sanitation."[20]

April 2020: Oregon OSHA Rulemaking in Worker Housing and Agricultural Field Sanitation

Although Oregon OSHA had not seriously considered rulemaking in the earliest days of the pandemic, largely because of the expectation that the most severe effects would be measured in weeks or perhaps a few months, on March 20, 2020, several farmworker advocates submitted what was later confirmed to be a formal petition requesting immediate rulemaking to address COVID-19 in Field Sanitation and Agriculture Labor Housing.[21] Oregon OSHA declined to take immediate action, but the petition was circulated for review and comment by affected stakeholders, with a request for comments by April 13, 2020.

Oregon OSHA received and considered 117 timely comments, as well as six additional comments received in the days immediately following April 13. While those comments were being evaluated, Stemilt Ag Services in

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[13]Testimony of Oregon OSHA Administrator Michael Wood before the House Business & Labor Committee, May 27, 2020.
[14]Ibid.
[15]Ibid.
[16]Ibid.
[17]Ibid.
[18]Ibid.
[19]Ibid.
[20]Ibid.
[21]Nargess Shadbeh and Julie Samples of the Oregon Law Center and Dr. Eva Galvez, in a letter dated March 20, 2020, addressed to senior officials at OHA and copied to Michael Wood, Administrator of Oregon OSHA. An e-mail from Nargess Shadbeh to Michael Wood on March 21, 2020 confirmed that the letter should be treated as a petition for Oregon OSHA rulemaking.

Washington state reported that 36 of 71 workers living in its labor housing had tested positive for COVID-19, even though all 36 were apparently asymptomatic.[22] In addition, on April 23, 2020, the Washington Departments of Health and of Labor and Industries released a draft rule addressing employer-provided housing, inviting comments on their draft by April 27. This allowed Oregon OSHA to compare the options it was considering with the approach under review in the neighboring state.

After considering the totality of the record, Oregon OSHA fully responded to the petition on April 28, 2020, with the adoption of a temporary rule addressing both field sanitation and worker housing.[23] The rule took initial effect on May 11, 2020, but enforcement was delayed until June 1, 2020.[24] As is the case with the current rulemaking, as well as with the more extensive temporary rule adopted in November, the April 28 rule was adopted using Oregon OSHA's existing statutory authority, in compliance with the applicable requirements of the Administrative Procedures Act. Oregon OSHA's rulemaking was intended to address the workplace implications of the COVID-19 public health emergency, but it was not itself dependent upon any special authority granted as a result of the emergency declaration or found in any of the Governor's other executive orders responding to that emergency.

The temporary rule remained in effect until October 23, 2020, 180 days from the rule's adoption. The rule could not be replaced or extended through the temporary rulemaking process, and Oregon OSHA was not prepared to replace it with a permanent rule. However, Governor Kate Brown determined that the protections of workers living in employer-provided housing should not be allowed to lapse, based on the continuing public health emergency. She therefore issued Executive Order 20-58,[25] which extended those protections through April 30, 2021, in order to allow Oregon OSHA to address the issue through the normal rulemaking process. Oregon OSHA did so, specifically in relation to housing, on April 30.[26] As is the case with the more comprehensive rule addressed by this document, the COVID-19 employer-provided housing rules are intended to be temporary and will be repealed when no longer necessary to address the COVID-19 pandemic.

June 2020: Oregon OSHA Begins Development of a Comprehensive COVID-19 Workplace Rule

In conversations with worker advocates who had been pursuing potential legislative solutions to workplace COVID-19 risks prior to the First Special Session of 2020 in June, Oregon OSHA advised them that the agency had sufficient authority to address COVID-19 workplace hazards through rulemaking and was prepared to do so on a temporary basis until the full rulemaking process could be completed. On June 26, 2020, Oregon OSHA announced it would begin both temporary and "permanent" rulemaking to address the risks of airborne infectious diseases in Oregon workplaces:

> *The COVID-19 emergency has highlighted the risks that any infectious disease, particularly one that is airborne, can create for a wide variety of workplaces. As a result of both the immediate and long-term risks highlighted by the current public and occupational health crisis, Oregon OSHA is responding to the request that the state adopt an enforceable workplace health rule on an emergency basis this summer, to be replaced by a permanent rule.*[27]

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[22] *"Stemilt Ag Services shares COVID-19 test results from isolated East Wenatchee site," Press release from Stemilt Ag Services, April 21, 2020, available at https://cdhd.wa.gov/wp-content/uploads/2020-14-Stemilt-Ag-Services-shares-COVID-19-test-results-from-isolated-East-Wenatchee-Site.pdf.*

[23] *"Rule addressing the COVID-19 public health emergency in labor housing and agricultural employment," April 28, 2020 https://osha.oregon.gov/OSHARules/adopted/2020/ao2-2020-filing-emergency-rules-ag-covid.pdf.*

[24] *"Interim Guidance Related to Temporary Rules Adopted in Response to the COVID-19 Emergency," Memo from Michael Wood, Oregon OSHA Administrator, May 8, 2020. https://osha.oregon.gov/OSHARules/adopted/2020/ao2-2020-enforcement-delay-memo.pdf.*

[25] *Oregon Executive Order 20-03: "Enhanced Health and Safety Requirements for Certain Employer-Provided Housing During Agricultural Off Season in Response to Coronavirus (COVID-19) Outbreak," October 23, 2020. https://www.oregon.gov/gov/Documents/executive_orders/eo_20-58.pdf.*

[26] *"Oregon OSHA's Adoption of Rules Addressing the COVID-19 Workplace Requirements for Employer-Provided Labor Housing," April 30, 2021. https://osha.oregon.gov/OSHARules/adopted/2021/ao1-2021-letter-cov19-laborhousing.pdf.*

[27] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," June 26, 2020.*

The announcement described a plan to adopt temporary rules addressing COVID-19 in both the general workplace and health care (and related activities), with an initial target date of September 1 to allow for somewhat limited stakeholder and public engagement before a rule was finalized (the draft legislation had anticipated an August 1 adoption date, which Oregon OSHA considered to be too soon for such a comprehensive effort).

The announcement also clearly stated that the temporary rules would be replaced by a more comprehensive permanent rule, which would need to be in effect by March 1, because the temporary rule was expected to expire on February 28, 2021.[28]

July 2020: Oregon OSHA Complaint Workload Peaks Again Following "Mask Mandate"

The earliest public health recommendations did not encourage the use of face coverings, indicating that they would not protect the wearer and that procedure masks and respirators should be retained for the use of health care workers. However, in April of 2020 the CDC reevaluated the evidence and determined that the use of cloth masks and similar facial coverings could protect others from infection by asymptomatic, presymptomatic, and mildly symptomatic individuals. As a result, the CDC and the OHA began to recommend the use of such facial coverings. Oregon OSHA's temporary standard addressing employer-provided housing and agricultural field sanitation, adopted on April 28, required such facial coverings in certain situations.

Based on the course of the pandemic, the Governor and OHA determined in mid-June that part of the reopening plan for certain counties would involve a requirement to wear facial coverings in certain public-facing business. Over the weeks to come, the requirement was strengthened several times, including the establishment of a statewide facial covering requirement at the beginning of July. At the same time, businesses continued to reopen based on the guidance developed earlier in the year, while certain restrictions stayed in place. Together, these factors led to a fresh influx of complaints to Oregon OSHA about workplaces throughout the state.

During the week beginning June 29, 2020, the COVID-19 complaints received by Oregon OSHA more than doubled to 556, and the following week saw them jump yet again, to 875. The week beginning July 13, 2020 saw an increase to 988, the largest number of COVID-19 complaints the agency had received since early April. From that point forward until the end of August, the COVID-19 complaint volume averaged 501, which meant that the overall volume of complaints for the nine-week period encompassing July and August was 603, compared to 493 for the nine weeks immediately after the "Stay Home, Stay Safe" order. Not surprisingly, the list of concerns being addressed in such complaints now included the failure to enforce the use of facial coverings by workers or by other individuals in the workplace.

August 2020: Oregon OSHA Work on the Temporary Rule Continues with an Extended Timeline

As Oregon OSHA developed the two temporary rules and held more than a dozen virtual forums with different industry groups, it became clear that it would be more straightforward to develop a single rule, with a distinct set of requirements for "exceptional risk" workplaces such as health care, rather than addressing such higher risk industries with a completely separate rule. In addition to this change in approach, the continuing discussions with stakeholder groups caused Oregon OSHA to delay publication of the first drafts of the rule. The original timeline had targeted two different dates, July 20 and July 27, for the two drafts. On July 13, 2020, Oregon OSHA revised the timeline to allow the single rule draft to be circulated on August 3, but still expecting the temporary rule to be adopted by September 1, 2020.[29]

Ultimately, a further adjustment was needed and the agency issued yet another timeline, which pushed the expected draft production to August 17, and pushed the expected adoption and effective date for the temporary rule to September 14.[30] Each of these documents continued to reflect the expected need for

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[28] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," June 26, 2020.*
[29] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," Revised July 13, 2020.*
[30] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," Revised August 6, 2020.*

"permanent" rulemaking, including the need to replace the temporary rule before it expired at the end of 180 days.

On August 17, 2020, Oregon OSHA circulated its first draft, ultimately inviting public and stakeholder comment through September 7. Although this was not a formal public comment period as described by the Administrative Procedures Act, it was similar in both function and purpose. That first draft incorporated three risk tiers, although subsequent drafts eliminated the middle tier (in large part because the risk assessment and written program requirements for most employers were incorporated into the lower tier).

The agency received more than 1,500 comments on the initial draft, including significant and substantive comments from both labor organizations and employer groups. In order to allow more time to consider those comments and develop a revised draft, the agency again revised its timeline, this time targeting October 1, 2020 as the adoption date.[31] For the first time, this revision showed a change in the date that a permanent rule would be expected to take effect, pushing it to March 29 to allow its development to take advantage of the delay in finalizing the temporary rule – but continued to reflect the expectation that any permanent rule would be in place by the time the temporary rule expired.

On September 23, 2020, Oregon OSHA provided information about its permanent infectious disease rulemaking plans in the course of a broader update to the House Business and Labor Committee. That report noted the agency's plan to make a decision on the permanent rule "before expiration of temporary rule in late March, with delayed effective dates for any provisions in the permanent rule that are not already required by the temporary rule."[32] As the agency noted in comments before the committee, the effective definition of a "permanent" rule in Oregon law "is simply a rule that needs to be in place more than 180 days."[33]

As an additional draft of the rule was circulated and discussed with stakeholders, it became clear that many of the questions and concerns raised related to the need to provide specific information about how the rule's requirements would apply in certain industries, as well as to make clear how the rule's expectations related to those requirements issued by OHA and other agencies using their public health authority and the authority conferred by the governor's executive orders. This produced another change in the timeline,[34] and the creation of a third draft on October 13. That draft incorporated the concept of industry- and activity-specific appendices, although they had not all been completed when the draft was circulated. A further draft, which included the appendices and incorporated certain other suggested changes, was circulated on October 23.

Ultimately, the temporary COVID-19 workplace rule was finalized and adopted on November 6, 2020.[35] The press release announcing the temporary rule's adoption ended with the statement that "Oregon OSHA continues to pursue permanent rulemaking that would provide a structure for responding to potential future disease outbreaks" and directing readers to the Oregon OSHA Infectious Disease Rulemaking page for more information.[36]

November 2020: Oregon OSHA Begins Work on a Permanent Infectious Disease Rule

Based on the November 6 adoption date, it was now clear that the temporary rule could remain in place through May 4, 2021, and the agency began working in earnest with the two Rulemaking Advisory Committees (RACs) that had been empaneled to assist with the permanent rulemaking process (and who had ultimately been involved in reviewing the later drafts of the temporary rule as well).

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[31] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," Revised September 10, 2020.*
[32] *Testimony of Oregon OSHA Administrator Michael Wood before the House Business & Labor Committee, September 23, 2020.*
[33] *Ibid.*
[34] *"Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases," Revised October 5, 2020.*
[35] *"Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces," November 6, 2020.* https://osha.oregon.gov/OSHARules/adopted/2020/ao3-2020-filing-temporary-rules-covid19.pdf
[36] *"Oregon OSHA adopts temporary rule addressing COVID-19 in all workplaces," November 6, 2020,* Oregon Occupational Safety and Health : Oregon OSHA adopts temporary rule addressing COVID-19 in all workplaces : 2020 News : State of Oregon

Each committee included 25 members – 12 representing the employer perspective and 12 representing the worker perspective, with a chair appointed from within neither interest group. One of the committees focused on the general requirements of the rule, while the other focused on health care and the other "exceptional risk" industries. The two groups worked in parallel, with Oregon OSHA staff working with both committees, in an effort to develop a permanent rule that both would provide for ongoing COVID-19 protections and could function on an ongoing basis to address infectious disease in the future.

November-December 2020: Oregon OSHA Complaint Workload Peaks Yet Again as Cases Rise

In the months of September and October, Oregon OSHA COVID-19 complaint volumes had dropped to a lower level (although still high by historical standards), averaging 314 per week over the nine-weeks covering the two months. In early November, the number of COVID-19 complaints began to increase. They peaked at a weekly total of 830 in mid-November, and averaged more than 665 per week for the next month, before decreasing to an average of 409 per week from the middle of December through the end of January. Although it appears likely that the complaint volume was affected by the two-week "freeze" and the implementation of county risk levels, it is also worth noting that the upward trend actually began before the Governor announced either action.

January 2021: Plans for Permanent Rule Dropped to Focus Solely on Extending COVID-19 Protections

Following discussions about the scope of the rule and whether the timeframe could be met in both RACs the first week of January, the Oregon AFL-CIO made a request on behalf of itself and its coalition partners that "Oregon OSHA use the current permanent rule-making process on infectious diseases and COVID-19 to solely focus on a robust and comprehensive COVID-19 specific rule to protect workers as this pandemic continues into 2021."[37] The request further stated, "Although we appreciate the effort and initiative to craft a new rule to address all current and potential future infectious diseases in this few week process, there is broad agreement that to do so in the prescribed timeline isn't feasible."[38]

Oregon OSHA then asked both RACs to weigh in on the request. The General Workplace RAC strongly concurred with the recommendation at its January 11 meeting, as did the Exceptional Risk RAC at its January 13 meeting. Both RACs also strongly encouraged Oregon OSHA to use the existing temporary rule as the starting point for its proposed rule, with a majority of the Exceptional Risk RAC members present voting to recommend that Oregon OSHA should not propose *any* variations from the existing temporary rule.[39] From this point forward, Oregon OSHA was no longer working on a rule that was expected to be genuinely permanent (although the rulemaking process remained identical to that required of a truly permanent rule). Instead, the rule would be limited to addressing the COVID-19 pandemic in Oregon workplaces and would be repealed when it was no longer necessary for that purpose.

Ultimately, and as discussed elsewhere in this document, the rule Oregon OSHA proposed included a limited number of suggested changes from the temporary COVID-19 rule. The rule as adopted excludes some of those proposed changes but includes a number of other changes, particularly within Appendix A. In any case, the temporary rule certainly provided the foundation of Oregon OSHA's proposal, and the proposal was focused on addressing COVID-19 in the workplace as the members of both RACs had strongly recommended.

The wisdom of the two RACs' collective recommendation to focus on COVID-19 risks was made increasingly clear by the challenges involved in completing the remaining work before the end of January.[40] Oregon OSHA was able to settle on a final draft of the proposed rule and to develop a proposed Fiscal Impact

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[37]"OSHA COVID-19 Permanent Rule Making Process," January 9, 2021 memo to Oregon OSHA Administrator Michael Wood from Jess Giannettino Villatoro on behalf of the Oregon AFL-CIO.

[38]Ibid.

[39]The motion was passed with all employer representatives present voting in favor and all worker representatives present voting against. Before the vote, the Oregon OSHA Administrator advised the RAC members that Oregon OSHA would not necessary consider itself obligated to give the greatest weight to a vote that did not reflect a majority – or at least a significant portion – of both groups.

[40]Even so, the issues around employer-provided housing could not be fully resolved and were separated from the comprehensive COVID-19 rule to be handled in a separate proposed rule filed four weeks later.
https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-laborhousing-covid19.pdf

Statement, which it submitted to both RACs for review and a recommendation regarding the adequacy of the draft statement (this recommendation regarding the Fiscal Impact Statement is distinct from any recommendation or discussion about the wisdom of the requirements themselves).

In an electronic vote ending on January 29, 2021, the General Workplace RAC voted to approve the Fiscal Impact Statement by 19 to 2. However, a number of the employer representatives did share concerns about particular areas where they thought the document could be improved, as did the two employer representatives who voted against the statement. At the same time the Exceptional Risk RAC voted 11 to 10 to approve the Fiscal Impact Statement, with the vote split between worker and employer representatives who participated (in both RACs, the vote was conducted electronically, giving all 24 RAC members an opportunity to participate). Again, several of those who voted against the statement supplemented their vote with an explanation of their reasoning, which was helpful in determining the next steps for the proposal.

Before filing the final proposed rule, the Oregon OSHA Administrator reviewed the comments provided by members of both RACs to determine 1) whether they suggested that there might a significant problem the overall cost-of-compliance estimates; and 2) whether they suggested that the cost of complying with the rule would have an otherwise unidentified significant effect on small business. After determining that neither problem appeared to be present,[41] and based upon the fact that both RACs had approved the draft Fiscal Impact Statement, as did a 30-12 majority of the members of the two RACs combined, Oregon OSHA proceeded with the rule filing, including the Fiscal Impact Statement.[42] The Fiscal Impact Statement and the comments received in relation to it are discussed in more detail in another portion of this document.

February and March 2021: Public Comment

The filing for the proposed rule announced four virtual public hearings between February 23 and March 4, 2021. This included two evening hearings, one of which was held in Spanish. In addition, the record was open to receive written comment through April 2, 2021, which provided nearly nine weeks for public comment following the proposed rule's publication by the Secretary of State on February 1.

In addition to the legally required notices, Oregon OSHA issued a press release on February 1, 2021 announcing the proposed rule and the opportunity for the public to comment through April 2.[43] This release generated coverage in both local media and specialized press outlets.[44]

The record of public comment on this rule, either in writing or in testimony recorded at one of three hearings, is extensive. Although Oregon OSHA has not yet been able to fully resolve the uncertainty created by duplicate comments submitted by a single individual to different agency e-mails, it appears clear that more than 5,000 comments were received as part of the rulemaking, considerably more than any previous Oregon OSHA rule. The overwhelming majority of those comments opposed the rule, either in whole or in part, although many comments did not provide any detail about the reasons for their opposition. The nature

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[41]At least one of the comments suggested that the Fiscal Impact Statement understated the impact on large businesses in the exceptional risk sectors, and several of the other comments related to public-sector employers who would not be part of the assessment of the cost-of-compliance effect on businesses (although they are employers whose impacts should be – and were – addressed as part of the overall Fiscal Impact Statement).

[42]"Oregon OSHA's Proposal on Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces," January 29, 2021. https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf.

[43]"Oregon OSHA proposes permanent rule addressing COVID-19 in all workplaces -- Division accepting comments through April 2 on replacement of temporary rule," https://osha.oregon.gov/news/2021/Pages/nr2021-05.aspx.

[44]See, for example, "Oregon OSHA proposes 'permanent' rule addressing COVID-19 in all workplaces," News Channel 21 KTVZ, February 2, 2021, https://ktvz.com/news/coronavirus/2021/02/01/oregon-osha-proposes-permanent-rule-addressing-covid-19-in-all-workplaces/; Louise Esola, "Oregon OSHA proposes permanent COVID-19 rule," February 2, 2021, Business Insurance, https://www.businessinsurance.com/article/20210202/NEWS06/912339500/Oregon-OSHA-proposes-permanent-COVID-19-rule; "Oregon OSHA Proposes Final, Permanent COVID-19 Safety Rules for Oregon Employers," JD Supra (Stoel-Rives Labor & Employment Law Blog), February 2, 2021, https://www.jdsupra.com/legalnews/oregon-osha-proposes-final-permanent-9274027/; Guy Burdick, "Oregon Proposes Permanent COVID-19 Infectious Disease Standard," EHS Daily Advisor, February 12, 2021. https://ehsdailyadvisor.blr.com/2021/02/oregon-proposes-permanent-covid-19-infectious-disease-standard/. "Oregon OSHA seeks public comment on proposed rule," Curry Coastal Pilot, February 18, 2021. https://www.currypilot.com/news_free/oregon-osha-seeks-public-comment-on-proposed-rule/article_29186328-707b-11eb-83d2-7f22e41bec1e.html.

of those comments and how they were evaluated as part of this rulemaking is discussed in considerable detail throughout this document.

April 2021: Evaluation of the Record of Comments and Assessment of the Overall State of the Pandemic

With the extensive record before it, Oregon OSHA spent much of the month of April reviewing and evaluating the arguments presented in the various public comments. Oregon OSHA also took the opportunity to review the most recent information not only from OHA but also from the CDC. That review, and the decisions made based upon it, are reflected in the rule and in the discussions in the balance of this document.

On April 27, 2021, the Oregon OSHA Administrator received a letter that was also addressed to Representative Paul Holvey, chair of the Oregon House Business and Labor Committee, and to Senator Chuck Riley, chair of the Oregon Senate Business and Labor Committee. The letter was signed by the Republican leaders of both the House and the Senate, as well as by the Republican members of the respective committees.

> *Pursuant to ORS 183.335(16), we are requesting an opportunity to review rules proposed by Oregon Occupational Health and Safety Administration (OR-OSHA) titled "Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces." As you know, ORS 183.335(16) provides any member(s) of the Legislative Assembly with the right to trigger a committee review of a proposed agency rule to determine its compliance with the legislation from which the proposed adoption, amendment or repeal results. There has obviously been a great deal of additional information and updated guidance issued since the rules were first proposed in January 2021. We request this new information be considered as part of the review process to determine if the proposed rule is consistent with its authorizing statute.*
>
> *Chairs Holvey and Riley, please convene your committees for purposes of fulfilling the statutory review process. The undersigned request one or more public hearings on this subject.*
>
> *Administrator Wood, please suspend adoption of the proposed rules until the mandatory review process is complete.*
>
> *We look forward to working with you to facilitate this review.*[45]

After receiving this letter, Oregon OSHA reviewed the relevant statute to confirm that the law did not trigger a mandatory delay in the adoption of a rule when such a review is requested.[46] Oregon OSHA then considered whether such a delay in adopting the rule was possible. At this point, Oregon OSHA concluded that no delay beyond May 4, 2021 was appropriate, given the need (as repeatedly expressed by the agency) for the rule to be in place before the temporary rule expired.

On April 30, 2021, Oregon OSHA received a letter from a law firm on behalf of an employer association asking that the rule's adoption be delayed under ORS 183.335(4) for "an additional 90 days to submit data, views, and arguments concerning the proposed Permanent Rules."[47] Oregon OSHA responded the same day with a letter noting that the referenced statute (which appears to require a delay of at least 21 days for comment) applied to requests "received before the earliest date that the rule could become effective after the giving of notice,"[48] which would have been April 3, 2021, the day after the record originally closed.[49] However, Oregon OSHA considered the request outside the context of the particular statute and responded to it as follows:

> *Although our consideration of the issue has, of necessity, been rapid, we have thoroughly evaluated the issues such a reopening of the public comment period would present.*

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[45] *Letter to Rep. Paul Holvey, Sen. Chuck Riley, and Michael Wood from Sen. Fred Girod, Rep. Christine Drazan, et al, April 27, 2021*
[46] *ORS 183.335(16) reads, in its entirety, "Upon the request of a member of the Legislative Assembly or of a person who would be affected by a proposed adoption, amendment or repeal, the committees receiving notice under subsection (15) of this section shall review the proposed adoption, amendment or repeal for compliance with the legislation from which the proposed adoption, amendment or repeal results."*
[47] *Letter from Attorney George Goodman to Matthew Kaiser, Oregon OSHA Technical Specialist, on behalf of Oregon Manufacturers and Commerce, April 30, 2021*
[48] *ORS 183.335(4)*
[49] *Letter from Michael Wood, Oregon OSHA Administrator, to George Goodman, April 30, 2021*

As you know, it has been Oregon OSHA's stated intention throughout this process that the "permanent" rule would be in place by the time the temporary rule expired. Although for some time Oregon OSHA was considering a broader and more long-lasting "infectious disease" rule, there was never any question about the timing of the "permanent" rule in relation to the temporary rule's expiration. Indeed, the reason the earlier plan for such a long-term rule was discarded before the rule was proposed was primarily based on the need to complete the proposal in time to enable careful consideration of the record, with a decision made before May 4. As early as last June, Oregon OSHA indicated in public statements and documents that any "permanent" rule addressing the COVID-19 pandemic would need to be in place by the time the temporary rule expired. The proposed rule filing itself, in discussing the need for the rule, refers to the permanent rule "replacing the temporary rule" upon its May 4 expiration.

Since the public comment period closed on April 2, 2021, Oregon OSHA has been working to review the more than 5,500 comments received (including those your office made while the public comment period was open and primarily on behalf of the same client mentioned in today's letter). We have worked to develop potential changes to the rule based on those timely comments. That work is, obviously, nearing completion. Reopening and extending the public comment period for 90 days is obviously inappropriate in that context, and doing so for even a brief period is unrealistic, as Oregon OSHA still intends to take action before the temporary rule expires next Tuesday. To do so would create unnecessary and inappropriate delays in providing employers and those who work for them with as much clarity and certainty as possible about continued measures to protect against the COVID-19 pandemic in Oregon workplaces. Although the current rulemaking has followed the permanent rulemaking process, the circumstances that justified Oregon OSHA's emergency rule last fall have not disappeared. They strongly argue against any delay at this stage of the rulemaking process.

For these reasons, we will not be reopening and extending the public comment period on this rule.[50]

The same day, Oregon OSHA was informed that the House Business and Labor Committee would be holding an informational hearing on May 5, 2021, to hear from Legislative Counsel as to whether Oregon OSHA had the necessary statutory authority to adopt the proposed rule. The following Monday, May 3, the department sent a letter to the legislators who had requested the hearing and had requested that Oregon OSHA delay a decision on the rule. The portions of the letter addressing the rule adoption time frame appear below:

…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 or rules.

….

[50] *Ibid.*

> *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.*[51,52]

May 2021: Adoption of Rule Extending and Modifying COVID-19 Workplace Protections in Oregon

On May 4, 2021, the final day that the existing temporary rule was in effect, Oregon OSHA adopted a revised version of the rule it had proposed on January 29, 2021, which was in turn based on the temporary rule that had been in place since November 6, 2020.

That rule reflects the agency's best judgment, based on the record of public comment and other available information, as to the most appropriate way to balance the need to maximize worker protections from the real workplace hazards presented by the virus during the coming months against the need to minimize both economic and other burdens on employers, who have been faced with considerable challenges over the course of the pandemic. The rule provides sufficient flexibility to allow the agency to respond to changing circumstances, while still providing a workable framework to guide employers and to protect employees.

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[51]*The discussion accompanying the letter was an abbreviated version of the discussion of statutory authority found in Section III of this document.*

[52]*Although it was not relevant to Oregon OSHA's decision on the rule, which was made the previous day, Oregon OSHA notes for the purpose of completing the record that in the hearing on the subject, the Office of Legislative Counsel unequivocally stated that Oregon OSHA had the statutory authority to adopt the rule. See the testimony of Deputy Legislative Counsel Jessica Santiago at the meeting of the House Committee on Business and Labor, 3:15 pm, May 5, 2021 (time stamp 7:30 to 9:30).*

II. Description of the Rule as Adopted and Comparison to Previous, Temporary Rule

The rule as adopted parallels the basic structure and contents of both the temporary rule adopted November 6, 2020, and the rule as proposed January 29, 2021. As such, it includes the following basic provisions (the highlighted portions of the document identify those provisions that specifically reference other requirements that are potentially subject to change, such as those established by the Oregon Health Authority):

1. *Physical distancing.* The rule as adopted, like both the temporary rule and the proposed rule, applies the basic 6-foot distancing requirement found in guidance from both the Oregon Health Authority (OHA) and the US Centers for Disease Control and Prevention (CDC). It requires employers to design work activities and workflow, to the degree feasible, so that it does not require employees to be within six feet of another individual.
2. *Facial coverings.* The rule as adopted, like both the temporary rule and the proposed rule, relies upon the facial covering mandatory guidance issued by OHA, although it also includes a provision for situations where there is no applicable OHA guidance, as well as some additional provisions specific to the workplace.
3. *Cleaning and sanitation.* The rule as adopted is less stringent than either the temporary rule or the proposed rule when it comes to cleaning and sanitation. Instead, it mirrors the most recent CDC guidance, which itself reflects an updated understanding of the limits of surface transmission.
4. *Posting requirements.* Like both the proposed rule and the temporary rule, the rule as adopted includes modest posting requirements for all workplaces.
5. *Building operators.* The rule as adopted, like both the temporary rule and the proposed rule, includes language making it clear that building operators responsible for common areas are responsible for addressing the cleaning and posting requirements in those common areas.
6. *Ventilation.* The rule as adopted, like the proposed rule, includes the provisions of the temporary rule regarding maintenance and operation of existing ventilation systems. It also includes an employer self-attestation about the operation of the system that was not part of the temporary rule but was part of the proposal, but the rule as adopted states more clearly that the certification need be based only on the employer's knowledge.
7. *Exposure risk assessment.* Like the temporary rule and the proposed rule, the rule as adopted includes a requirement for an exposure risk assessment, as detailed in the rule. The requirement is identical to that in the temporary rule and employers do not need to repeat the previous work. As was true of the temporary rule, employers with more than 10 employees or that are identified as exceptional risk workplaces must document in writing that the assessment has been completed.
8. *Infection control plan.* Again, the rule as adopted is identical to the rule as proposed and the temporary rule, with the exception of a statement making it clear that employers whose plan complies with the temporary rule do not need to repeat the planning process. As was true of the permanent rule, employers with more than 10 employees or that are identified as exceptional risk workplaces must document the plan in writing.
9. *Infection control training.* The rule as adopted requires training based on the risk assessment and plan, as did the temporary rule and the rule as proposed. The requirements are identical to the previous requirements, with the exception of language making it clear than employers whose training complied with the temporary rule do not need to repeat the training.
10. *COVID-19 exposure notification process*. Like the temporary rule, the rule as proposed and as adopted requires exposed and affected employees to be notified about confirmed COVID-19 cases.
11. *COVID-19 testing for workers*. Like the temporary rule, the rule as proposed and as adopted requires employers to cooperate with testing efforts directed by OHA or local public health officials.

12. *Medical removal*. The medical removal requirement in the rule as proposed and as adopted is very similar to that in the temporary rule (although, in practice, the likelihood and duration of such removals has decreased as guidance from OHA has changed, which the rule automatically takes into account). The rule as adopted also included language in the proposed rule that was not part of the temporary rule, which requires written notification of workers about their right to return to the job as described in the rule.
13. *Mandatory Appendices*. The proposed rule essentially kept Appendix A from the temporary rule intact. The rule as adopted includes significant changes. The final rule removed six of the appendices entirely and shortened most of the rest of them significantly by focusing on worker protection and relying upon the language of the main body of the rule whenever possible. The list of appendices in the rule as adopted includes the following:

    A-1: Restaurants, Bars, Brewpubs and Public Tasting Rooms at Breweries, Wineries and Distilleries

    A-2: Retail Stores

    A-3: Personal Services Providers

    A-4: Construction Operations

    A-5: Transit Agencies

    A-6: Professional, Division 1, Pac-12, West Coast Conference and Big Sky Conference Sports

    A-7: Employers Operating Fitness-Related Organizations

    A-8: K-12 Educational Institutions (Public or Private)

    A-9: Employers Operating Child Care and Early Education Programs20

    A-10: Veterinary Clinics

    A-11: Emergency Medical Services: First Responders, Firefighters, Emergency Medical Services and Non-Emergency Medical Transport

    A-12: Law Enforcement Activities

    A-13: Jails, Prisons, and Other Custodial Institutions

14. *Exceptional Risk Infection Control Training.* The rule as proposed and adopted leaves the temporary rule's additional infection control training requirements for exceptional risk employers in place.
15. *Exceptional Risk Infection Control Plan.* The rule as proposed maintained most of the temporary rule's additional requirements for the plan and added a provision requiring health care employers to develop and implement a written personal protective equipment supply and crisis management plan, using the joint OHA/Oregon OSHA guidance on the subject.
16. *Exceptional Risk Sanitation and Cleaning.* The rule as proposed and adopted maintained the additional cleaning provisions for health care settings found in the temporary rule. For details with regard to disinfection, the rule references information provided both by the Environmental Protection Agency and the CDC (although the latter is not subject to change, because a specific document is referenced by date.
17. *Exceptional Risk Personal Protective Equipment.* Based on CDC guidance, the rule as proposed and adopted added a requirement for respirator use when treating known COVID-19 patients that was stronger than the similar provision in the temporary rule. Like the temporary rule and the proposed rule, the final rule continues to refer to CDC guidance for information about aerosol-generating procedures when patients are not known COVID-19 patients.
18. *Exceptional Risk Ventilation Requirements.* The rule as proposed and adopted maintained the additional ventilation requirements for health care facilities that were part of the temporary rule.
19. *Barriers and Isolations Rooms.* The rule as proposed and adopted maintained the barriers and isolation room requirements for health care facilities that were part of the temporary rule.

20. *Screening in Health Care Settings.* The rule as proposed and adopted maintained the screening requirements specific to health care settings that were part of the temporary rule.
21. *Exposure Notification Process in Certain Health care Settings.* The rule as adopted provides guidance allowing notifications to be suspended in situations when contact tracing in health care is not practical per OHA guidance. This language was not in the proposed rule or the previous temporary rule.
22. *Medical Removal Provisions in Certain Health Care Settings.* The rule as adopted is substantively identical to the proposed and temporary rule when it comes to limited exceptions to medical removal for health care workers, although the provision was moved from subsection (3) to subsection (4), where it probably should be have been placed originally.

III. Application of Statutory Requirements

> *Q: What law are your rules attached to? OHA has these listed as "guidance" OHA, your department nor the Governor can make laws, what law?*
> *A: Oregon OSHA has the authority to adopt rules that carry the force of law under the Oregon Safe Employment Act. These rules, which will be adopted in accordance with the requirements of the Administrative Procedures Act, are adopted under that authority (as are all Oregon OSHA rules).*[53]

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 (OSEA)[54] and the Administrative Procedures Act (APA).[55]

Throughout the public comment period, several individuals raised objections to Oregon OSHA's authority to adopt these rules. For example, one commenter suggested Oregon OSHA has "zero authority to enforce your temporary rule. Let alone a permanent rule on this matter."[56] Another wrote, "You have absolutely no authority to make laws such as this. Making laws are the responsibility of legislators and the people of the State of Oregon."[57] Yet another wrote to the Oregon OSHA Administrator, indicating first,

> *You, sir, do not have the authority to legislate as you are not a legislator. You are an administrator, and your job is to follow the rules, not make them. Anything you do outside of that purview is illegal. The People of Oregon are no longer asleep. Take note.*[58]

After being advised of the rulemaking authority in the Oregon Safe Employment Act, the same commenter raised a concern about the constitutionality of the rulemaking, writing,

> *With all due respect, that "rule making authority" does not give you the right to make mandates in violation of the US Constitution, which is what you are proposing in regards to workplace masks. That would be the role of the legislature, which would then be tested in the US Supreme Court.*[59]

The theme that the proposed rule would be illegal lawmaking was echoed by other commenters, such as the one who wrote,

> *It is unconstitutional and you have ZERO authority to implement such a law! You are NOT a legislator and they are the only ones that are (by law) allowed to make laws! You are overreaching! You are going against our rights which are not forfeited even during a health crisis! There are still laws that protect our rights no matter who you think you are! You need to step back in your place!*[60]

Another commenter took issue with the exchange at the beginning of this section, writing

> *…you fail to answer even the most basic questions that don't pertain to science, but the law. Case in point, this audience question….Do you really not know the ORS statute number that gives you this authority? Isn't it part of your job to know this? Why can't you answer this question directly?*[61]

The Oregon OSHA representative did answer the question directly, by naming the law that provides the agency with its statutory authority (as well as by naming the law governing rulemaking processes). In the agency's experience, most people prefer the use of names to numbers (Oregon OSHA has used the same terms in the same fashion already in this discussion). Had the agency representative been asked for the statutory references, he would easily have identified ORS 654 and ORS 183, as well as many of the specific provisions involved.

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[53] *From question and answer session prior to the formal public comment period at an Oregon OSHA hearing. These are not normally included in the formal record, but this was one of several such exchanges placed into the record as part of written comments from Erik Harper, February 23, 2021.*
[54] *ORS 654*
[55] *ORS 183*
[56] *Letter from Oregon State Senator Brian Boquist*
[57] *E-mail from Larry Gregory, April 2, 2021; see similar e-mail from Terri Steller, April 2, 2021*
[58] *E-mail from John Winterbourne*
[59] *2nd E-mail from John Winterbourne*
[60] *E-mail from Angi Gregory, April 2, 2021*
[61] *Erik Harper, February 23, 2021*

With all respect for the depth of the feelings reflected by these and other, similar comments,[62] Oregon OSHA disagrees with the assertion that it does not have the authority to adopt such rules, for reasons described in the remainder of this section.

Other commenters did not necessarily challenge the existence of Oregon OSHA's authority under the law, but suggested that Oregon *should not* have such authority. For example, one commenter wrote, "As a former state legislator, I want to be absolutely clear that OSHA, nor any other state agency, should have rule making authority without legislative oversight."[63] Ultimately, the question of whether Oregon OSHA *should* have rulemaking authority is beyond the scope of the agency's rulemaking. In addition, the agency notes that all of its activities, including rulemaking, are ultimately subject to legislative oversight, as well as to judicial review. For the purposes of this rulemaking, however, Oregon OSHA's inquiry is necessary limited to the question of whether it has the necessary rulemaking authority and how it should make use of that authority, if at all, in relation to the COVID-19 pandemic.

In considering the issue, it is worthwhile to recognize that this rulemaking applies Oregon OSHA's existing statutory authority. Although the rulemaking addresses the workplace implications of the same public health emergency created by the COVID-19 pandemic that led to the Governor's emergency declarations, Oregon OSHA claims no exceptional authority as a result of those declarations or any other Executive Orders. Nor does the rule as adopted rely upon a declared state of emergency for its existence.

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 by Oregon OSHA 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 the Legislative Assembly's intents is, among other things, 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."[64]

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…..*
>
> *(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,"[65] and it represents Oregon OSHA's determination of appropriate "safeguards or other means of

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[62]See, for example, e-mail from Michelle McDevitt, April 1, 2021; e-mail from the Linda Grabow family, April 2, 2021
[63]E-mail from Douglas County Commissioner Tim Freeman. See similar comments in e-mails from Troutdale Mayor Randy Lauer,
[64]The 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.
[65]ORS 654.003

protection…well adapted to render…safe and healthful"[66] the affected workplaces. The rule provides direction concerning "safeguards and other means of protection, and of methods, processes and work practices"[67] 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."[68]

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. For example, although it's not entirely clear, that appears to be the point made by the commenter who wrote, "rules should be written to acknowledge that the agency's authority is limited to worker safety and does not extend beyond that."[69]

Another commenter made point more clearly when she wrote,

> *I find this subject I am writing you on, Frankly, UNBELIEVEABLE !*
>
> *You, OSHA, are charged with protecting workers in the work place, from potential injuries. That is the definition of your Agency.*
>
> *Who charged you with taking on a role in your agency with Covid 19?*
>
> *Your role is to help keep workers, employees a better word, from injury. Your place is not to keep people Safe from Corona Virus. Influenza, the Flu, a Virus, whatever you want to call it. A virus that has a 99.9 etcetera, chance of recovery, much like our normal influenza we Oregonians deal with Every Single Influenza Season.*
>
> *"We THINK our job is addressing hazards in the workplace and COVID-19 is certainly a hazard in the workplace a well as elsewhere."*
>
> *Well, Mr. Woods, I DO NOT AGREE!!!*
>
> *I KNOW, NOT THINK your place is to protect workers in the work place, from potential injuries,*
>
> *I KNOW IT IS NOT your role to take on the RULES of ENFORCING MASKING, Sanitation, and Social Distancing.*
>
> *Who gave you the notion to take on this role ? OSHA?*
>
> *PLEASE STAY IN YOUR LANE, AND I WILL REMIND YOU, THAT LANE IS PROTECTING WORKERS IN THE WORKPLACE NOT FROM CORONA VIRUS.*[70]

In contrast, the rulemaking authority and obligation quoted above expressly demands the protection of the "health" of employees as well as their safety, and COVID-19 represents a workplace health hazard. Both Oregon OSHA and its federal counterpart, the Occupational Safety and Health Administration of the United States Department of Labor ("federal OSHA") 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.

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[66] *ORS 654.035(1)(a)*
[67] *ORS 654.035(1)(b)*
[68] *ORS 654.035(1)(e)*
[69] *E-mail from Debbie Mustoe, April 2, 2021*
[70] *E-mail from Monique Hebner*

For example, the Hazardous Waste Operations and Emergency Response Standard[71] defines "hazardous substance" expressly to include biological and other disease-causing agents.[72] Similarly, the Access to Employee Exposure and Medical Records standard[73] includes a definition of the phrase "toxic substance or harmful physical agent" that expressly includes biological hazards, including viruses.[74] Perhaps most clearly, the entire Bloodborne Pathogens standard[75] is designed to prevent or at least reduce employee exposure to "blood and other potentially infectious materials"[76] because of the possible presence of "pathogenic microorganisms," including bloodborne viruses.[77]

Another commenter offered a similar claim:

> *It is interesting to note that according to the CDC Oregon's website, update as of March 17th, 2021, COVID-19 is not among the Top 10 Leading Causes of Death in the state as listed here: Cancer, Heart Disease, Accidents, Stroke, Chronic Lower Respiratory Disease, Alzheimer's Disease, Diabetes, Suicide, Chronic Liver Disease/Cirrhosis, and Hypertension. Why have these not been addressed by OSHA? The reason is, with exception to accidents occurring at the workplace, that this is out of their jurisdiction.*[78]

Oregon OSHA notes first of all that there is not actually a "CDC Oregon," but there is a website maintained by the CDC's National Centers for Health Statistics that provides Oregon-specific data, and that was indeed last updated on March 17, 2021.[79] The commenter accurately reproduced the list of the "Leading Causes of Death" in Oregon but the comment about the absence of COVID-19 appears to attach a mistaken meaning to the review date. As the information itself indicates, the year on which it is based is Calendar 2019. More relevant to the current discussion, Oregon OSHA has never claimed authority to address such issues *outside the workplace*, and many of these issues involve little if any workplace risks. However, the commenter is mistaken in his claim that Oregon OSHA has no such rules.

The first disease on the list, cancer, is actually the target of many existing Oregon OSHA rules. One rule, for example, is entitled "13 carcinogens."[80] In addition, to name two examples among many, one of the harmful outcomes addressed by both the asbestos[81] and the methylene chloride[82] rules is cancer. In addition, although Oregon OSHA fully recognizes that underlying heart disease is generally not the result of workplace

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[71] *29 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.*

[72] *29 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]*

[73] *29 CFR 1910.1010. Again, Oregon OSHA has adopted the federal rule by reference.*

[74] *29 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]*

[75] *29 CFR 1910.1030*

[76] *29 CFR 1910.1030(a)*

[77] *29 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)."*

[78] *Letter from Alexander Sisemore, March 22, 2021*

[79] *"Oregon: Key Health Indicators," CDC-NCHS, last reviewed March 17, 2021; https://www.cdc.gov/nchs/pressroom/states/oregon/or.htm*

[80] *"13 Carcinogens," 29 CFR 1910.1003, adopted by Oregon OSHA by reference*

[81] *"Asbestos," 29 CFR 1910.1001, adopted by Oregon OSHA by reference*

[82] *"Methylene Chloride, 29 CFR 1910.1052, adopted by Oregon OSHA by reference*

exposure, heart attacks can be triggered by workplace conditions and for that reason they are explicitly addressed by the rules on reporting workplace fatalities.[83]

Another commenter focused on the intersection between public and workplace health, suggesting that because Oregon OSHA has the authority to enforce public health rules in the workplace, Oregon OSHA does not have the authority to adopt such rules directly:

1) *Oregon OSHA lacks legal authority to adopt permanent public health rules affecting Oregon workplaces under ORS 654.003, (1) Purpose, , in sentence 1 Oregon OSHA has authority solely for prevention of Occupational injury and disease, and has a long standing practice since before the federal OSHA Act of 1970 of not doing so.*
2) *Further in 654.003, (3) gives authority for promulgation of Occupational Safety and Health Standards, not Public Health Standards.*
3) *654.003 (5) also specifies research and data collection for Occupational, not public health hazards.*
4) *The Oregon Act anticipated the potential overlap of Public Health and Occupational health issues and in 654.025 (3)(a) provides for the Director to enforce such Public Health rules as may be implemented by other state entities. It goes further to require those other entities share proposed rules to avoid duplication with existing Occupational requirements*
5) *Further, 654.035, c) provides authority to require the performance of any other act deemed necessary, but in no way provides authority for the permanent adoption of public health protections.*

While I believe the director has authority to enforce duly adopted Public Health rules in the current public health emergency, and authority to review and comment on rules proposed by Public Health agencies to minimize conflict with Occupational Safety Health rules. Nothing in the original Legislative record or Administration of this Oregon legislation provides authority for the proposed adoption of these Public Health protections into permanent rules.[84]

Another commenter also wrote, "It is not OSHA's job to protect patients, people in congregate housing or care facilities, students at a school, or customers of a business."[85]

Oregon OSHA agrees that its jurisdiction is limited to the workplace, as is the rule under discussion. The commenters' suggestion notwithstanding, there is nothing in the agency's authority to adopt occupational health rules that indicates Oregon OSHA cannot use that authority if those rules are similar to or even duplicates of public health rules. The two disciplines are not separated by a "bright line" – nor, for example, has Oregon OSHA previously refused to adopt rules related to sanitation and the need to provide potable drinking water in the workplace simply because those issues are also addressed by the Oregon Health Authority within its own jurisdiction.

While COVID-19 is certainly not limited to the workplace, the COVID-19 workplace rule explicitly addresses a health hazard that is present in Oregon workplaces. It therefore falls within the statutory authority granted by ORS 654.003 and ORS 654.035.

One of those commenters also wrote, "It is not within OSHA's statutory authority to adopt rules just to satisfy epidemiological concerns."[86] The same commenter also wrote, "OSHA has relied on an epidemiological interpretation of a COVID-19 case but workplace rules require a medically informed definition."[87] Not only does Oregon OSHA not accept the crisp distinction made by the commenter between an "epidemiological" and a "medically informed" approach, but Oregon OSHA sees no restriction in the statute on the use of epidemiology to assist in evaluating the hazards in Oregon workplaces, nor is the use of such data unprecedented in rulemaking by either federal or Oregon OSHA.[88]

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[83] *"Reporting Fatalities, Catastrophes, Injuries, and Illnesses to Oregon OSHA," OAR 437-001-0704; note specifically OAR 431-001-0704(3)(a)*
[84] *E-mail from Brian Sparks, March 31, 2021*
[85] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[86] *Ibid.*
[87] *Ibid.*
[88] *Almost all, if not all, of the rules related to protection against specific carcinogens, for example, relied heavily upon epidemiology in the assessment of the workplace risk.*

Other commenters focused specifically on the question of requiring employers to enforce practices involving customers, which they see as a deviation from Oregon OSHA authority. For example, one association offered the following:

> *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.*
>
> *… 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.*[89]

Oregon OSHA finds the analogy to traffic safety rules to be an apt one; it illustrates a situation where worker protection requires a combination of control measures, some of them involving the control of non-employees. In contrast to the suggestion that an employer who puts properly designed and placed traffic control in place can then disregard the activity of non-employee drivers in the work zone, employers often must use active measures – flaggers – as well as passive ones – signage and lane modifications – to control driver behavior. If drivers disregard either the active or the passive measures, and particularly if such disregard occurs on a repeated or extended basis, Oregon OSHA would indeed expect such an employer to take appropriate corrective measures, perhaps including a referral to law enforcement, in addition to evaluating changes to the controls being used.

Just as a road construction employer must take measures to ensure that traffic control actually *works* as intended, an employer whose employees are exposed to risks presented by non-employees must also take measures to protect against those risks. This is not a "tectonic shift." It is a recognition that employers must address the hazards they can anticipate in their workplace, even if that hazard involves people who are not themselves employees. Indeed, Oregon law[90] specifically gives Oregon OSHA the responsibility to enforce provisions addressing one such risk through its existing authority, and the issue of workplace violence has also long been addressed by Oregon OSHA and by federal OSHA under various general obligation rules, even though it involves addressing the behavior of individuals other than the employees involved.

A similar concern was raised by an exchange prior to public comment in one of the hearings:

> *Q: How does OSHA have the authority to dictate customer-employee relationship when their jurisdiction is only the employee-employer relationship?*
> *A: Oregon OSHA has authority to require employers to control hazards to which their employees are exposed -- even if that hazard involves other individuals. We do not require employers to enforce the use of facial coverings to protect customers -- but we do require employers to require customers to use facial coverings to protect employees, which is entirely consistent with our jurisdiction.*[91]

The exchange accurately reflects Oregon OSHA's position on the issue, which remains unchanged.

The OSEA also provides for consultation with advisers to assist "in establishing standards of safety and health," indicating that Oregon OSHA "may adopt and incorporate in its regulations, rules and standards such safety and health recommendations as it may receive from such advisers."[92] This consultation

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[89] *Letter from Frank Stratton on behalf of the Special Districts Association of Oregon in partnership with the Oregon Fire Chiefs Association, the Oregon Fire District Directors Association, the Oregon State Ambulance Association, the Oregon Volunteer Firefighters Association, the Oregon Association of Conservation Districts, the Oregon Recreation & Park Association, and the Oregon Water Resources Congress, April 1, 2021*

[90] *"Safety of Health Care Employees," ORS 654.412 to 654.423, codified as part of the Oregon Safe Employment Act*

[91] *From question and answer session prior to the formal public comment period at an Oregon OSHA hearing. These are not normally included in the formal record, but this was one of several such exchanges placed into the record as part of written comments from Erik Harper, February 23, 2021.*

[92] *ORS 654.090(2)*

effectively works in tandem with similar provisions of the Administrative Procedures Act, discussed in the following subsection.

Summary of Administrative Procedures Act (APA) Requirements

The rulemaking provisions of the Oregon Administrative Procedures Act[93] include a number of provisions related to public notice and to comment periods, explaining the circumstances where the agency can take immediate action or where the agency can dispense with the need for public hearings. In relation to the current rulemaking (as opposed to the temporary rule Oregon OSHA adopted in November of 2020), those exceptions do not apply and the agency has not suggested otherwise.

The law both encourages and in some respects requires that affected stakeholders be involved in the development of proposed rules.[94] The current proposal was the product of discussions with two separate 24-member Infectious Disease Rulemaking Advisory Committees (RACs), one focused on general workplaces and one focused on exceptional risk workplaces, particularly health care workplaces. In addition, the rule built upon the extensive public discussion opportunities used to develop the temporary rule, which included multiple public forums and the circulation of four distinct drafts shared with stakeholders, including one draft that received more than 1,500 comments from the general public. The existence of the temporary rule has also enabled the agency to receive feedback specifically in relation to the rule's language as applied in practice during the first three months of its existence.

In addition to making suggestions about specific regulatory elements, both the employer and the worker representatives on the two RACs ultimately recommended that Oregon OSHA forego plans to develop a genuinely permanent infectious disease rule and instead focus only on the need to provide COVID-19 protections after the expiration of the temporary rule. Oregon OSHA took that suggestion and proposed a rule limited to COVID-19 pandemic risks and intended to remain in place only as long as necessary to address those risks in Oregon workplaces. As discussed elsewhere in this document, the resulting proposal was largely, but not entirely, identical to the existing temporary rule.

The law requires that notice be given when a proposal is made,[95] and Oregon OSHA gave such notice[96] (the extent of the record itself provides ample evidence of the notice's effectiveness). The law requires that a set of specific elements be included in the notice,[97] particularly in relation to the anticipated fiscal impact of the proposal.[98] After gathering information about the fiscal impacts, Oregon OSHA drafted a Fiscal Impact Statement, submitted to and approved by both RACs. That Fiscal Impact Statement was filed as part of the rulemaking package. The fiscal issues are discussed in greater detail in another section of this document.

Beyond the limited requirement for a written statement of objective and evaluation,[99] addressed elsewhere in this document, the law does not require a discussion of the merits of the rule other than the initial Statement of Need filed with the original proposal. The law also does not require a written response to the public comments provided in writing or in public testimony. Finally, the law does not require an evidentiary record nor a written explanation of the decision made.[100] However, as has been its practice in the past, Oregon OSHA has provided such an explanation and discussion of the available evidence in the form of this document.

The law includes a policy statement that "agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions" when adopting rules, while at the same time promoting a policy

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[93]ORS 183.325 to 405
[94]ORS 183.333
[95]ORS 183.335
[96]https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf
[97]ORS 183.335
[98]ORS 183.335(2)(b)(E), ORS 183.336, ORS 183.530, and ORS 183.534
[99]ORS 183.335(3)(d), which requires the agency, if requested in writing by at least five individuals to do so, to "provide a statement that identifies the objective of the rule and a statement of how the agency will subsequently determine whether the rule is in fact accomplishing that objective."
[100]ORS 183.335(13)

"that agencies attempt to adopt rules that correspond with equivalent federal laws and rules."[101] Striking such a balance in this case is not necessary because, at least to date, there is no equivalent federal rule addressing the COVID-19 pandemic.[102,103]

Finally, the law prescribes the manner in which notice of the rulemaking decision will be made,[104] and Oregon OSHA has complied with those requirements as part of the rule adoption filing.

Several individuals raised concerns about what they viewed as legal deficiencies in the process. For example, one commenter wrote,

> *I'm not convinced that OSHA has even used proper procedure in the creation of these rules. Your proposal references "Covid-19", which is a collection of symptoms covering at least 5 other coronavirus illnesses. The actual infectious agent is Sars CoV-2, which has not been isolated. SARS CoV-2 is what is referenced in the Governor's emergency orders. OSHA may like or prefer using the term "Covid-19" because it's "easy", but your rules don't permit this.*[105]

Oregon OSHA defines terms for the purposes of its rulemaking activities. And in the scope of the rule, Oregon OSHA specifically addresses its use of the term in question: "For clarity and ease of reference, this rule refers to 'COVID-19' when describing exposures or potential exposures to SARS-CoV-2, the virus that causes Coronavirus Disease 2019." There is no ambiguity or uncertainty in what the term means when Oregon OSHA uses it, and the commenter did not explain which of Oregon OSHA's rules "don't permit this." Oregon OSHA is unaware of any such prohibition.

The reference to the Governor's emergency orders suggests that the commenter believes that if Oregon OSHA uses a different term than that used by the governor in the emergency declaration, the rule is necessarily invalid. There are at least three critical errors with this line of thought:

1. Oregon OSHA's rules are not dependent upon the declaration of an emergency or any other executive order. As noted previously, they have been adopted using Oregon OSHA's existing authority and in compliance with the Administrative Procedures Act.
2. Oregon OSHA's definition of the term effectively encompasses SARS CoV-2.
3. The Governor's Executive Orders use the term "COVID-19" in much the same way Oregon OSHA does.[106]

The argument plainly has no merit.

The same commenter raised another issue regarding the use of terms:

> *Let's take a look at section C. OSHA has referenced the term "stakeholders" with regard to "Covid-19" rule making. The term "stakeholder" indicates that you're using a consensus process, and according to ORS 183.400, this would be adopted without compliance with applicable rulemaking procedures. Administration agencies can normally use this consensus process ONLY if there aren't other existing law and procedure available. Yes, OSHA is using a fraudulent consensus process to arrive at these rules, because existing laws and constitutional processes are available.*
>
> *I'm politely "calling your agency out" for participating in this fraudulent process. Cease and desist from imposing your proposed permanent administrative rules for "Covid-19".* [107]

Oregon OSHA routinely uses "stakeholder" to describe those with whom it engages on various issues. The term does not indicate that the agency is claiming to use "a consensus process" and Oregon OSHA has made

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[101] *ORS 183.332(6)*
[102] *ORS 183.332(6)*
[103] *At the time of the Oregon OSHA rule's adoption, the potential federal OSHA emergency temporary standard (ETS) addressing COVID-19 in the workplaces remained under consideration by the Office of Management and Budget's Office of Information and Regulatory Affairs, where it had been submitted for review by federal OSHA on April 27, 2021. See Courtney Buble, "OSHA Prepares New Workforce Safety Standards for COVID-19," Government Executive, April 27, 2021.*
[104] *ORS 183.355*
[105] *E-mail from Bill Meyer, April 2, 2021*
[106] *To take the most obvious example, the first emergency declaration -- Executive Order 20-03 -- is entitled "Declaration of Emergency due to Corona Virus (COVID-19) outbreak in Oregon" and does not use the term "SARS CoV-2" anywhere in its text.*
[107] *E-mail from Bill Meyer, April 2, 2021*

no such claim (nor made any claim that the rule can "be adopted without compliance with applicable rulemaking procedures"). The charge of a fraudulent use of the consensus process is clearly misplaced.

Another comment suggested with Oregon OSHA's list of documents on which it relied in developing the rule.

> *• The COVID-19 rules proposal merely provides links to an entire website of covid-19 documents maintained by OHA, and the entire body of CDC covid-19 documents, with just a hint about which documents it used. It is impossible to tell from these links which version of which guidance OSHA has relied on. For example, one link on the OHA website refers to guidance effective on March 19, 2021, long after OSHA published its proposal.*
>
> *• OSHA apparently relied on a formal and informal employer survey to develop the Fiscal Analysis but did not reference survey documents or instruments.*
>
> *• OSHA apparently relied on no internally created documents and no industry standards of any kind to create this proposal.*
>
> *• Most remarkably, OSHA did not identify any specific documents providing a scientific or medical rational for the proposed rules.*
>
> *• OSHA's proposal does not seem to meet the requirements of the Administrative Procedures Act because OSHA failed to disclose the documents the agency relied on to develop the rules.*[108]

Oregon OSHA's rule filing complied with the requirement to include "a list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule and a statement of the location at which those documents are available for public inspection…."[109] by listing the following:

> *More than 1700 comments received on the four drafts circulated for review, available from Oregon OSHA, Department of Consumer and Business Services.*
>
> *Oregon Health Authority guidance documents and outbreak tracking related to COVID-19 public health emergency, available from the Oregon Health Authority and at https://govstatus.egov.com/or-covid-19/.*
>
> *Centers for Disease Control and Prevention COVIDO-19 recommendations for various industry sectors, available from the CDC and at https://www.cdc.coronavirus/2019-ncov/index.html.*[110]

Contrary to the comment, Oregon OSHA did not simply identify two websites. It specifically identified the nature of the documents relied upon – the "guidance documents" and "outbreak tracking" related to COVID-19 from the Oregon Health Authority and the "COVIDO-19 [sic] recommendations for various industry sectors." It also noted that the documents could be obtained from the respective agencies, as well as located on their respective websites. Had it been important to the commenter to obtain a copy of the particular document he referenced that was current as of the date of the rule's filing, he could easily have obtained it from the Oregon Health Authority. The commenter appears to disbelieve Oregon OSHA's suggestion that it reviewed the entire category of documents referenced from OHA and from the CDC. But the agency's identification of the principle documents on which it relied is correct.

The commenter also criticizes the list for omitting the survey documents or instruments used as part of the fiscal analysis. Aside from the question of whether these would qualify as "principal documents" on which the agency relied in development the rule if the agency had conducted the survey itself, the agency conducted no such survey (nor did the Rulemaking Advisory Committee do so as a body). The survey referenced in the Fiscal Impact Statement was conducted by certain industry representatives who were members of the RAC and who shared the results of *their* survey with Oregon OSHA.

He appears surprised that Oregon OSHA did not rely upon "internally created documents" in developing the rule. However, the only such document is the proposed rule itself – it would seem redundant to list the proposed rule and its various drafts here.

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[108] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[109] *ORS 183.335(2)(b)(D).*
[110] *Statement of Need and Fiscal Impact filed with the proposed rule, January 29, 2021; https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf*

The commenter noted the absence of any industry standards. The failure to include the ASHRAE industry consensus standards was perhaps an error on Oregon OSHA's part, although it could be argued that it was not a principal document. In any case, the fact that it is specifically identified and referenced in the proposed regulatory text means that the oversight, if it *was* an error on Oregon OSHA's part, had no impact on the ability of commenters to identify the relevance of that particular document.

Finally, he suggests that there must have been scientific or medical documents on which the agency relied. To the degree that Oregon OSHA had reviewed such documents prior to developing the proposed rule, they were not the "principal" documents on which Oregon OSHA relied. Rather, Oregon OSHA relied principally upon the documents that reflected the conclusions reached by the OHA and the CDC on the issues in question – exactly the documents identified in the rule filing. As reflected by portions of this document, Oregon OSHA has done a more extensive and direct review of its own of the scientific materials submitted as part of the public record and identified in its own more detailed review of the research in response to the concerns expressed and questions raised.

Several commenters questioned the handful of references in the rule to OHA requirements that are subject to change.

> *References to OHA emergency rules in a permanent OSHA rule makes it impossible for affected parties to rely on the published text of the proposed rule. The entire comment process is made fraudulent because OHA may change its rules tomorrow.*[111]

> *Oregon law gives the Director of OSHA discretion to enforce rules set by other agencies. Enforcement is not mandatory. By incorporating non-OSHA agency temporary rules directly into its proposed rule, OSHA is exercising its discretionary enforcement power without knowing what rules will be imposed.*[112]

The preceding section of this document highlights the relatively few places in the rule that directly rely upon other agencies requirements to determine their content. As long as the other agencies are appropriately exercising their own authority, Oregon OSHA sees no legal problem with such references. It is comparable to the language in the Respiratory Protection Standard that requires employers to use respirators approved by the National Institute for Occupational Safety and Health (NIOSH);[113] the "list" of approved respirators is not in the OSHA or Oregon OSHA rule, but the requirement is effectively updated whenever NIOSH modifies its own approvals.

> *OSHA neglected to include in the proposal a mandatory request for more cost effective suggestions from the public for achieving the rule's goals. This may be because OSHA supplied no actual health-related goals for the rules.*[114]

It is not necessary to speculate as to why Oregon OSHA "neglected to include" the required notice because the notice appears on the forms filed with and published by the Oregon Secretary of State (SOS), which were included in the material posted on Oregon OSHA's own website.[115] In order to make proposed rule documents accessible and organized for interested parties, pertinent documents, including the SOS filing notice with the particular request language, are bundled into a PDF and posted on the proposed rules page of OSHA's website. Oregon OSHA also included the SOS filing notice – with the particular request language – in Exhibit A on its own website; this Exhibit was specifically highlighted, along with others, during public hearings. The statutory requirement has been satisfied.

The final suggested deficiency to be addressed by Oregon OSHA was the following statement: "Laws, rules and regulations must have an associated code cited. There is no code listed in these guidelines."[116] Oregon OSHA finds this comment puzzling. The proposed rule itself is a proposal to establish a rule, and the final rule is the codified text of OAR 437-001-0744.

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[111] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[112] *Ibid.*
[113] *1910.134(d)(1)(ii), adopted by Oregon OSHA by reference*
[114] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[115] *The filing can be found at file:///C:/Users/Owner/Downloads/NoticeFilingTrackedChanges%20-%202021-05-17T201352.463.pdf*
[116] *E-mail from Rod Taylor, March 31, 2021*

Another commenter appeared to raise a different issue, apparently related to a misunderstanding of the enforcement of administrative rules:

> *It is telling to note that OSHA does indeed realize they are overreaching in their authority as noted in their title, "PROPOSED PERMANENT RULE". A "RULE", even with the wording of "MANDATORY" or "MUST" attached, does not make it a law and is therefore not enforceable. A law carries with it a penal code, which a "PROPOSED PERMANENT RULE" does not.*[117]

Oregon OSHA proposed the adoption of an administrative rule because that is what the law gives the agency the authority to do. Oregon OSHA agrees that rules cannot be enforced without an applicable statutory provision that authorizes such enforcement. However, Oregon OSHA's rules carry the force of law for employers, who have a "duty to comply" with those rules under the Oregon Safe Employment Act.[118] As noted previously, the law gives Oregon OSHA the authority to adopt such rules. It also gives Oregon OSHA both the authority and the obligation to enforce them.

The language of ORS 654.071(1) requires Oregon OSHA to "with reasonable promptness issue to such employer a citation" whenever Oregon OSHA, "has reason to believe, after inspection or investigation of a place of employment, that an employer has violated any state occupational safety or health law, regulation, standard, rule or order." ORS 654.086 provides the necessary authority to issue penalties and additional guidance related to those penalties. The commenter's understanding of the issue notwithstanding, the *law* is clear: employers who violate Oregon OSHA *rules* are indeed subject to citation and potential penalties. Oregon OSHA's description of its proposal as a proposed "rule" does not reflect any weakness or legal deficiency.

The requirements of the Administrative Procedures Act related to determining the cost of compliance are addressed in the "economic impact" portion of this document.

The Question of the Rule's Constitutionality

Ultimately, any rule adopted by Oregon OSHA is valid only to the degree it violates neither the United States Constitution or the Oregon Constitution. Even without the express language of ORS 183.400(4)(a)[119] related to the judicial review of rules, no government action can be sustained if it violates the constitution. In the present rulemaking, a significant number of commenters have raised constitutional concerns about the proposed rule. For example, one commenter discussed the need for the rule to be constitutional and indicated his own conclusion about the issue:

> *…upon review your document demonstrates a clear violation of constitutional provisions. ORS 183.400 4a would preclude the suggested this proposed rule change. The rule proposal will cause great harm to the people and businesses of Oregon and you are exceeding your authority if you proceed with this action that violates Oregon's Constitutional provisions.*[120]

Others also referenced perceived constitutional violations in their comments:

> *You've recently put out to the news media that the reason this bill is written is because there is no "permanent" law available. The reason there is no permanent law is because you have no right to take constitutionally protected rights. YOU DO NOT HAVE THE RIGHT TO TAKE OUR CONSTITUTIONALLY PROTECTED RIGHTS. DO NOT ASSUME YOU HAVE CONSTITUENT'S CONSENT TO TAKE OUR CONSTITUTIONALLY PROTECTED RIGHTS!!!*[121]

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[117] *Letter from Alexander Sisemore, March 22, 2021*

[118] *ORS 654.022 reads "Every employer, owner, employee and other person shall obey and comply with every requirement of every order, decision, direction, standard, rule or regulation made or prescribed by the Department of Consumer and Business Services in connection with the matters specified in ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780, or in any way relating to or affecting safety and health in employments or places of employment, or to protect the life, safety and health of employees in such employments or places of employment, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, standard, rule or regulation.*

[119] *ORS 654.400(4) reads "The court shall declare the rule invalid only if it finds that the rule: (a) Violates constitutional provisions; (b) Exceeds the statutory authority of the agency; or (c) Was adopted without compliance with applicable rulemaking procedures."*

[120] *E-mail from Richard Cole, April 2, 2021*

[121] *E-mail from Susan Steele, March 28, 2021*

Statements such as these make emphatic claim that the rule is unconstitutional without ever explaining the nature of the issue (or even, in many cases, whether it is the United States or the Oregon Constitution, or both, that the commenter believes is being violated). A similar lack of clarity appears in comments such as the following comment (included in its entirety), which views the constitutional issues as being so apparent that they not only need not be explained but that they demand a personnel investigation:

> *We are writing in strong opposition to the "Oregon OSHA's Proposal on Rules Addressing the COVID-19Public Health Emergency in All Oregon Workplaces" drafted on Jan 29, 2021. If enacted, it will prove to be the final death blow to Oregon's businesses and economy. Any Oregon OSHA members that are in support of such an unscientific and unconstitutional measure are to be removed from their position immediately and placed under unpaid leave while an internal investigation takes place to determine actual motives for the proposal. Oregon OSHA neither has the authority nor the means to enforce such a measure. If enacted, Oregon OSHA will be charged by the citizens of Oregon with an endless stream of lawsuits that will bankrupt the organization. Squashing the proposal immediately is the only sensible course of action.*[122]

This lack of clarity in most such comments about the perceived constitutional inadequacy of the rule makes it more challenging for Oregon OSHA to evaluate the specific concerns involved. At the outset, it is worth noting that Oregon OSHA's review when the rule was initially proposed indicated no such constitutional concerns, and it is tempting to conclude that this is an example of the phenomenon of individuals questioning the constitutionality of any action with which they disagree. However, Oregon OSHA has endeavored to give the concern serious consideration due to the frequency with which it was expressed, in spite of the frequent lack of specific arguments. This discussion attempts to evaluate the constitutionality concerns raised in comments about the rule.

One commenter suggests that "extending restrictions or making permanent those rules already in place, creates a situation by which business owners limit the constitutional rights of their patrons and community members."[123] Presumably, this refers to the rule's expectation that employers will enforce distancing and facial covering requirements in order to protect employees when they enter the workplace. It is true that the rule creates such an obligation. It also appears to be true that, if such an obligation were constitutionally suspect, the agency cannot avoid responsibility for the constitutional violation by effectively using employers as the agent of such action (just as it appears true that the employer in such a case bears no real culpability for the constitutional violation when taking action at the direction of the government – indeed, without the government actor, there could be no constitutional violation, because the constitution itself (almost without exception) limits actions by the government, not by private citizens.

Another comment appears to suggest that requirements enacted without a popular vote are necessarily a violation of the Constitution: "I believe this 'permanent' rule addressing COVID-19 to be unconstitutional. It should be by the people, for the people, and this is not that."[124] Oregon OSHA notes simply that there is in fact no such constitutional principle – in the case of the United States, direct lawmaking by the people is not an option; the Constitution provides no alternative to lawmaking by Congress (and the resulting rulemaking by various administrative bodies granted the authority to do so by Congress). While Oregon, as is true of many states, provides an "initiative and referendum" alternative to legislation, action to the Legislature remains the way most laws are passed.

Some comments appear to agree with the statement by one individual who declared herself to be "against permanent mandates to take place in Oregon (or any other state). These mandates have been unconstitutional and against our civil liberties."[125] Again, it is not entirely clear, but this appears to be a suggestion that the Governor's executive orders and the mandates they represent are constitutionally suspect. It is not clear whether this is based on disagreements with the statutory interpretation on which the Governor's actions have relied. If so, Oregon OSHA notes only that to date only one court has found the

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[122] *E-mail from the Linda Grabow family, April 2, 2021*
[123] *E-mail from Simon Bachofner, March 8, 2021*
[124] *E-mail signed "Q," February 2, 2021*
[125] *E-mail from Patricia Searls, March 5, 2021*

Governor's legal authority lacking, and that action was subsequently reversed by the Oregon Supreme Court.[126] In any case, because neither the temporary Oregon OSHA rule nor the current rule is dependent upon the Governor's emergency authority but instead (as already described) relies upon the application of the authority of the Oregon Safe Employment Act and the rulemaking requirements outlined in the Oregon Administrative Procedures Act.

Some other comments reference one or more requirements that the commenter argues the state cannot constitutionally enact, but without providing the basis for that conclusion. For example, one commenter suggested made the following statement:

> *Requiring a healthy man, woman or child to wear a mask (which is a medical device) of any kind, take a medical test, recieve a vaccine, recieve an mRNA experimental drug, stay in their homes, close down their businesses, or stay any number of feet away from another, under threat of the loss of job, income, or God-given rights, is not lawful. It is unconstitutional. These are war crimes.*[127,128]

Commenters who provided more detail about their constitutional concerns identified several amendments to the United States Constitution that they believe the rule as proposed would violate. In some cases, these claims were made without elaboration or explanation.[129] Others provided only minimal details. For example, one commenter claimed that the facial covering requirements specifically violate several amendments, saying "Requiring permanent regulations on mask wearing violates the 9th, 13th, and 14th Amendments."[130] The comment does not, however, explain how such a requirement violates those provisions. Oregon OSHA has reviewed the language of each of the amendments referenced and does not find that the rule represents a constitutional violation.

The following comment, on the other hand, was a bit clearer about which provision of the First Amendment was purportedly violated by the facial covering requirement:

> ***No mask mandate***
>
> *Whatever your opinion is on keeping yourself healthy and safe, I respect your right to have an opinion and live by what YOU believe is best for you and your family. I cannot, however, support an organization attempting to violate our Constitutional rights.*
>
> *Here is the First Amendment of the United States Constitution:*
>
> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*
>
> *Did I you notice how it says we have the right to "peaceably assemble?" There's nothing there that says "... IF X,Y, or Z."*
>
> *As a concerned citizen I say this is a very bad idea, will cause a lot of backlash and is completely unconstitutional.*[131]

Oregon OSHA has considered the issue and does not agree that requiring the use of facial coverings in all places of employment where an employee is exposed to another individual, as described by the rule, violates the right of the people to assemble peaceably.

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[126] *Elkhorn Baptist Church et al v. Brown, Oregon Supreme Court, June 12, 2020. https://cases.justia.com/oregon/supreme-court/2020-s067736.pdf?ts=1591974273*

[127] *E-mail from Stephanie Gilbert, February 21, 2021.*

[128] *This is not the only reference to war crimes, crimes against humanity, or genocide reflected in the record. See, for example, letter from State Senator Brian Boquist; e-mail from Lindsay Briggs, February 24, 2021; e-mail from Mary Crandles, March 17, 2021; e-mail from William Brown, March 30, 2021; beyond acknowledging the existence of such statements and noting for the record that there is nothing to support the allegations made in them, Oregon OSHA finds it neither necessary nor appropriate to respond to such claims in detail.*

[129] *See for example, the 14th amendment concerns in the statement by Mindy Cope, February 26, 2021; and in the e-mail from Joseph Adam Chase, April 2, 2021.*

[130] *E-mail from Andie-Mae Williams, March 15, 2021*

[131] *E-mail from Alexandra Gomes, March 27, 2021.*

Similarly, several commenters raised specific concerns based in their understanding of the Fourth Amendment. One suggested that "To gather everyone's name who does not wish to be part of the experiment with your declination forms is violating people's medical privacy and fourth amendment rights."[132] Oregon OSHA notes that there was no "experiment" in the proposed rule, and that the use of declination forms to allow employees to refuse vaccination even when employers are required to offer them is already a well-established principle in occupational safety and health rules, reflected by the vaccination provisions of the existing Bloodborne Pathogens Standard.[133] Oregon OSHA also notes that the rule as drafted would not actually have required the use of declination forms in most circumstances, just as vaccinations themselves would not be required. In any case, the vaccination provisions of the proposed rule are not included in the final rule, so any concern based on the use of declination forms has become moot.

Another comment raised a different concern, suggesting, "It is unlawful for someone to require a temperature check on another individual (Violation of the 4th Amendment)."[134] Oregon OSHA does not understand how requiring screening for fever violates the Fourth Amendment, particularly since in the final rule the only situations where such screening is expressly required involve emergency services and health care. Other comments are more general in nature, such as the one that said, "This is totalitarian & a violation of my 4th amendment rights to prohibition of illegal search & seizure, as set forth in the Constitution. This will not be tolerated & if passed will be adjudicated in a class action suit, before the Supreme Court of the United States!"[135] The commenter does not suggest exactly how the rule violates the prohibition against illegal search and seizure; Oregon OSHA has reviewed the issue and does not share the concern.

Summary

The rule is fully within Oregon OSHA's statutory authority. Oregon OSHA has satisfied all applicable requirements of the Administrative Procedures Act. And Oregon OSHA is satisfied that the rule does not involve any constitutional violations.

The rule strikes a reasonable balance between real health hazards to Oregon workers and the need to minimize further disruption to employers and businesses affected by the pandemic. The rule is legal. And the rule is warranted.

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[132]E-mail from Kelly Kane, March 28, 2021.
[133]29 CFR 1910.1030(f)(2)
[134]E-mail from Kimberly Moser, April 2, 2021
[135]Statement from J. Ballard

IV. Appropriate Consideration and Evaluation of Public Comments

As noted in an earlier discussion, a significant activity during any rulemaking is the consideration and evaluation of public comments received on the proposed rule. With a record approaching 5,500 comments, Oregon OSHA has spent considerable time reviewing the various comments and the points that they have raised.

It is certainly the case that the overwhelming majority of individual opinions expressed in the record opposed the rule (although that opposition varied from opposition because of particular provisions to concerns over the timing to complete opposition to any effort to address COVID-19 in Oregon workplaces). However, the inquiry cannot end with a simply "tally" of the comments before and against. The process of public comment is not akin to taking a poll or receiving a petition. It is the substance of the arguments, rather than the quantity of those arguments on one side or the other, that must be considered.

Evaluating Comments that Provide Little or No Analysis

In reviewing the public record, Oregon OSHA encountered hundreds of comments that, in one fashion or another, provided a conclusion without much, if any, explanation of the reasons behind that conclusion.

For example, one could read a comment such as "I oppose making any temporary Covid19 rules permanent. Specifically: OAR 437 001 0744"[136]as simply being opposed to the perceived permanent nature of the rule, but not otherwise concerned. While that is unlikely, it does highlight the limited utility of such comments once Oregon OSHA has decided to go ahead with the rulemaking. They provide little information that allows Oregon OSHA to consider those areas that are of greatest concern. Even in relation to the "permanent" nature of the rule, does this commenter stand with those who believe the rule is truly intended to be in place permanently, with those who want no extension at all, or with those whose biggest concern is the lack of an explicit repeal date in the rule? The comment does not provide the answer to the question.

In some cases, the most emphatic comments provide the least useful information: "This is complete garbage that is NOT BACKED BY ANY REAL SCIENCE! You clowns work for us not the other way around! Do NOT PASS THIS! I'll be forwarding this onto thousands of others!!"[137] It is clear that the commenter does not believe anything in the rule is supported by science (a conclusion with which Oregon OSHA disagrees, as discussed elsewhere in this document). Beyond that, the comment provides little information.

Similarly, Oregon OSHA cannot make much use of a comment such as "Your Bureaucracy Can Go To HELL. F**k your masks and your anti Constitutional existence. Free men dont ask permission."[138] It is clear that the facial covering requirement is a major concern, but it is not clear why, beyond the general invocation of freedom. Facial coverings (usually referred to in the comments as "masks") are frequent subjects of comments where the only information shared is opposition to "the mask mandate," although such comments are also frequently combined with opposition to "mandatory vaccines" for all workers. That latter example leads to the next challenge in evaluating comments in the record.

Evaluating Comments that Misunderstand the Proposal's Effects

A recurring challenge in the record are comments that are not only opposed to what the rule would do, but that also are opposed to the rule because of things it would not actually do, as is the case in the following comment:

> *…I want to strongly say the idea of making us wear a mask inside and outside permanently and only being able to shop if you have had the vaccine is absolutely wrong and this is America where we are supposed to be free to make our own choices. It's not for Kate Brown and her liberal ideas to make us live a certain way. Please do not let this happen. It is so very wrong![139]*

Aside from the somewhat inaccurate representation of the mask requirement and the excessive concern about the "permanent" nature of a rule that will only be in place temporarily, there is absolute nothing in

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[136] *E-mail from Kathleen Legler, April 2, 2021*
[137] *E-mail from Brent Wallace, March 18, 2021*
[138] *E-mail from Wyatt Withrow, March 29, 2021*
[139] *E-mail from Brenda Hague, March 22, 2021*

the rule about prohibiting a person who has not been vaccinated from shopping. As discussed in another portion of this document, some commenters criticized the rule for not making provisions for those who have been vaccinated – but even those commenters would not go as far as to suggest "only being able to shop if you have had the vaccine."

At times, the misunderstanding themselves can have value, because they sometimes illustrate a lack of clarity in phrasing a particular provision of the rule in question. For example, several individuals commented about the language regarding use of vehicles:

> *These New requirements for transportation, reduce the opportunity to transport workers to worksites. It is hard to enforce requirements while employees are in vehicles with no manager to enforce. Further, in many instances it is **impossible** to have workers travel in separate vehicles. We only have a couple trucks and can not afford to buy more.*[140]

Oregon OSHA notes that the proposed rule stated that use of a single vehicle was to be avoided "to the degree practical." If an action were truly "impossible," it would certainly be "impractical." But such comments occurred frequently enough[141] that Oregon OSHA was persuaded that the language was not sufficiently clear and made revisions to it, as described in a separate portion of this document.

Other comments suggest confusion over various public health requirements not included in the rule. For example, one commenter wrote, "Continued visitation limits for the elderly in nursing home are severely damaging to people who want to see their loved ones. Many elderly people have already been vaccinated and they are no more allowed to see their family than before they were vaccinated."[142] Neither the temporary rule, the rule as proposed, nor the rule as adopted included any such visitation limits, which are a public health provision designed solely to protect the residents of such facilities.

And still other comments appeared to believe that the rule would require everyone to be vaccinated. One commenter wrote, "The mask mandates should NOT ever be made permanent. Nor should vaccines be mandatory. VOTE NE! End the lockdowns, shutdowns and mandatory vaccinations. Let us Oregonians thrive with the CHOICE!"[143] Of the four items to which she objected ("mask mandates" and "lockdowns, shutdowns and mandatory vaccinations"), three of them are not required by the rule.

Another wrote, "Mandatory Vaccinations is 100% against the rights of an individual! It's medical tyranny. The fact that you want mandatory vaccinations will cripple the small businesses who won't be able to get employees because they choose not to put poison in their body for a virus with a 95+ recovery rate."[144]

Another commenter appeared to find specific language in the proposed rule that was not actually there:

> *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.* [145]

Other commenters also raised similar concerns, such as the association who wrote,

> *ODA requests that OSHA updates the medical removal requirements to be consistent with other OSHA guidance on quarantine. Specifically, that quarantine is not necessary for a fully vaccinated person who is at least 14 days post- completion of vaccine.*[146]

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[140] *E-mail from Rea Branch on behalf of Terra-Sol Landscaping*
[141] *E-mail from Wally Lierman*
[142] *E-mail from Charlene Kuipers, March 22, 2021*
[143] *E-mail from Christine Hart-Sowell, March 24, 2021*
[144] *E-mail from Ashley Erickson, March 20, 2021*
[145] *Letter from Frank Stratton on behalf of the Special Districts Association of Oregon in partnership with the Oregon Fire Chiefs Association, the Oregon Fire District Directors Association, the Oregon State Ambulance Association, the Oregon Volunteer Firefighters Association, the Oregon Association of Conservation Districts, the Oregon Recreation & Park Association, and the Oregon Water Resources Congress, April 1, 2021*
[146] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*

The rule as proposed and adopted, like the temporary rule, requires quarantine when "the Oregon Health Authority, local public health agency, or medical provider recommends"[147] it, and the rule directs that return to work after quarantine "must be made in accordance with applicable public health guidance and must be otherwise consistent with guidance from the employee's medical provider."[148] Oregon OSHA is aware of the revisions to the OHA guidance indicating that individuals who have been fully vaccinated do not need to quarantine, which is apparently the source of the commenter's concern. Oregon OSHA can find nothing in the rule as proposed or as adopted that is in any way "in conflict" with that.

Similarly, the rule defers to "applicable Oregon Health Authority requirements" in relation to the use of masks, face coverings or face shields.[149] Oregon OSHA believes that the commenter has failed to notice that the limited vaccination exemption to the face covering requirement in the applicable Oregon Health Authority guidance that was in effect when the rule was under consideration and when it was adopted does not apply to the workplace.[150] If and when the OHA guidance changes, the Oregon OSHA rule will automatically adjust to reflect that change.

The commenter suggests that Oregon OSHA should simply refer to the OHA guidance in relation to these issues – and the rule as proposed and adopted, like the temporary rule that preceded it, does exactly that.

Evaluating Comments that Appear to Misunderstand the Scientific Discussion

Disagreements about science are not unusual in Oregon OSHA rulemaking, and much of the balance of this document includes the evaluation and consideration of various perspectives of the science and what it means in relation to controlling COVID-19 in the workplace. While Oregon OSHA may disagree with the conclusions reached in such cases, that does not mean that they should not be given serious consideration.

However, there are several sorts of comments about the science that cannot realistically be assigned much weight.

The first occurs when a comment simply declares a purported fact without providing any source or opportunity for verification. For example, one commenter wrote, "

> *This is not being reported by the main stream media but there have been many people that have gotten pneumonia and we've seen a huge uptick in pneumonia simply due to the government forcing us to wear masks. The masks don't work and the virus is not dangerous at all.*[151]

This short statement makes at least four distinct (though interrelated) claims without providing a source for any of them (beyond the declaration that the "mainstream media" is not reporting them): first, there is a huge uptick in pneumonia; second, the uptick is caused by the government requiring the use of masks; third, the masks don't work to reduce the spread of COVID-19; and fourth, the virus is not dangerous at all. Although some of these claims are addressed elsewhere in this document, Oregon OSHA notes them here only to make the point that a series of unsubstantiated claims has little impact on the overall record or the issues at hand in the rulemaking.

Another commenter wrote, **"**I am writing to you to day that I oppose the permanent covid rules that osha is trying to purpose. It has been determined that 70-80% of positive cases all wore masks."[152] In this case, Oregon OSHA is actually aware of the source of the claim, which is a misunderstanding of a CDC report last year. As a result, it is also an example of the second type of challenging comment, and it is discussed in more detail below.

Another commenter appeared to provide a source for his claim when he wrote, "I also found the CDC statement that Covid-19 has an almost 100% survival rate, that the virus has actually not been isolated per

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[147] *OAR 437-001-0744(3)(l)*
[148] *OAR 437-001-0744(3)(l)(C)*
[149] *OAR 437-001-0744(3)(b)(A)*
[150] *"Statewide Reopening Guidance: Masks, Face Coverings, Face Shields, Oregon Health Authority, April 27, 2021; https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2288k.pdf*
[151] *E-mail from E. "Lamar" Yoder, March 5, 2021*
[152] *E-mail from Evdoksia Vshivkov, March 22, 2021*

the Koch Postulate and **that the death rate in the USA in 2020 was actually lower than in 2019 and 2018, so there is no evidence of a pandemic**."[153] [emphasis added] Grammatically, the statement attributes the statement about the lower death rate to the CDC. But it does not provide sufficient detail to identify the precise source, and that is not, in fact, what the CDC has concluded.[154] The report entitled "Provisional Mortality Data — United States, 2020," which confirmed that deaths from all causes increased significantly were considerably higher in 2020 than in previous years (an estimated 15.9 percent increase in the age-adjusted mortality rate) was not published until after this comment was made, but Oregon OSHA has been unable to identify any previous information on the CDC site that would have provided a basis for the statement.

And in other cases there is simply no information provided to support the claims at all. For example, one commenter wrote, "A large portion of the population has already had and recovered from the virus and therefore cannot contract it again and therefore not be able to spread it to anyone else."[155] The statement actually makes two claims: first, that a "large portion" the population has had COVID-19 and second, that having it, even only mildly confers complete immunity. Oregon OSHA has no independent reason to believe that either statement is true, and the comment provides insufficient detail to cause Oregon OSHA to reconsider that position.

The second occurs when a comment is clearly mistaken about the information it is presenting (possibly because the commenter has never seen the source and is relying upon someone else's misrepresentation).

The 2008 study of the 1918 flu pandemic

One example of this are several comments that reference a 2008 study about the 1918 flu pandemic. The following are two examples:

> *Dr Fauci wrote a paper in 2008 highlighting some of these disastrous consequences of wearing masks. Bacterial pneumonia from wearing masks happened to have killed more people than spanish flu did.*[156]
>
> *In 2008 Faci [sic] did a study which concluded that during the Spanish flu there were more people that actually died from the mask then there were people that died from the actual flu. The majority people that died during the Spanish flu actually died from pneumonia. And yes the pneumonia was caused by wearing a mask.*[157]

The final sentence of the second comment might lead one to suspect that this particular commenter has been told before that the study had less to say about "masks" than suggested here. That seems even more likely because the comment completely misrepresents the reality of the study in question. Oregon OSHA cannot provide a specific quotation of the discussion of facial coverings (or masks) in the study that disputes the commenter's declaration *because the study does not say a word about it*.[158] What the study does say is, "Based on contemporary and modern evidence, we conclude here that influenza A virus infection in conjunction with bacterial infection led to most of the deaths during the 1918–1919 pandemic."[159] The study also discusses the possible ways in which the viral infection led what were likely to be existing "colonizing" bacteria in the respiratory tract to multiply and become more virulent.

> *We believe that the weight of 90 years of evidence (table 3), including the exceptional but largely forgotten work of an earlier generation of pathologists, indicates that the vast majority of pulmonary deaths from pandemic influenza viruses have resulted from poorly understood interactions between the infecting virus and secondary infections due to bacteria that colonize the upper respiratory tract. The data are consistent with a natural history in which the virus, highly cytopathic to bronchial and bronchiolar epithelial cells, extends rapidly and diffusely down the respiratory tree, damages the epithelium sufficiently to break down the mucociliary barrier to bacterial spread, and if able to gain access to the distal respiratory tree—perhaps on the basis of*

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[153] *E-mail from Max Lowen, March 4, 2021*
[154] *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html*
[155] *E-mail from Charlene Kuipers, March 22, 2021*
[156] *E-mail from Jason Taylor, February 7, 2021*
[157] *E-mail from E. Lamar Yoder, March 5, 2021*
[158] *Morens, D. M., Taubenberger, J. K., & Fauci, A. S. (2008). Predominant role of bacterial pneumonia as a cause of death in pandemic influenza: implications for pandemic influenza preparedness. The Journal of infectious diseases, 198(7), 962–970. https://doi.org/10.1086/591708.*
[159] *Ibid.*

> *receptor affinity—creates both a direct pathway for secondary bacterial spread and an environment (cell necrosis and proteinaceous edema fluid) favorable to bacterial growth.*
>
> *…*
>
> *The extraordinary severity of the 1918 pandemic remains unexplained. That the causes of death included so many different bacteria, alone or in complex combinations, argues against specific virulent bacterial clones. The pathologic and bacteriologic data appear consistent with copathogenic properties of the virus itself, perhaps related to viral growth, facility of cell-to-cell spread, cell tropism, or interference with or induction of immune responses. Certain observers believed that cotransmission of the influenza agent and of pneumopathogenic bacteria was responsible for many severe and fatal cases, especially during the October–November 1918 peak of mortality and case-fatality rates. We speculate that any influenza virus with an enhanced capacity to spread to and damage bronchial and/or bronchiolar epithelial cells, even in the presence of an intact rapid reparative response, could precipitate the appearance of severe and potentially fatal bacterial pneumonia due to prevalent upper respiratory–tract bacteria.*[160]

The theory that masks in some way contributed to the spread of the bacterial infection is at most an intriguing but untested hypothesis, one which Oregon OSHA finds even less persuasive than it might otherwise have been because the individuals who argue in support of it find it necessary to point to a non-existent conclusion in a 2008 study.

Similarly, individuals point to at least two recent CDC analyses in ways that misrepresent the CDC conclusions. The first concerns an evaluation specific to the utility of facial coverings in response to the COVID-19 pandemic. The authors of that evaluation summarized their own findings as follows:

> *Community mitigation measures can help reduce the transmission of SARS-CoV-2.* ***In this study, mask mandates were associated with reductions in COVID-19 case and death growth rates within 20 days****, whereas allowing on-premises dining at restaurants was associated with increases in COVID-19 case and death growth rates after 40 days. With the emergence of more transmissible COVID-19 variants, community mitigation measures are increasingly important as part of a larger strategy to decrease exposure to and reduce transmission of SARS-CoV-2 (3,4). Community mitigation policies,* ***such as state-issued mask mandates*** *and prohibition of on-premises restaurant dining, have the potential to slow the spread of COVID-19, especially if implemented with other public health strategies. [emphasis added]*[161]

The authors clearly conclude that the study supports the continued (and mandatory) use of facial coverings where necessary to mitigate the spread of the disease. Yet more than one commenter pointed to it as evidence that requiring facial coverings would have little impact. For example, one wrote the following:

> *The proposed permanent rule with regards to masks and face coverings does very little, if anything, to mitigate coronavirus infection as many studies have shown. Even the most recently published CDC mega study showed only around a 1% reduction in overall cases with a margin of error about as big.*[162]

It is clear that the comment is referencing the study just described, since the two links imbedded in the comment are to the study and to a news story about the study. What accounts for the difference? The commenter (and others who reached the same conclusion) made an understandable but significant error. The study found a reduction in case growth rates and death growth rates from requiring the use of facial coverings, and it reports that reduction the growth rate in "percentage points."

Reducing the growth rate by a percentage point is not the same thing as reducing the overall case rate by one percent, nor is it even the same thing as reducing the growth rate by one percent. To take a somewhat oversimplified example, if the daily growth rate were 5 percent every day, then the change in that growth rate between those days would be zero percentage points (even though the number of cases is going up, the rate at which they are going up is unchanged). If the growth rate itself decreased to 4 percent on a particular day, that would represent a one percentage point decrease in the growth rate, but it would also be a decrease of 20 percent (from 5 percentage points to r percentage points) in the rate of growth. Such

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[160] *Ibid.*

[161] *Guy GP Jr., Lee FC, Sunshine G, et al. "Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020." Morbidity Mortality Weekly Report 2021;70:350–354. DOI: http://dx.doi.org/10.15585/mmwr.mm7010e3external icon*

[162] *E-mail from Michael Schmidt, March 22, 2021*

differences can be significant. While the published CDC study does not include all the raw data on which its peer-reviewed analysis was based, making it impossible to use "real numbers" in the preceding discussion, Oregon OSHA is comfortable deferring to the authors' own conclusions about what their study suggests, rather than another person's assessment that, at best, reflects a confusion of terms.

The second CDC study that has been frequently misunderstood is the one already referenced, purportedly suggesting that masks do not work because of a study in which more than 70 percent of positive cases wore masks. The study that gave rise to widespread (and inaccurate) claims that it proved facial coverings actually contribute to COVID-19 cases was published by the CDC in September 2020, based on an analysis of data from July 2020.[163]

> *In this investigation, participants with and without COVID-19 reported generally similar community exposures, with the exception of going to locations with on-site eating and drinking options. Adults with confirmed COVID-19 (case-patients) were approximately twice as likely as were control-participants to have reported dining at a restaurant in the 14 days before becoming ill. In addition to dining at a restaurant, case-patients were more likely to report going to a bar/coffee shop, but only when the analysis was restricted to participants without close contact with persons with known COVID-19 before illness onset. Reports of exposures in restaurants have been linked to air circulation. Direction, ventilation, and intensity of airflow might affect virus transmission, even if social distancing measures and mask use are implemented according to current guidance. Masks cannot be effectively worn while eating and drinking, whereas shopping and numerous other indoor activities do not preclude mask use.*[164]

It is true that roughly the same percentage of those with COVID-19 reported using masks in accordance with applicable guidelines as did those in the control group.[165] But when combined with the finding that the only identified difference in behavior between the two groups was "going to locations with on-site eating and drinking options," where they could not wear masks, the study clearly does not demonstrate either that masks cause disease or that they are ineffective. If this particular study says anything about masks, it actually suggests that they work, and that places and situations where they cannot be worn actually present greater risk: "Efforts to reduce possible exposures where mask use and social distancing are difficult to maintain, such as when eating and drinking, should be considered to protect customers, employees, and communities."[166]

At times, even relatively detailed discussions fall prey to misunderstandings, misapplication, and misrepresentation. One such example is the extensive comment[167] Oregon OSHA received related to the May 2020 paper that analyzed past research related to the prevention of influenza. In discussing each distinct finding of the paper (which is itself discussed in more detail elsewhere in this document), the commenter makes several inaccurate statements about the intention of the study, its scope, and its relationship to COVID-19.

The paper was published in May 2020.[168] The work had apparently been done over the previous year (the authors' review of previous studies ended with 2018). And the paper itself several times refers to "the next pandemic" in a context that clearly does not suggest an awareness of the scope of the COVID-19 pandemic when the bulk of the writing was done. Neither "COVID-19" nor "SARS CoV-2" appear anywhere in the paper. However, the commenter describes the authors' purpose as "to separate myth from reality and to demonstrate what data-driven measures can be helpful in preventing the spread of COVID-19."[169] That description is plainly inaccurate.

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[163] *Kiva A. Fisher, et al, "Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities — United States, July 2020,"CDC Morbidity and Mortality Weekly Report, September 11, 2020*

[164] *Ibid.*

[165] *Ibid.*

[166] *Ibid.*

[167] *Written comment by Nick Carpol*

[168] *Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. Emerging Infectious Diseases, 26(5), 967-975. https://doi.org/10.3201/eid2605.190994.*

[169] *Written comment by Nick Carpol*

In discussing the methodology of the study, the commenter contrasts it to his assessment of other research conducted in 2020. While Oregon OSHA agrees that much of the COVID-19 research has been less complete, less thorough, and less comprehensive than one might like, we disagree with his implicit suggestion that this represents either carelessness or malfeasance. During a pandemic, research that has not yet been peer-reviewed and that may even not yet be complete will inevitably be reported and discussed. The urgency of the moment should to some degree outweigh other considerations.

However, it is also not useful to pretend that all research published in the first half of 2020 took the COVID-19 pandemic into account or was intended to address that pandemic. While the commenter criticizes the work done during the pandemic, he fails to acknowledge the obvious reality that research on COVID-19 was not possible before the strain appeared. In fact, he appears to consistently suggest just the opposite. He describes the paper's assessment as concluding that handwashing "is not useful in the prevention of Covid."[170] He may infer such an application to COVID-19 from the published paper, but the paper itself makes no such claim, nor does it even mention COVID-19. It addresses the influenza virus, not SARS CoV-2.

Again, in discussing facial coverings, he makes the same misrepresentation: "Face masks might help prevent the spread of some infections, but there's no proof that they work with Covid-19 or influenza."[171] The paper, largely completed in 2019 and using research conducted during and prior to 2018, certainly made no claims about the novel coronavirus that causes COVID-19.[172]

He repeats the same misrepresentation in relation to the use of facial coverings by the sick, noting that the paper "found no proof that people sick with Covid or influenza should wear masks either."[173] The paper itself refers to "limited evidence" and "no significant effect" from the use of face masks "on transmission of laboratory-confirmed influenza."[174]

In discussing respiratory etiquette, the commenter again attributes to the paper a conclusion that it does not (and cannot) make about COVID-19 transmission, writing about the topic,

> *Xiao went so far as to investigate this also, finding such respiratory etiquette unhelpful in preventing the transmission of Covid, and encouraging others to take up that area of research: "Respiratory etiquette is often listed as a preventive measure for respiratory infections. However, there is a lack of scientific evidence to support this measure. Whether respiratory etiquette is an effective nonpharmaceutical intervention in preventing influenza virus transmission remains questionable, and worthy of further research."*[175,176]

Although this presents one extensive example of the problem, this is not the only case where Oregon OSHA found it necessary to look closely at the sources cited (when they were cited) to ensure they actually support the point being made in the comments.

Another commenter referred to the same May 2020 paper[177] about influenza transmission to represent the CDC's current opinion about the utility of facial coverings in relation to COVID-19:

> *Michael Wood Stated at the public hearing yesterday that he and OSHA looks to the CDC for guidance to make OSHA rules. Please see the CDC conclusion on how effective masks are.*
>
> *Either Michael Wood is lying, or he does not comprehend the obviousness of the CDC statement below.*

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[170] *Ibid.*

[171] *Ibid.*

[172] *Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. Emerging Infectious Diseases, 26(5), 967-975. https://doi.org/10.3201/eid2605.190994.*

[173] *Written comment by Nick Carpol*

[174] *Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures.* ***Emerging Infectious Diseases****, 26(5), 967-975. https://doi.org/10.3201/eid2605.190994.*

[175] *Written comment by Nick Carpol*

[176] *Oregon OSHA also notes that the commenter's description of the study still says more than the paper's authors were prepared to say, even in relation to influenza. The paper indicates that there is insufficient research to reach a conclusion. "Unhelpful," however, would be a conclusion.*

[177] *The paper was not actually a CDC study, although it was published on the CDC site, as are many studies.*

Referenced from the CDC website https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article

Directly From The CDC Website:

Disposable medical masks (also known as surgical masks) are loose-fitting devices that were designed to be worn by medical personnel to protect accidental contamination of patient wounds, and to protect the wearer against splashes or sprays of bodily fluids. There is limited evidence for their effectiveness in preventing influenza virus transmission either when worn by the infected person for source control or when worn by uninfected persons to reduce exposure. Our systematic review found no significant effect of face masks on transmission of laboratory-confirmed influenza.

Based on Michael Wood's words that OSHA relies on the CDC's research to make OSHA rules, and this CDC reference which clearly states that masks are not effective... for him to continue in the direction to impose a "permanent mask rule" is not found in reason or sanity.

With all due respect, Michael Wood does not look to be an image of health, yet he is supposedly an "authority" on matters of health? I am not buying this garbage.

He could most likely benefit from some sunlight, exercise, vitamin C and spiritual guidance.

Please - this man needs to resign. It is obvious he does not have the best interest of the people at heart... his plan to "protect" us is absurd.[178]

Of course, the study in question, which has already been discussed, does not reflect the sum total of information about facial covering effectiveness on the CDC website. And it certainly does not represent "the CDC conclusion on how effective masks are" in combatting COVID-19, which is exactly the opposite of that suggested by the commenter. The CDC states,

You should wear a mask, even if you do not feel sick. This is because several studies have found that people with COVID-19 who never develop symptoms (asymptomatic) and those who are not yet showing symptoms (presymptomatic) can still spread the virus to other people. Wearing a mask helps protect those around you, in case you are infected but not showing symptoms.

It is especially important to wear a mask when you are indoors with people you do not live with and when you are unable to stay at least 6 feet apart since COVID-19 spreads mainly among people who are in close contact with one another.[179]

The commenter claims that the Oregon OSHA Administrator is either "lying" or ignorant of the CDC's position on the subject; neither is the case. Oregon OSHA's position on the issue is consistent with that recommended by the CDC.

This document addresses several other such examples in the context of the issues themselves.

Addressing other Comments by Individuals who Make Clear Errors

In some cases Oregon OSHA has found it must assess the veracity of claims that cannot be easily evaluated by assessing other statements made by the same commenter that lend themselves to easy verification. While such comments may or may not be relevant in and of themselves (although the commenters generally consider them to be), they appropriately provide a gauge of the credibility of other claims made by the same individual.

For example, more than one commenter made a similar claim about the CDC: "By the way - The CDC is a privately owned company - FOR PROFIT! Look it up. It's public information."[180] Oregon OSHA notes for the record that the Centers for Disease Control and Prevention are part of the United States Department of Health & Human Services.[181] There *is* a CDC Foundation, which is a private, *non-profit* entity that collaborates with the CDC on certain public-private partnerships: "The CDC Foundation is an independent

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[178] *E-mail from Sharon "Ananda" Coniff, March 5, 2021*

[179] *"Guidance for Wearing Masks: Help Slow the Spread of COVID-19," CDC, updated April 19, 2021, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html*

[180] *E-mail signed "Ananda"*

[181] *From the CDC website, although it can also be confirmed by a review of budgeting documents and by the authorizing statutes: CDC Organization | About | CDC*

nonprofit and the sole entity created by Congress to mobilize philanthropic and private-sector resources to support the Centers for Disease Control and Prevention's critical health protection work."[182]

The CDC is not privately owned. It is not a for-profit company. Those who claim otherwise are visibly misinformed on that issue, at least. In assessing other comments from the same individuals that lack supporting documentation, Oregon OSHA will generally discard them based on the demonstrated lack of veracity.

Similar issues arise with a comment such as the following:

> *The CDC recently released a report stating that their data shows masking reduced the spread by 1% on average. If we had told our citizens one year ago that their mask wearing everywhere they go may reduce the spread by 1%, most never would have agreed. The average person has a 99.9% chance of surviivng if they come into contact with Covid. How are these measures being justified considering the destruction they have caused for your citizens?*
>
> *Other data out of Florida is proving that masks make zero difference, and it is in fact likely criminal to impose such restrictive measures, MOST ESPECIALLY since your own rules prior to Covid would have made this mandate illegal.*[183]

Oregon OSHA's evaluation of other claims made in the statement is necessarily influenced by the fact that the claim about the CDC study is plainly inaccurate,[184] as is the claim made by this person and others that Oregon OSHA rules would have previously made requiring the use of facial coverings illegal.[185]

Summary

As with any proposed rule, Oregon OSHA has reviewed the comments provided in the record thoughtfully and, when appropriate, critically. Oregon OSHA has considered the arguments and information provided based on their merits, rather than their quantity. The decision, ultimately, must be based upon the weight of the arguments made and the evidence available to the agency, taken as a whole.

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[182] *Not only is the CDC Foundation not a profit-making enterprise, it is actually registered as a 501(c)(3) charity with the Internal Revenue Service. CDC Foundation | CDC Foundation*

[183] *E-mail from Jennifer Gibbs, March 10, 2021*

[184] *This apparently refers to the same study discussed earlier in this section.*

[185] *This issue is addressed in some detail in the discussion of the issue of facial coverings.*

V. Application of Science and Other Data in Rulemaking

Oregon OSHA endeavors to make its decisions with as complete an understanding as possible of the available information, including scientific research, related to the subjects at hand. Oregon OSHA recognizes that science will generally not itself dictate policy decisions, and the answers to certain questions may at times be either unclear or unavailable. Nonetheless, policy decisions related to workplace health and safety must be informed by the available science and made in a manner that reflects an understanding of the science involved.

The present rulemaking is firmly rooted in such an understanding of the relevant science.

The Limitations of Science in Determining Regulatory Provisions

Over the years, Oregon OSHA has frequently encountered questions about exactly how a particular number or a particular threshold was determined, suggesting that there must always be a specific scientific basis for any number used in a rule.

Oregon OSHA believes such criticisms reflect a misunderstanding of the relationship between science and establishing specific regulatory thresholds. In responding to questions about whether or in what way a particular number was dictated "by science," Oregon OSHA consistently acknowledges that it does not base its rules on such a specific level of scientific precision or certainty. In the current rulemaking questions were sometimes framed in a manner such as, "What are the studies that say that six feet is the right number?" Oregon OSHA believes that such a request asks too much of the science. Such precision is not achievable, either from a practical or a scientific standpoint.

The need to reflect a complicated reality and to describe it in reasonably straightforward terms as part of setting workplace health and safety standards is not unfamiliar to Oregon OSHA. In adopting a 6-foot threshold for fall protection in construction, Oregon OSHA (and federal OSHA before it) was not aware of any research indicating a dramatic drop in the risk of injury from a fall at 5-feet, 11-inches when compared to falls from 6-feet, 1-inch. And even in developing exposure limits for individual chemicals, both the regulators and the various advisory bodies promulgate limits that endeavor to fit the various research analyses into round numbers. Similarly, Oregon OSHA's recent rulemaking related to Application Exclusion Zones during pesticide applications[186] uses thresholds selected using a balance of scientific information.

In relation to the six-foot distancing requirement, for example, Oregon OSHA fully acknowledges that Canadian public health officials assessing the same scientific information implemented a two-meter distancing expectation.[187] It is plain that their decision to implement a distancing requirement 6¾" longer than that put in place in the United States is not based on a different assessment of the science, but on the ease of explaining the public health expectation using a different standard of linear measurement.

The Need to Act in the Face of Uncertainty

In any rulemaking record, it is possible to point to particular pieces of information that might appear to be lacking. For example, one commenter said that rulemaking was impossible because the science does not provide quantifiable information regarding exposure:

> *Neither OHA nor OSHA has attempted to quantify the actual risk related to "exposure" as defined in the rule. Either agency should certainly have the data needed to count the numbers of workers to date who have met the proposed criteria and been reported as "exposed." It should be easy to determine what percentage of such "exposed" workers have actually reported symptoms of COVID-19 or become confirmed cases. No such research seems to have been carried out.*[188]

Oregon OSHA believes that science should be reflected in decision-making regarding workplace health and safety rules and other policy. A thorough understanding of the available science is critically important.

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[186] *https://osha.oregon.gov/OSHARules/adopted/2018/ao2-2018-ltr-WPS-AEZ.pdf*

[187] *"Advice for essential retailers during COVID-19 pandemic," Government of Canada, https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/guidance-documents/advice-essential-retailers.html*

[188] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

At the same time, Oregon OSHA also believes that policy-making, especially in the face of genuine risks to the health of workers and (in this case) their family members, can rarely afford to wait for "perfect" or "complete" science. Policy decisions cannot be made in the absence of information. But they also cannot wait until all questions are answered and all uncertainty erased – particularly since a decision not to act is itself a decision. When Oregon OSHA sets out to make a decision on a rule, the rule will be based on Oregon OSHA's assessment of the best *available* evidence. Oregon OSHA is not, however, prepared to wait until a decision can be based upon the best *conceivable* evidence. Indeed, such a course would realistically mean that no decisions would ever be made.

In the context of a pandemic response, awaiting better and more fully developed science is even less desirable. As the commenter notes with regard to the research he wants to see, "no such research seems to have been carried out." Oregon OSHA considers it both unrealistic and unwise to wait for such a comprehensive and sophisticated study. At some point down the road, it might tell us what we *should have done*. But it will not be available in time to tell us what we *should do*, which is the question that must be answered in the context of rulemaking.

Much of the remainder of this document is devoted to a discussion of the scientific research, as well as to other evidence provided in the record. While the discussion will not ultimately answer each of the questions raised, it will reflect an understanding of the rule and its various provisions as being consistent with the available science – as being based upon the best available, rather than the best conceivable, evidence.

Section VI: Analyzing COVID-19 Exposure Risks

> *If this were day "one" of the pandemic, the number of daily deaths were on a linear upward curve, or this were anything more than an alternate version of the flu, I would not question OSHA or HHS; but they would also be pushing for temporary orders.*[189]
>
> *Again, we appreciate the leadership of Oregon OSHA by implementing a temporary standard and a permanent standard to protect Oregon's workers. With 1 in 10 COVID-19 cases stemming from workplace outbreaks, the need for a permanent rule cannot be overstated.*[190]

Oregon OSHA has analyzed the COVID-19 exposure risks in Oregon workplaces and has concluded that they continue to represent a real and exceptional danger, although Oregon OSHA acknowledges that the danger is decreasing and is likely (although not entirely certain) to continue to decrease as vaccinations become more widespread. Oregon OSHA believes that the current crisis does involve a situation that is considerably "more than an alternate version of the flu." Therefore, the risk justifies action at the present time, even as Oregon OSHA recognizes that the need for the rule will be of a limited duration.

The Reality of the Pandemic

The COVID-19 pandemic has highlighted the risks that infectious disease, particularly one that is airborne transmissible, can create for a wide variety of workplaces. Although the record includes a large number of comments suggesting that the pandemic is not real or that it is not particularly severe, and others suggested that the disease itself does not necessarily exist, Oregon OSHA disagrees.

This portion of the document discusses the nature of the COVID-19 exposure risks in more detail. Toward that end, Oregon OSHA views it as important that the Oregon situation be viewed in the context of the global pandemic and its impact on the world and on the country, as well as on the state.

> *The health and economic impact of the COVID-19 pandemic are well known. As of today, an estimated 100 million people have contracted the virus worldwide, and over 2.2 million died from the disease. According to the International Monetary Fund, the global economy shrunk by 3.5 per cent last year. This represents the deepest global recession since the Second World War.*[191]

Comparison to Seasonal Flu or the Common Cold

Oregon OSHA received a large number of comments suggesting that the effect of COVID-19 was comparable to the season flu.

> *Given that COVID is a seasonal virus with little if any added mortality versus the yearly flu, it is a costly and harmful error to create a set of rules addressing it as if it were a plague that threatens to destroy humanity.*[192]
>
> *…….*
>
> *This is a very unwise idea. This is and has been an overreaction to a condition that is on par with the annual flu.*[193]
>
> *Were this virus truly the plague it is let on to be, these measures might be valid, but given what is now known about this virus, it is clear that it is seasonal and that, like, the common cold, it will hang on and sicken people here and there, now and then, but it is NOT a threat to all of society, and changing all of society to meet it is a serious threat to our society. We cannot keep all of the people all of the time from becoming ill, and it is not healthy to even try to do so. Exposure equals immune response and immune response enhances resistance.*[194]

Oregon OSHA believes that these comments, like the one that opens this section, are simply incorrect. The final comment's comparison to the "common cold" is especially troublesome, given the mortality data.

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[189] *Written comments from Daniel Kennedy, Future Systems Enterprises, April 2, 2021*
[190] *Letter from Jess Giannettino Villatoro on behalf of the Oregon AFL-CIO, April 2, 2021*
[191] *Matteo Marchisio, "What impact will the COVID-19 pandemic and the global economic downturn have on world food security?"* , *March 2, 2021* https://www.ifad.org/en/web/latest/-/what-impact-will-the-covid-19-pandemic-and-the-global-economic-downturn-have-on-world-food-security-
[192] *E-mail from Carol B. Low, February 16, 2021*
[193] *E-mail from Loren Burnham, March 10, 2021*
[194] *E-mail from Carol B. Low, February 16, 2021*

There is little indication that the virus is truly "seasonal." Weekly deaths related to COVID-19 in the United States peaked the first time in early May of 2020, then experienced a lesser peak in late August, followed by the largest peak to date in late January.[195] While it is true the largest peak occurred during the winter and that rates have declined overall since then, that appears to have less to do with the seasonal nature of the virus and more to do with the nature of the underlying social activity – and given last year's experience it appears clear that the decrease is more a result of the availability of the vaccine than a seasonal decline.

The death data does appear to have been influenced to some degree by early uncertainty about the most effective treatment methods. United States case data (which itself can be influenced by testing frequency) shows an initial peak in mid-summer and then a second, much larger peak in mid-winter. Overall, case rates have declined since then for the most part, but the decline did slow and in fact reverse and rates had been on an upward trend for several weeks when the rule was adopted.[196]

Oregon's epidemiological curve, although less severe overall than the national picture, shows a similar pattern – a peak in cases last summer, a much greater peak during the winter, and then a decline that reversed in early spring and that resulted in a new, lesser peak in early spring. However, the Oregon rate did appear to have reversed that upward trend at the time the rule was adopted.[197]

More significant than the seasonal question, however, is the commenters' conclusion regarding COVID-19 mortality compared to the annual flu, which reflected a recurring theme in many of the comments.

The World Health Organization updated and increased its estimates of the annual flu deaths due to respiratory diseases in 2017, indicating that between 290,000 and 650,000 such deaths occur each year.[198] In contrast, during the 12 months beginning March 1, 2020, COVID-19 accounted for a reported 2,561,341 deaths globally.[199]

The CDC estimates that influenza has resulted in between 12,000 – 61,000 deaths annually since 2010, for an estimated 10-year total of 359,000.[200] COVID-19 fatalities for the 12-month period beginning March 1, 2020 exceeded 531,000.[201] Oregon OSHA notes that 12-month total does not reflect the entire burden of the pandemic, which has extended longer than 12 months. But that *12-month* total for COVID-19 deaths is more than 2/3 greater than the *10-year* (120-month) total for seasonal influenza. COVID-19 is not "just the flu."

Even from the standpoint of a pandemic, the COVID-19 emergency is exceptional. It has been only 10 years since the last pandemic, which involved a novel influenza virus. It was a serious national and global event, but nothing like the events of 2020-21:

> *In the spring of 2009, a novel influenza A (H1N1) virus emerged. It was detected first in the United States and spread quickly across the United States and the world. This new H1N1 virus contained a unique combination of influenza genes not previously identified in animals or people. This virus was designated as influenza A (H1N1)pdm09 virus. From April 12, 2009 to April 10, 2010, CDC estimated that there were 60.8 million cases*

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[195] *CDC "COVID Data Tracker," Weekly Deaths, https://covid.cdc.gov/covid-data-tracker/#forecasting_weeklydeaths*

[196] *CDC "COVID Data Tracker," Weekly Cases, https://covid.cdc.gov/covid-data-tracker/#forecasting_weeklycases*

[197] *OHA COVID-19 Dashboard, https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19DataDashboard/COVID-19EPICases?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false*

[198] *"Up to 650 000 people die of respiratory diseases linked to seasonal flu each year," World Health Organization, December 13, 2017; https://www.who.int/news/item/13-12-2017-up-to-650-000-people-die-of-respiratory-diseases-linked-to-seasonal-flu-each-year; the article acknowledges that the estimate, which is a significant increase from previous estimates, no longer includes non-respiratory diseases.*

[199] *"Coronavirus Worldwide Graphs" at https://www.worldometers.info/coronavirus/worldwide-graphs/#total-deaths*

[200] *"Disease Burden of Influenza," CDC, last reviewed October 5, 2020; https://www.cdc.gov/flu/about/burden/index.html#:~:text=While%20the%20impact%20of%20flu,61%2C000%20deaths%20annually%20since%202010*

[201] *"Daily Updates of Totals by Week and State--Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)," CDC, last reviewed April 28, 2021; https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm*

> *(range: 43.3-89.3 million), 274,304 hospitalizations (195,086-402,719), and 12,469 deaths (8,868-18,306) in the United States due to the (H1N1)pdm09 virus.*[202]
>
> *This novel H1N1 flu virus was first detected in April of 2009 in the United States, and spread quickly around the world. On June 11th, 2009, the World Health Organization declared the start of the first flu pandemic in 40 years. CDC estimates that between 151,700 and 575,400 people died worldwide from the 2009 H1N1 virus infection during the first year the virus circulated.*[203]

The previous pandemic, which also involved a variant influenza virus, was more severe, but still did not approach the levels of the COVID-19 pandemic, even when adjusted for the lower population in 1968:

> *The 1968 pandemic was caused by an influenza A (H3N2) virus comprised of two genes from an avian influenza A virus, including a new H3 hemagglutinin, but also contained the N2 neuraminidase from the 1957 H2N2 virus. It was first noted in the United States in September 1968. The estimated number of deaths was 1 million worldwide and about 100,000 in the United States. Most excess deaths were in people 65 years and older. The H3N2 virus continues to circulate worldwide as a seasonal influenza A virus.*[204]

By any reasonable standard, the COVID-19 pandemic represents an extraordinary threat, which justifies extraordinary action. Even on the state level, where the numbers have been less extreme than the national and international effects, Oregon has faced an exceptional crisis. As of May 3, 2021, Oregon had experienced 186,877 confirmed and presumptive cases of COVID-19, and 2,502 COVID-19 related deaths.[205]

Discussion of Death and "Survival" Rates

Throughout the pandemic, it has become commonplace for opponents of strong preventative measures to talk about the high "survival rate" of contracting COVID-19. For example, one commenter wrote, "This virus has a 99% survival rate that no one wants to address."[206] Another declared, "I also found the CDC statement that Covid-19 has an almost 100% survival rate…."[207] Yet another wrote,

> *This virus has the same mortality rate as the common flu (99.9+% survive) and we submitted to the temporary rules for a time because a year ago we didn't know that. Now we know and it is now time for letting the sovereign citizens or Oregon make their own health care determinations without the iron fist of the government involved.*[208]

Another made the claim in more traditional terms, appearing to address the mortality rate rather than the survival rate:

> *COVID is deadly for 0.01% of the population. COVID is not a reason to stomp on the freedoms of HEALTHY people that are not at risk to themselves or others that accept the risk of going into workplaces. Any adult that does not accept the risk of going to public places can CHOOSE not to. Your job is not to choose for us. Plain and simple.*[209]

The *infection* mortality rate – the percentage of those who become infected who ultimately succumb to the disease -- of COVID-19 is not yet clear. The *case* mortality rate – the percentage of those who have been diagnosed who ultimately die – can be determined more easily (although it is to some degree dependent upon testing rates, which can generate positive diagnoses in the absence of symptoms). For the United States as a whole, the number of fatalities (571,297)[210] and the number of identified cases (32,031,068)[211] generate a case fatality rate of 1.78 percent. In order for the infection mortality rate to be 1 percent (a 99 percent "survival rate"), the United States would need to have 25 million more infections than have been

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[202] *"The burden of the influenza A H1N1pdm09 virus since the 2009 pandemic," CDC, last reviewed June 10, 2019*
[203] *"Influenza (Flu): Summary of Progress Since 2009," CDC, last reviewed June 6, 2019; https://www.cdc.gov/flu/pandemic-resources/h1n1-summary.htm*
[204] *"1968 Pandemic (H3N2 virus)," CDC, last reviewed January 2, 2019; https://www.cdc.gov/flu/pandemic-resources/1968-pandemic.html*
[205] *Oregon COVID-19 Dashboard, Oregon Health Authority, May 3, 2021; https://coronavirus.oregon.gov/Pages/default.aspx*
[206] *E-mail from Charlene Kuipers, March 22, 2021*
[207] *E-mail from Max Lowen, March 4, 2021*
[208] *E-mail from Roxanne Steward, March 23, 2021*
[209] *E-mail from Rob Blotske, March 5, 2021*
[210] *COVID Data Tracker Weekly Review, CDC, April 30, 2021*
[211] *Ibid.*

identified. That is plausible. In order for the infection mortality rate to be 0.1 percent (a 99.9 percent "survival rate"), on the other hand, the number of actual infections in the United States would need to reach approximately 571,291,000. Such a number is not only implausible, it is more than 75 percent greater than the population of the country, which makes it statistically impossible. Not surprisingly, if a 0.1 percent mortality rate is statistically impossible, a 0.01 percent survival rate is considerably more unlikely.

A similar review of state-level data can narrow the possibilities. While there is, not surprisingly, variation in the fatality rate based on identified cases (presumably based for the most part on different approaches to testing and therefore to case identification), a review of several states reveals an identified case fatality rate between 1.25 and 1.85. In South Dakota, for example, using the number of fatalities and the number of reported cases results in a rate of 1.83 percent.[212] In Oregon, the calculation results in a rate of 1.34 percent. In Washington the comparable rate is also 1.34 percent,[213] while in California the data generates a rate of 1.67 percent.[214]

If we compare the reported fatalities to population, rather than to identified cases, we see a much greater variation. For the entire country, the number of COVID-19 fatalities compared to the 2020 population of 331,449,281[215] is 0.17 percent, or 1,700 per 1,000,000. In Oregon, comparing the population[216] of 4,237,256 to the record of COVID-19 related deaths[217] generates a rate of 0.06 percent, or 600 per 1,000,000. For the State of South Dakota, the same rate using the state's 2020 population of 886,667[218] and only those deaths identified by the state as "caused by COVID-19"[219] is 0.20 percent, or 2,000 per 1,000,000.[220] Oregon OSHA believes that the variation cannot easily be exchanged by radically different mortality rates – it is unlikely that the health care system of Oregon is that much better than that of South Dakota, or that the population of South Dakota is more prone to severe outcomes for some reason. Rather, the most reasonable explanation is that the bulk of the difference in the number of deaths compared to the population is the result of a difference in the number of infections.

The CDC does provide its own estimates of infection fatality rates as part of its "COVID-19 Pandemic Planning Scenarios," which it last updated in March. The CDC's "current best estimate" of infection mortality by age group is:

0–17 years old: 20 per 1,000,000

18–49 years old: 500 per 1,000,000

50–64 years old: 6,000 per 1,000,000

65+ years old: 90,000 per 1,000,000[221]

While the estimates certainly reflect the reality that the risk of death increases substantially with age, they also illustrate that the risk remains significant for the country's working age population. For older workers, Oregon OSHA certainly considers a 0.6 percent risk of dying of COVID-19 is a meaningful risk, even without

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[212] *"South Dakota COVID Dashboard," South Dakota Department of Health, last reviewed May 3, 2021; https://doh.sd.gov/COVID/Dashboard.aspx*

[213] *"COVID-19 Data Dashboard," Washington Department of Health, May 3, 2021; https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard*

[214] *"State Officials Announce Latest COVID-19 Facts," California Department of Public Health, May 3, 2021; https://www.cdph.ca.gov/Programs/OPA/Pages/NR21-146.aspx*

[215] *Christine Hartley, Marc Perry, and Luke Rogers, "A Preliminary Analysis of U.S. and State-Level Results From the 2020 Census," U.S. Census Bureau, April 2021.*

[216] *Ibid.*

[217] *"Oregon COVID-19 Dashboard," Oregon Health Authority, May 3, 2021; https://coronavirus.oregon.gov/Pages/default.aspx*

[218] *Christine Hartley, Marc Perry, and Luke Rogers, "A Preliminary Analysis of U.S. and State-Level Results From the 2020 Census," U.S. Census Bureau, April 2021.*

[219] *"South Dakota COVID Dashboard," South Dakota Department of Health, last reviewed May 3, 2021; https://doh.sd.gov/COVID/Dashboard.aspx*

[220] *Making the calculation using the total reported deaths with COVID-19, the South Dakota rate would be 23 per 10,000.*

[221] *"COVID-19 Pandemic Planning Scenarios," CDC, updated March 19, 2021; https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html*

taking into account the take-home" risks created by COVID-19 infection. And while it is true that the "lower bound" CDC estimate of the same group's risk is 0.18 percent, it is also true that the "upper bound" CDC estimate is 2.0 percent.[222]

Such "older" workers do not represent a small or negligible portion of the working population. The median age of the United States workforce (the age where half of the workers fall above the line and half the workers fall below the line) is currently estimated to be 41.9 years old (and it is getting steadily older).[223] Looking at the data another way, the overwhelming majority of adults in the 50 through 64 age group participate in the workforce, with 87.4 percent of men ages 45 through 54 and 75.7 percent of women in the workforce, while 71.5 percent of men ages 55 through 64 and 59.6 percent of women do so.[224]

After comparing the number of deaths with population figures, and reviewing the CDC estimates, Oregon OSHA finds one conclusion unavoidable: Whatever the COVID-19 infection mortality rate ultimately turns out to be, it certainly will be considerably higher than 0.1 percent – at least four or five times as great. And in contrast to the opinion shared by some commenters, Oregon OSHA does not believe a one percent – or even a 0.5 percent – mortality rate is trivial or low. With a virus that "is more contagious (spreads more easily) and leads to a more serious illness than the common flu,"[225] the risks – including those in the workplace – are very real.

Suggestions of Inaccurate Reporting of COVID-19 Fatalities

Oregon OSHA recognizes that many of the comments about mortality rates and survival, particularly those that cannot be mathematically reconciled with the COVID-19 mortality data, are likely to be based on a belief that the reported fatalities have been overstated. Oregon OSHA finds that argument unpersuasive. Aside from a general presumption that data presented by the Oregon Health Authority and the Centers for Disease Control and Prevention should be treated as reliable absent a very compelling reason not to do so, Oregon OSHA finds the overall mortality rates for 2020 difficult to explain in any other way.

The CDC released a preliminary mortality report for 2020 that illustrates the issue very well:

> *This report presents an overview of provisional U.S. mortality data for 2020, including the first ranking of leading causes of death. In 2020, approximately 3,358,814 deaths occurred in the United States. From 2019 to 2020, the estimated age adjusted death rate increased by 15.9%, from 715.2 to 828.7 deaths per 100,000 population.*[226]

The same report concludes that in 2020, COVID-19 became the third leading cause of death in the United States.[227] As illustrated by the figure from the report reproduced on the following page, COVID-19 deaths outpaced unintentional injuries of all sorts, stroke, chronic lower respiratory disease, Alzheimer's Disease, diabetes, influenza & pneumonia, and kidney disease. Only deaths from heart disease and cancer outpaced the effects of the pandemic.[228]

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[222] *Ibid.*

[223] *"Median age of the labor force, by sex, race, and ethnicity," United States Bureau of Labor Statistics, last updated September 1, 2020; https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm*

[224] *"Civilian labor force participation rate by age, sex, race, and ethnicity," United States Bureau of Labor Statistics, last updated September 1, 2020; https://www.bls.gov/emp/tables/median-age-labor-force.htm*

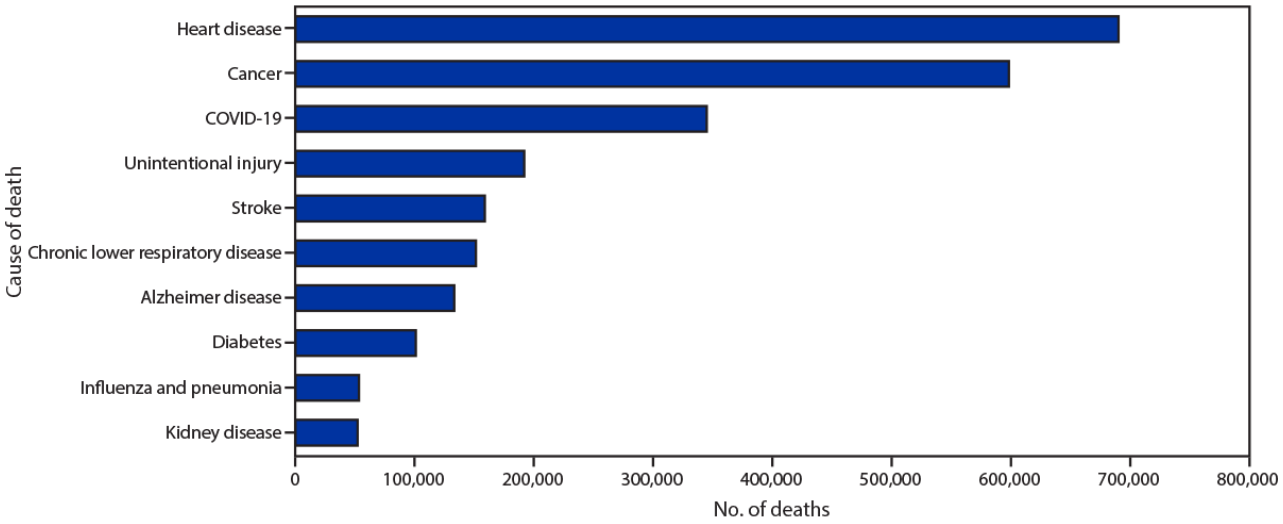
[225] *Rohini Radhakrishnan, "Is the Coronavirus More Contagious Than the Flu?," MedicineNet.com, March 9, 2021, https://www.medicinenet.com/is_the_coronavirus_more_contagious_than_the_flu/article.htm*

[226] *Ahmad FB, Cisewski JA, Miniño A, Anderson RN. Provisional Mortality Data — United States, 2020. Morbidity and Mortality Weekly Report 2021;70:519–522. DOI: http://dx.doi.org/10.15585/mmwr.mm7014e1*

[227] *Ibid.*

[228] *Ibid.*

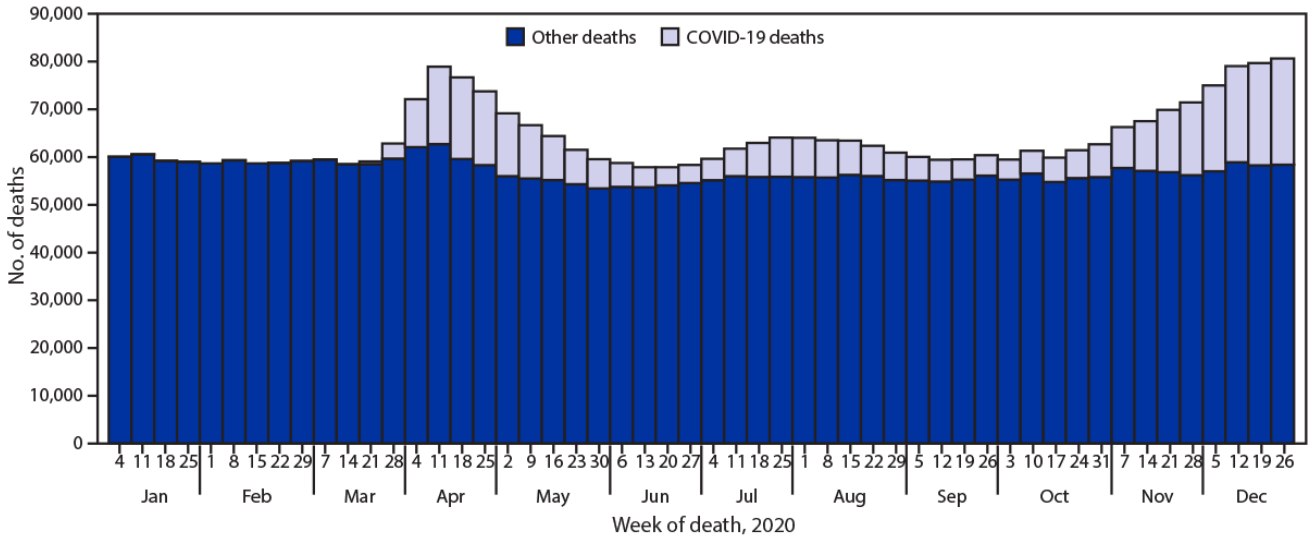
United States Fatalities by Cause of Death, 2020[229]



The most compelling illustration comes in the graphic from the same report that tracks weekly deaths throughout 2020, which appears on the following page. Non-COVID-19 deaths are remarkably stable and do not show the offsetting decline that would appear if case misidentification explained the pandemic.

When combined with the dramatic uptick in the overall estimated age-adjusted death rate between 2019 and 2020,[230] this information persuades Oregon OSHA that the obvious and most straightforward conclusion is the correct one: The COVID-19 pandemic is very real.

United States Fatalities by Week of Death, 2020[231]



A similar effect can be seen in Oregon mortality data, although it is somewhat muted by the fortunate reality that Oregon has maintained a lower COVID-19 death rate than the country at large throughout the pandemic. Oregon OSHA reviewed the annual death data tables maintained by the OHA Center for Health Statistics, as reflected by the table and discussion on the following page.[232]

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[229] *Ibid.*

[230] *It is true that the 2020 data is preliminary, and that such annual mortality reports are not normally published until November of the following year. But it is also true that any significant change in the 2020 is likely to result from the identification of additional deaths that had not been reported – not the conclusion that the deaths reported in the preliminary report did not in fact occur. If the preliminary death rate is incorrect, it is much more likely to be low than to be high.*

[231] *Ibid.*

[232] *The reports can be found at https://www.oregon.gov/oha/ph/BirthDeathCertificates/VitalStatistics/death/Pages/index.aspx*

Oregon Fatality Data – 1998 through 2020

Year	Fatalities	Population	Per 10,000	Change
1998	29,346	3,282,055	89.41	
1999	29,356	3,316,154	88.52	-0.99%
2000	29,541	3,429,708	86.13	-2.70%
2001	30,128	3,467,937	86.88	0.86%
2002	31,082	3,513,424	88.47	1.83%
2003	30,813	3,547,376	86.86	-1.81%
2004	30,201	3,569,463	84.61	-2.59%
2005	30,854	3,613,202	85.39	0.93%
2006	31,304	3,670,833	85.28	-0.13%
2007	31,433	3,722,417	84.44	-0.98%
2008	32,020	3,768,748	84.96	0.62%
2009	31,547	3,808,600	82.83	-2.51%
2010	31,887	3,837,614	83.09	0.31%
2011	32,731	3,872,672	84.52	1.72%
2012	32,475	3,900,102	83.27	-1.48%
2013	33,931	3,924,110	86.47	3.84%
2014	34,160	3,965,447	86.14	-0.37%
2015	35,709	4,018,542	88.86	3.15%
2016	35,799	4,093,271	87.46	-1.58%
2017	36,640	4,147,294	88.35	1.02%
2018	36,191	4,183,538	86.51	-2.08%
2019	37,397	4,216,116	88.70	2.53%
2020	40,132	4,237,256	94.71	6.78%

The table shows the total number of fatalities for each year, as reported to the Oregon Health Authority. Oregon law requires such a report be completed for every death that occurs in the state, making the Center for Health Statistics data the primary source for such information.

The 2nd to last column shows the rate of deaths per 10,000 Oregonians, while the final column shows the change in the death rate compared to the previous year. Several items are worthy of immediate attention:

- *The death rate has not exceeded 90 per 10,000 for the 22 years prior to 2020. In 2020 it was 94.71*
- *The 2020 death rate was 6.78% higher than the year that preceded it, 5.93% higher than 1998, the next highest year, and 9.83% higher than the 22-year average of 86.23.*
- *The rate has not changed by more than 3.84% in any previous year, the rate has rarely increased two years in a row, and the rate has never increased by more than 1 percent two years in a row.*
- *If 2020 had been an "average" year, the number of fatalities would have been 36,538.*

Based on both the national and state-level data, Oregon OSHA is persuaded that the scale of the pandemic's effects in both cases are accurately reflected by the COVID-19 reported deaths, whatever issues there may be at the margins.

The Need to Address Asymptomatic, Presymptomatic, and Mildly Symptomatic Transmission

One of the significant challenges of the COVID-19 pandemic is the nature of its transmission in relation to symptom onset. An understanding of the reality of transmission by infected individuals who are not and will never be symptomatic, as well as by individuals who are not yet symptomatic or whose symptoms are relatively mild, informs both the public and workplace health controls that have been put into place in Oregon and throughout the country.

A number of comments in the record suggested that such spread is not possible. For example, one commenter stated, "OSHA is willing to be complicit in enforcing these mandates on healthy people when asymptomatic spread has been proven to not even be a thing![233] Similarly, another declared, "Healthy individuals do not need to wear a mask. Asymptomatic individuals cannot spread COVID."[234] As discussed below, even to the degree that there is a question about asymptomatic spread, that uncertainty does *not* justify a decision to take protective measure only in the face of symptoms.

[233] *E-mail from Lindsay Briggs, February 24, 2021*

[234] *E-mail from Rob Sands, February 24, 2021*

Another commenter argued that the precautionary approach used to address potential COVID-19 is completely unprecedented in workplace health and safety law:

> *Never before has OSHA assumed that the mere presence of a seemingly healthy person in a workplace presents a hazard to others. Rules based on such novel assumptions demand solid scientific evidence. Such evidence is absent from the current proposal.*[235]

Aside from Oregon OSHA's determination that there is such "solid scientific evidence," there are at least two respects in which Oregon OSHA's approach to the potential for the "silent spread" of COVID-19 is not unprecedented.

First, a number of existing federal OSHA and Oregon OSHA rules rely upon the "assumption" that a hazard is present until it can be verified that it is not present. The workplace health rules addressing asbestos,[236] for example, treat certain work locations as presumptively hazardous until the employer can demonstrate otherwise.

Second, the Bloodborne Pathogens Standard presumes that blood or other potentially infectious material, from any source, including that from "a seemingly healthy person," is infected with potentially dangerous pathogens. The rule relies upon "universal controls" that protects employees from potentially hazardous exposure by protecting them against all such exposures, whether determined to be hazardous or not.[237]

Early in the pandemic, the CDC reached the conclusion that protective measures need to be used even in the absence of symptoms early and has reaffirmed that conclusion several times since then.

In the CDC's current "COVID-19 Pandemic Planning Scenarios," which were updated in March, the "current best estimate" suggests that 30 percent of cases are and will remain truly asymptomatic, while the individuals with such infections are estimated to be 75 percent as infectious as are symptomatic individuals.[238] The same scenario also addresses the risk of presymptomatic transmission with an estimate that half of transmission will occur prior to symptom onset.[239]

The risks of transmission by individuals who are not symptomatic at the time are real ones, as indicated by several papers published since the beginning of the COVID-19 pandemic. For example, one early review offered the following discussion:

> *It has been suspected that infected persons who remain asymptomatic play a significant role in the ongoing pandemic, but their relative number and effect have been uncertain. The authors sought to review and synthesize the available evidence on asymptomatic SARS-CoV-2 infection. Asymptomatic persons seem to account for approximately 40% to 45% of SARS-CoV-2 infections, and they can transmit the virus to others for an extended period, perhaps longer than 14 days.*[240]

A more recent and comprehensive review of the research by the same authors reinforced that early conclusion:

> *Available data suggest that at least one third of SARS-CoV-2 infections are asymptomatic. Longitudinal studies suggest that nearly three quarters of persons who receive a positive PCR test result but have no symptoms at the time of testing will remain asymptomatic. Control strategies for COVID-19 should be altered, taking into account the prevalence and transmission risk of asymptomatic SARS-CoV-2 infection.*[241]

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[235] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

[236] *See the definition of "presumed asbestos containing material" in 29 CFR 1910.1001(b), which Oregon OSHA has adopted by reference.*

[237] *See 29 CFR 1910.130, which Oregon OSHA has adopted by reference.*

[238] *"COVID-19 Pandemic Planning Scenarios," CDC, updated March 19, 2021; https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html*

[239] *Ibid.*

[240] *Oran, D. P., & Topol, E. J. (2020). "Prevalence of Asymptomatic SARS-CoV-2 Infection: A Narrative Review," Annals of Internal Medicine, 173(5), 362–367. https://doi.org/10.7326/M20-3012*

[241] *Oran, D. P., & Topol, E. J. (2021). "The Proportion of SARS-CoV-2 Infections That Are Asymptomatic: A Systematic Review," Annals of Internal Medicine.;174(5):655-662. DOI: 10.7326/m20-6976; https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7839426&blobtype=pdf*

Another paper summarized the issue before turning to its own analysis of grocery store exposures:

> *WHO declared COVID-19 as a pandemic on 11 March 2020. Since then, accumulating evidence has shown the transmission capability of SARS CoV-2, the virus causing COVID-19, not just from symptomatic carriers but from asymptomatic carriers.*[242]

Although most commenters who questioned the reality of asymptomatic transmission did not provide sources of their conclusion, others referred to at least one particular study. For example, one commenter referred to a study conducted in the Chinese city where COVID-19 was first identified:

> *Many of the proposed rules regulate interactions among seemingly healthy people and assume that such people may be contagious transmitters of COVID-19. A study of almost ten million people in Wuhan China found no COVID-19 infection by asymptomatic people.*[243]

In the context of asymptomatic transmission, the commenter's reference to "almost ten million people" is, at best, misplaced. The study did involve nearly ten million people in an effort to determine the extent of infection following Wuhan's lockdown.[244] However, its statistical power with regard to asymptomatic transmission was somewhat more limited, since the testing identified a relative handful of 300 asymptomatic cases and does not appear to have assessed the effect of any presymptomatic cases.[245] However, the reported results do raise questions about asymptomatic transmission:

> *Previous studies have shown that asymptomatic individuals infected with SARS-CoV-2 virus were infectious, and might subsequently become symptomatic. Compared with symptomatic patients, asymptomatic infected persons generally have low quantity of viral loads and a short duration of viral shedding, which decrease the transmission risk of SARS-CoV-25. In the present study, virus culture was carried out on samples from asymptomatic positive cases, and found no viable SARS-CoV-2 virus. All close contacts of the asymptomatic positive cases tested negative, indicating that the asymptomatic positive cases detected in this study were unlikely to be infectious.*[246]

Before relying too heavily on the conclusions of this study, however, it is important to recognize that the researchers themselves argue against applying its results outside of its own narrow context:

> *The researchers said that their findings did not show that the virus couldn't be passed on by asymptomatic carriers, and they didn't suggest that their findings were generalisable.*
>
> *They said that strict measures—such as mask wearing, hand washing, social distancing, and lockdown—were successful in reducing the virulence of SARS-CoV-2 in Wuhan and that asymptomatic people in Wuhan may have low viral loads. This means that the finding cannot be applied to countries where outbreaks have not been successfully brought under control.*[247]

Another study that raises questions about asymptomatic spread involved the careful analysis of contacts of one individuals to determine if any of them became infected.

> *Here, we report a case of an asymptomatic SARS-CoV-2 carrier with nosocomial infection, as shown below, and describe the clinical characteristics of 455 contacts. Our purpose is to analyze the infectivity of asymptomatic carriers.*[248]

The study found no asymptomatic transmission. But it is important to recognize that, although the study involved 455 contacts, it involved only one identified case:

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[242]*Fan-Yun Lan, Christian Suharlim, Stefanos Kales, Justin Yang "Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA," Occupational Environmental Medicine, October 30, 2020.*

[243]*Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

[244]*Cao, S., Gan, Y., Wang, C. et al. "Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China," Nature Communications 11, 5917 (2020). https://doi.org/10.1038/s41467-020-19802-w*

[245]*Ibid.*

[246]*Ibid.*

[247]*Griffin, Shaun, "Covid-19: Asymptomatic cases may not be infectious, Wuhan study indicates," BMJ, December 1, 2020 ; 371 doi: https://doi.org/10.1136/bmj.m4695*

[248]*Gao, M., Yang, L., Chen, X., Deng, Y., Yang, S., Xu, H., Chen, Z., & Gao, X. (2020). "A study on infectivity of asymptomatic SARS-CoV-2 carriers," Respiratory medicine, 169, 106026. https://doi.org/10.1016/j.rmed.2020.106026*

> *The limitation of our study is that there is only one case and lack of detailed information on family members quarantined locally. Large-scale multicenter studies are needed to verify our conclusion. However, both asymptomatic carrier and 455 contacts were admitted to and treated in designated places. Hence, the study results are representative to some extent.*[249]

Reaching the conclusion that asymptomatic spread cannot occur because one particular individual's asymptomatic case did not result in such spread is a logical fallacy, and one that the study authors largely avoid in describing their own conclusion:

> *Infectivity of **some** asymptomatic SARS-CoV-2 carriers **might** be weak. Effective prevention and control measures are helpful to prevent COVID-19 spread of asymptomatic carriers. The result of this study may alleviate parts of the public concern about asymptomatic infected people.*[250] *[emphasis added]*

Oregon OSHA is aware of at least one recent study suggesting that, while presymptomatic transmission is high, genuinely asymptomatic transmission is unlikely.

> *The fact that we did not detect any laboratory-confirmed SARS-CoV-2 transmission from asymptomatic case-patients is in line with multiple studies. However, Oran et al. have speculated that asymptomatic cases contribute to the rapid progression of the pandemic. Some studies may be prone to misclassify presymptomatic cases as asymptomatic, leading to heterogeneous reporting of SAR of asymptomatic cases, because of different case definitions or differential duration of follow-up. In our study we used a very sensitive case definition for symptomatic cases that did not require specific symptoms (e.g. fever) to be present. Also, timing of our study would have enabled detection of late onset of symptoms, which gives us confidence in our classification of exposure groups.*
>
> . . . . .
>
> *The 75% of SARS-CoV-2 transmissions in our cohort from case-patients in their presymptomatic phase exceeds reported transmission rates from other investigations. Possible reasons are the prior evidence that infectiousness peaks around the date of symptom onset, declining thereafter, and that case-patients probably reduced social contacts themselves once they experienced symptoms or when ordered to self-isolate.*[251]

Oregon OSHA notes that understanding the distinction between asymptomatic and presymptomatic spread may be important for purposes of case tracking and contact tracing, as well as for other clinically-related reasons. For the implementation of primary prevention measures, however, a person who has been infected but *will not* become symptomatic and a person who has been infected but *will* become symptomatic are essentially indistinguishable from one another. It is therefore impossible to direct those who are presymptomatic to engage in physical distancing, the use of facial covering, and other protective measures without also providing the same direction to those who are truly asymptomatic. One systematic literature review highlighted that reality:

> *The findings of this living systematic review suggest that most people who become infected with SARS-CoV-2 will not remain asymptomatic throughout the course of the infection. The contribution of presymptomatic and asymptomatic infections to overall SARS-CoV-2 transmission means that combination prevention measures, with enhanced hand hygiene, masks, testing tracing, and isolation strategies and social distancing, will continue to be needed.*[252]

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[249] *Ibid.*

[250] *Ibid.*

[251] *Bender, J., Brandl, M., Höhle , M., Buchholz, U., Zeitlmann, N. "Analysis of Asymptomatic and Presymptomatic Transmission in SARS-CoV-2 Outbreak, Germany, 2020" Emerging Infectious Diseases, Volume 27, Number 4—April 2021; Analysis of Asymptomatic and Presymptomatic Transmission in SARS-CoV-2 Outbreak, Germany, 2020 - Volume 27, Number 4—April 2021 - Emerging Infectious Diseases journal - CDC*

[252] *Buitrago-Garcia D, Egli-Gany D, Counotte MJ, Hossmann S, Imeri H, et al. (2020) "Occurrence and transmission potential of asymptomatic and presymptomatic SARS-CoV-2 infections: A living systematic review and meta-analysis," PLOS Medicine 17(9): e1003346. https://doi.org/10.1371/journal.pmed.1003346*

In considering the workplace implications of the risk of individuals with asymptomatic, presymptomatic or mildly symptomatic COVID-19 infections, Oregon OSHA notes at least one study that addressed the question of "essential workers" outside the context of health care:

> *In conclusion, in this cohort of grocery retail essential workers, 20% had a positive SARS-CoV-2 RT-PCR assay result and the majority (76%) of them were asymptomatic at time of testing. Employees with direct customer exposure were five times more likely to have a positive SARS-CoV-2 assay result.*[253]

The same study also concluded that much of the exposure appeared to be work-related:

> *In our current study [of retail grocery employees] we did not observe a difference in SARS-Co-V-2 community prevalence among those tested positive versus negative employees, indicating the possibility of true work-related SARS-CoV-2 exposure. In terms of exposure risk, >90% of employees with positive assay results had a position with significant direct exposure to customers.*[254]

Although there is only limited such research in this and in other industries, the results are at least suggestive that risk of COVID-19 can be increased by exposure to multiple individuals outside of one's normal circle – such as occurs in most public-facing workplaces and in some other workplaces as well.

Workers in health care noted similar concerns about asymptomatic transmission as part of the record:

> *Since this rule will only apply during the course of the pandemic and at least one third of all infected people are asymptomatic, we believe that respirators should be required for any AGPs. In a study of all patients admitted to a hospital over a 12-week period, 37 percent of those found to be infected with COVID-19 were asymptomatic. Most of these patients were admitted for trauma-related injuries or for labor and delivery.*

Oregon OSHA concurs with the determination of both the Oregon Health Authority and the CDC that so-called "silent transmission" of COVID-19 by those individuals who may not know they have it is a genuine risk and that control measures must be crafted accordingly. Whatever the determination with regard to how much of that transmission involves truly asymptomatic individuals and how much involves presymptomatic or mildly symptomatic individuals, Oregon OSHA is convinced that a model that assumes any individual is a potential risk to others reflects the sound application of the principles of occupational health.

Contrary Views of the Risks Presented by COVID-19

In addition to the discussion of fatality rates and comparisons to the seasonal flu already discussed, Oregon OSHA is aware that many of those who commented believe that there are other voices that should be considered:

> *Research Dr. Tenpenny, Attorney Lee Dundas, Dr. Judy Mikovits, Dr, Lee Merritt, Dr. Simone Gold... Del BigTree, Dr. Kauffman.... ...for being in the health field, it is imperative to look at many points of view and many different studies.*[255]

> *Get your facts right, NO more masks and social distancing in Oregon!! Do your research. Masks cause pheumonia, severe anxiety and are plane BS! Let people breath! Listen to Dr. Sherry Tenpenny for one. She has brilliant information.*[256]

Oregon OSHA has reviewed Dr. Sherri Tenpenny's thoughts related to COVID-19 and finds them unpersuasive. In addition, Oregon OSHA considers it significant that, by her own description,[257] she sits well outside the medical mainstream when it comes to the use of vaccinations to address contagious disease.

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[253] *Fan-Yun Lan, Christian Suharlim, Stefanos Kales, Justin Yang "Association between SARS-CoV-2 infection, exposure risk and mental health among a cohort of essential retail workers in the USA," Occupational Environmental Medicine, October 30, 2020.*
[254] *Ibid.*
[255] *E-mail signed "Ananda"*
[256] *E-mail from Tani Brentano, March 16, 2021*
[257] *https://www.drtenpenny.com/*

Oregon OSHA has spent less time considering the views of Leigh Dundas on the subject. Her actions on January 6, 2021,[258] easily persuade the agency that she does not share Oregon OSHA's understanding of the rule of law.

Similarly, Dr. Judy Mikovits is a virologist with a "toxic legacy,"[259] Dr. Lee Merritt's claims regarding vaccines and COVID-19 have been widely discredited,[260] as have those of Dr. Simone Gold, [261] who has been arrested for her own role in the events of January 6, 2021.[262] Del BigTree has made his reputation in conflict with the medical profession, and Dr. Andrew Kauffman (trained as a psychiatrist) promotes the belief that the pandemic is entirely artificial and the result of the global conspiracy.[263]

Against these stand the expertise of public health officials at OHA and at the CDC, as well as doctors dealing with the effects of the pandemic in Oregon hospitals and elsewhere. Conspiracy theories may be seductive, but Oregon OSHA has chosen to go with the weight of the scientific and other evidence.

Suggestions that the Need for Exceptional Action Has Passed

Oregon OSHA found the comments in the record that acknowledged the reality of the crisis but that suggested that the need for exceptional protective measures to address the effects of the COVID-19 pandemic has passed to be potentially more persuasive than those that minimized the overall risks from the outset of the pandemic.

More than one employer association made the argument quite clearly:

> *As exposure rates continue to drop and more Oregonians receive the vaccine, OR-OSHA's proposal to expand upon the requirements outlined in the temporary rules is puzzling and problematic. Oregon businesses allocated significant resources to transition employees to virtual workstations or adapt workplaces to mitigate the spread of the virus and ensure employees can safely carry out their responsibilities in the physical workplace. These changes have been successful as evidenced by Oregon's low death and COVID-19 case rates.*[264]

Several organizations representing workers argued that the need for regulation regarding COVID-19 has not yet passed – and, indeed, that several requirements should be added and existing requirements strengthened. For example, the union representing health care workers made the following comment:

> *On behalf of the nearly 15,000 nurses and healthcare workers of the Oregon Nurses Association, we want to thank you for the opportunity to engage with Oregon OSHA on the COVID 19 temporary and permanent rules. We appreciate the leadership Oregon OSHA has shown by promulgating a temporary standard and a permanent standard to protect Oregon's workers. Occupational exposure to SARS CoV-2 has been an important cause of infection transmission in the pandemic and we appreciate the agency's recognition of the need to act.*
>
> *We thank the agency for the hard work put into drafting the rules and accepting our input through the Rulemaking Advisory Committee members. We want to take this opportunity to comment on the draft and look forward to safer workplaces through Oregon OSHA's enforcement of the temporary and permanent rules.*

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[258] *Hannah Knowles and Paulina Villegas, "Pushed to the edge by the Capitol riot, people are reporting their family and friends to the FBI," **Washington Post**, January 16, 2021. The article has this to say of Ms. Dundas: "Another woman said she informed the FBI about a former friend — estranged because of her increasingly radical politics — who appears in video close to the overrun Capitol, shouting toward police: 'Traitor! Traitor Traitor!' The ex-friend, a California attorney named Leigh Dundas, also posted video of herself telling a crowd the day before the Capitol chaos that 'we would be well within our rights' to take traitorous Americans "out back and shoot 'em or hang 'em.'"*

[259] *Neil, S., & Campbell, E. M. (2020). "Fake Science: XMRV, COVID-19, and the Toxic Legacy of Dr. Judy Mikovits" **AIDS research and human retroviruses**, 36(7), 545–549. https://doi.org/10.1089/AID.2020.0095*

[260] *Joseph Lyttleton, "Experts debunk the COVID-19 claims of Dr. Lee Merritt and the AFLDS," **The Millennial Source,** February 11, 2021, https://themilsource.com/2021/02/11/experts-debunk-covid-19-claims-of-dr-lee-merritt-and-aflds/*

[261] *Ibid.*

[262] *thehighwire.com*

[263] *https://truth11.com/2020/12/18/100000-doctors-medical-professionals-oppose-covid-19-vaccine-dr-andrew-kaufman/*

[264] *Letter from Jana Jarvis on behalf of the Oregon Trucking Association, March 31, 2021*

> *The need for the permanent rule cannot be overstated. Healthcare workers have been disproportionally impacted by the pandemic, with higher levels of infection, morbidity, and mortality. We have members who are experiencing the long-term consequences of COVID-19 infection and we know the traumatic experiences of healthcare workers across the globe will have lasting mental and physical effects. It was not the fault of frontline caregivers that healthcare systems were completely unprepared for a global pandemic, yet they showed up to do care for ill patients knowing they lacked appropriate PPE and other safety measures while facing an unprecedented number of very ill patients.*[265]

The advocates representing farmworkers expressed concern about the lack of worker knowledge of certain protections:

> *Many workers are unaware or confused about their right to quarantine, return to work, or protected leave, and are reluctant to pursue their rights for fear of retaliation by their employer. For example, our office spoke to a seafood processing worker who was told to quarantine by her health care provider. She quarantined at her one room apartment with her baby but was concerned that she would not be asked to come back to work and was not aware that she was entitled to paid or protected leave. Had she had the benefit of written information about her rights provided to her at the time she was told to quarantine, she likely would have been aware of leave protections available to her rather than suffer in silence.*[266]

Oregon OSHA has assessed the arguments made in such comments and reviewed the available information before making a decision on the rule. However, as of the date of the rule's adoption, Oregon is in the midst of what appears to be its fourth wave of increased COVID-19 infections statewide. [267] While there have been a number of positive indicators, and Oregon OSHA is hopeful that the state will see a dramatic reduction in risk during the weeks and months to come, Oregon OSHA is not persuaded that the risk has abated to the point that it is no longer a meaningful and significant workplace issue.

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[265] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*

[266] *Letter from Nargess Shadbeh and David Henretty on behalf of the Oregon Law Center, April 2, 2021*

[267] *"Oregon COVID-19 Dashboard," Oregon Health Authority, May 3, 2021; https://coronavirus.oregon.gov/Pages/default.aspx*

VII: The Question of Timing and the Rule's Repeal

> *Ten years from now, people are going to wonder what morons made the Oregon Covid mandates (masks, distancing, etc.) a permanent rule. It is hard to imagine how stupid this really is.*[268]

> *I strongly support the proposed permanent OSHA rule. Thank you for working to protect our communities as cases begin to rise again.*[269]

> *While OR-OSHA has made it clear that they will repeal these rules once the need for them dissipates, they are in fact labeled as "permanent". This label is deceiving and overall very disconcerting. The rule must have stronger language relative to the timing of repeal, preferably a sunset date or expiration tied to when the Governor rescinds the declaration of a public health emergency.*[270]

Oregon OSHA's temporary rule addressing COVID-19 in the workplace was adopted on November 6, 2021,[271] and expires May 4, 2021. Under the Oregon Administrative Procedures Act, a temporary rule cannot be renewed or extended beyond 180 days.[272] Therefore, in order to extend protections for workers against COVID-19, which remains a significant concern, Oregon OSHA adopted this rule following the normal rulemaking process. However, the purpose of this rule is to address the COVID-19 pandemic in Oregon workplaces, and it will be repealed when the need for such worker protection is no longer necessary.

The Challenge of the "Permanent" Rule Label

In discussing the rule, Oregon OSHA described the rule as a "permanent" rule to emphasize that it was being adopted in accordance with the prescribed rulemaking process. The law does not actually refer to such rules as "permanent" – it simply calls them "rules" and notes that the abbreviated process described by the law can only be used to adopt "temporary" rules. Because such rules normally remain in place until modified and repealed, the Secretary of State's forms describe them as "permanent." Such rules are also required to undergo regular review by the adopting agency to determine whether they should be repealed.[273]

Unfortunately, the effect of that label was to give certain commenters the impression that Oregon OSHA intended the rules to be permanent. As one state representative noted in the third comment that opens this section, the label was "deceiving and overall very disconcerting." Comments such as the first one in that set took the "permanent" nature of the rule very seriously, as did the person who wrote "I am strongly opposed to the proposal to continue COVID-19 precautions in perpetuity."[274] Still another wrote expressing outraged incredulity:

> *What is wrong with you people? Oregonians wearing masks for the rest of their lives?… You are all disgusting and money hungry and ridiculous. You're all completely nuts. Besides loving power over people think of something else to do PLEASE and leave us normal people along. Your sickening.*[275]

Oregon OSHA also heard similar concerns from at least one individual who otherwise was very supportive:

> *Thank you for all you are doing for our state over the past year plus a little in light of the Covid-19 pandemic. I really appreciate all the safely, support, and work you and others have been doing for all of us in Oregon. Thank you.*
>
> *I'm writing because I've heard about a possible mandate that would make wearing a mask permanent here in Oregon, even after the concern of Covid-19 goes away, and I'd like to share why I'm against such a mandate. I understand the importance of mask wearing over the past few months, and am grateful that it's been implemented. However, whenever, and I hope it's sooner rather than later, the concern of spreading Covid-19 is lowered, I find the need to wear masks unnecessary. For individuals who are worried about their own health or risk of spreading a disease, they can still wear a mask, but for others who don't feel the need to wear a*

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[268] *E-mail from F. W. Jamison, March 23, 2021*
[269] *E-mail from Priscilla Kelly, April 1, 2021*
[270] *Letter from Vikki Breese-Iverson, Oregon State Representative*
[271] *https://osha.oregon.gov/OSHARules/adopted/2020/ao3-2020-filing-temporary-rules-covid19.pdf*
[272] *ORS 183.335(6)*
[273] *ORS 183.405*
[274] *E-mail from Ryan Israelson, February 9, 2021*
[275] *E-mail from Colleen Brown, March 23, 2021*

> *mask, why make it permanent? With a vaccine and herd immunity, it seems unnecessary and forceful to mandate mask wearing.*
>
> *Thanks for your time, and thank you for your service in Oregon.*[276]

Another commenter provided the following explanation that a permanent rule would be unwise because the exact nature of any requirements should be subject to further revision:

> *Please DO NOT make permanent the rule making masks and social distancing a part of Oregon OSHA rules. This disease is progressing through our population and more and more research is being done that will tell us how we will approach protection in the future. We need to let science dictate where we go, it is not possible to guess what the future will hold post vaccine, and it is irresponsible to make a permanent rule in these uncertain times. Thank you.*[277]

Others recognized that Oregon OSHA had declared its intention to repeal the rule when no longer needed, but for various reasons distrusted that commitment. Some suggested that the lack of specific metrics would cause it to be permanent:

> *While the proposed rule change alleges it will be repealed in the future "once it is no longer needed to address the coronavirus pandemic", no metrics are given to measure this which lends itself to likely never being repealed.*[278]

Others suggested that because virus risks will never be eliminated the rule itself would never be eliminated:

> *I believe it would be a mistake to continue the mask mandate and make it permanent. If it is made permanent, it will not be repealed since we have many flu viruses that go around. This is a slippery slope that will not just stop there in affecting our personal freedoms (including yours eventually perhaps on some unrelated issue).*[279]
>
> *I wanted to write regarding my concern over making the emergency measures in place for COVID written into a permanent rule. I understand that it is supposed to change when the pandemic is over but truth be told we all know it will never be over. COVID is here to stay.*[280]
>
> *It is my understanding the Occupational Safety and Health Administration [OSHA] will work with the OHA's plans to make wearing face masks permanent for business owners and their customers, and for the general public, while in public spaces, until there is no threat of virus infections. In other words no end date will be set once the new rule is adopted.*[281]

Ironically, another commenter expressed a diametrically opposed view on the longevity of viruses in arguing against the rule: "COVID-19 like all viruses before, in the scope of time, are temporary. So, there is no need for permanent rules."[282]

More than one commenter agreed with the person who wrote, "The vagueness on when and how to remove this 'permanent rule' is even more concerning than the extension of the rule. When has OSHA repealed a rule after it is in place?"[283] Another commenter expressed a similar opinion:

> *Instead of talking about a permanent rule why instead can you not change the rule and allow a temporary rule to be extended based on scientific data and the numbers? Never has a government agency ever taken something and then returned it at a later date. Once we give this up I fear we will never get it back.*[284]

Although Oregon OSHA recognizes the level of concern that motivates these comments, it does not share them. Oregon OSHA *knows* that the rule will be repealed, although it is not clear exactly when that will occur. While it is true that other viruses and, in all likelihood, the virus that causes COVID-19 will continue to be with us, the rule is explicitly designed to address the risks of the COVID-19 *pandemic*. When those risks are no longer an issue in Oregon workplaces – when the risks of COVID-19 truly become part of the ongoing

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[276] *E-mail from James, March 25, 2021*
[277] *E-mail from Gene Souza, February 23, 2021*
[278] *E-mail from Michael Schmidt, March 22, 2021*
[279] *E-mail from Calvin Nail, March 30, 2021*
[280] *E-mail from Becca Lovelady, March 21, 2021*
[281] *E-mail from Frank Kretschmer-Dunn, March 23, 2021*
[282] *E-mail from Tim Freeman, Douglas County Commissioner*
[283] *E-mail from R. Joe Hubbard, February 21, 2021*
[284] *E-mail from John Holte, February 23, 2021*

and seasonal disease burden – the rule will be repealed. The final comment is correct that Oregon OSHA does not typically repeal rules once it has adopted them. However, it is also the case that Oregon OSHA does not typically announce that a rule being adopting is addressing a temporary situation and will be repealed. This is not a typical situation.

The Lack of a Sunset or a Trigger

Oregon OSHA also received significant oral testimony and written comments regarding the lack of a date or a specific trigger that would repeal the rule.

A number of comments suggested that the rule should be tied to the Governor's declaration of a public health emergency and therefore repealed automatically when the public health emergency ends. For example, one employer association made the following observation:

> *Applying permanent rules to a temporary situation is perhaps the most confusing element of this proposal. These permanent rules are in direct response to the state of emergency, which cannot exist in perpetuity. As such, the permanent rules should be repealed when the state of emergency ends; however, no such verbiage appears here. A timeframe must be established for rescinding these COVID-19 specific rules. These rules are tied to a public health emergency declaration. Once that declaration expires, these rules should, as well. These rules, if implemented, should be reviewed and sunset well within the accepted 60-day period, if not immediately.*[285]

The business coalition addressed the issue in their combined comments, saying, "…the note in the proposed language is vague and not specific to the Governor's Executive Order," and suggesting that the rule be tied directly to the state of emergency.[286]

Another employer organization made a similar suggestion:

> *The current language stating that the rules will be rescinded when it is no longer necessary to address the COVID-19 pandemic is vague. Explicitly stating that the rules will be rescinded when the Executive Orders relating to the pandemic are rescinded would be appreciated.*[287]

Similarly, an Oregon State Senator wrote, "Most important, is that OSHA rules should immediately expire when the Governor rescinds her executive orders regarding COVID-19 restrictions."[288]

Others argued in favor of a specific sunset date, when the rule would automatically expire, either as an alternative to tying the rule to an executive order, a supplement to doing so, or as a preferred option. For example, one individual wrote, "Having a sunset date on a rule would be much better option than repealing a rule at sometime in the future."[289] Many suggested specific time frames:

> *This rule should not be extended more than the time it takes to immunize at most, 80% of the population. It needs to have an end date clearly defined so we don't have to comply with these rules for years to come. There should be no need for this set of rules (126 pages?) after a large majority of the population is protected. Please state a clearly defined end date which should not exceed three months from now.*[290]
>
> *If OSHA is not willing to tie the end of the rules with the end of the Governor's emergency Order, we recommend a specific sunset date to complete the permanent rules and keep the basic safety protocols in-*

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[285] *Letter from Jana Jarvis on behalf of the Oregon Trucking Association, March 31, 2021*

[286] *Memo from Paloma Sparks on behalf of the Business Coalition: Oregon Business & Industry, the Northwest Grocery Association, the National Federation of Independent Businesses, the Oregon Restaurant & Lodging Association, the Oregon Association of Nurseries, the Oregon Fuels Association, the Oregon Health & Fitness Alliance, the Professional Land Surveyors of Oregon, the Associated Oregon Hazelnut Industries, the Oregon Trucking Association, the Far West Agribusiness Association, the Oregon Refuse & Recyclers Association, the Oregon Power Sports Association, the Oregon Auto Dealers Association, the Oregon Cattlemen's Association, the Oregon Farm Bureau, Oregon Wheat, the Northwest Automotive Trades Association, the Oregon State Chamber of Commerce, the Oregon Dairy Farmers Association, the Oregon Plumbing-Heating-Cooling Contractors Association, the Oregon RV Dealers Association, the Columbia Gorge Fruit Growers, the Oregon Vehicle Dealer Association, and the Associated General Contractors Oregon Columbia Chapter, March 26, 2021*

[287] *Letter from Tyler Janzen on behalf of the Association of Oregon Counties, April 1, 2021*

[288] *Letter from Tim Knopp, Oregon State Senator, April 1, 2021*

[289] *E-mail from Troy Stroud on behalf of Essex General Construction*

[290] *E-mail from Tim Rainey, March 30, 2021*

> *place past mid-year, then if necessary, adopt another temporary rule to get you to the end of the year in the unlikely event we don't hit herd immunity late spring/early summer. We believe this approach will retain flexibility but provides the clarity the public so desperately needs right now and avoid our concern of worker mask-wearing fatigue or increased complacency.*[291]
>
> *These rules must expire when the Governor's declaration of a public health emergency is rescinded, or sooner! OR-OSHA must include a sunset clause into these rules clearly stating that the rules will sunset when the state of emergency is rescinded or December 31, 2021, whichever comes first!*[292]
>
> *The previous rule was adopted Nov. 6, 2020, for expiration on May 4, 2021, a period of 6 months.* ***The new rules should be set for automatic expiration and re-evaluation no later than November 2021.***[293]

Some, such as the comment quoted earlier, were more focused on the fact that "no metrics are given" than on recommendations for what those metrics should be.

Oregon OSHA agrees that, if realistically possible, a rule that is intended to be temporary should include either a sunset date or a clear and objective trigger for the rule's repeal. Oregon OSHA considered several such options in relation to this rulemaking but ultimately discarded them all as unworkable.

As noted above, many commenters suggested that the rule's repeal should be connected to the emergency declaration, however, the emergency declaration itself is based on a number of factors. It is certainly possible to imagine situations where the rule would no longer be necessary but for one reason or another the public health emergency would need to remain in place, just as it is possible to imagine situations where the rule – or at least parts of it – should be left in place for a few months after the need for the public health emergency had ended. Oregon OSHA determined that it would be inappropriate to tie the rule to the emergency declaration in such a way. It would obviously be an unfortunate outcome if the governor were forced to extend the emergency for no reason other than to leave the rule in place.

Oregon OSHA also considered factors such as vaccination levels and infection rates. While important factors in the final decision, no such indicator could be used alone to assess the continuing risk of the pandemic in Oregon workplaces. And the relationship between them is both complicated and uncertain enough to make it impossible to develop some sort of precise algorithm that would consider all the relevant information before producing a mathematical "yes or no" answer.

Some, such as the comment quoted earlier, tied the suggestion of a sunset to their belief that Oregon OSHA would be able to extend the rule past the sunset date using the temporary rulemaking process. But because the underlying rule would continue to be substantially similar to the previous temporary rule, Oregon OSHA does not believe that option would be available under the requirements of the Administrative Procedures Act.[294] Others suggested that it would be relatively easily to revise the sunset date if needed:

> *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 reaching the point of not being a problem at all. By September 1st, COVID-19 will likely be no more of a problem than the ongoing annual cold and flu season is each year. If for some reason this progress does not happen as expected, the sunset clause can easily be modified as justified by current conditions at the time.*[295]

Oregon OSHA notes that modifying the sunset clause, if adopted as part of the rule, would require rulemaking – and it would need to be proposed approximately three months before it was reached (around June 1 for a sunset date of September 1). While such a clause would be workable in a rule that was expected

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[291] *Letter from Mark Long on behalf of the Oregon Homebuilders Association and Mike Salsgiver on behalf of the Columbia-Willamette Chapter of the Associated General Contractors, April 2, 2021*

[292] *E-mail from Wally Lierman*

[293] *Written comments from Jerry Russell, March 26, 2021*

[294] *The APA does not indicate that a temporary rule can be adopted again provided that there is a break between the two temporary rules. And it makes sense that this is not an option, since allowing such a practice would provide an opportunity to sidestep the administrative rulemaking requirements simply by allowing one temporary rule to lapse before replacing it with another, identical rule.*

[295] *Letter from Rex Storm on behalf of Associated Oregon Loggers, April 2, 2021*

to remain in place for several years, it is not a practical option when the rule is expected to remain in place a matter of months.

Another obstacle to setting even a tentative repeal date is that Oregon OSHA is aware that such a date would be read by some as a firm commitment on the part of the agency. Even in the case of the replacement of a temporary rule that Oregon OSHA always expected to replace with a permanent rule, some comments suggested that the current rule proposal was a failure to honor a previous commitment: "The TEMPORARY workplace requirements must EXPIRE by May 4, 2021. Keep your word, your integrity; let's get back to work at 100%."[296] To be clear, Oregon OSHA never promised that there would be no requirements after May 4, 2021; rather, as described in the previous section on the history of this rulemaking, the agency's plans openly included an intention to extend the temporary rule's requirements through the normal rulemaking process.

While Oregon OSHA does not believe that any sort of automatic repeal is workable, the final rule does at least partially reflect other suggestions. One commenter wrote, "I oppose making the COVID mandates permanent. The situation must be open to frequent review."[297] Another wrote,

> *For as long as the pandemic continues, scientific understandings can be expected to evolve, and conditions will change. The Oregon OSHA should recognize the evolving nature of the pandemic, by establishing clear dates for ongoing re-evaluation of the rules.*[298]

In direct response to many such comments, Oregon OSHA included a note in the final rule that commits the agency to exactly that sort of "frequent review" of the rule until it has been repealed:

> *Oregon OSHA will repeal the rule when it is no longer necessary to address that pandemic. Because it is not possible to assign a specific time for that decision, Oregon OSHA will consult with the Oregon OSHA Partnership Committee, the Oregon Health Authority, the two Infectious Disease Rulemaking Advisory Committees, and other stakeholders as circumstances change to determine when all or part of the rule can be appropriately repealed. The first of these discussions will take place no later than July 2021, and they will continue every two months until the rule has been repealed.*[299]

Additionally, the same note addresses the concern about the lack of criteria (although without providing specific metrics) by including the factors that will be included in those regular discussions:

> *In making determinations about when to repeal all or part of the rule, Oregon OSHA and its stakeholders will consider indicators and other information such as (but not limited to) Executive Orders issued by the Governor, guidance issued by the Oregon Health Authority and the Centers for Disease Control, infection rates (including the rate of spread of COVID-19 variants), test positivity rates, and vaccination rates, as well as indicators of severity such as hospitalizations and fatalities.*[300]

The rule will not remain in place permanently or in perpetuity. It will be repealed when the COVID-19 pandemic no longer represents an exceptional threat to Oregon workers. And the agency will engage in regular discussions about the need for and timing of that repeal until it occurs.

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[296] *E-mail from Gina Reece, February 24, 2021*
[297] *E-mail from Ed Hirsch, March 24, 2021*
[298] *Written comments from Jerry Russell, March 26, 2021*
[299] *OAR 437-001-0744 "Rule Addressing COVID-19 Workplace Risks," https://osha.oregon.gov/OSHARules/adopted/2021/ao2-2021-text-cov19-allworkplaces.pdf*
[300] *Ibid.*

Section VIII: The Question of Facial Coverings

Q: What is "Source Control"?
A: Source control refers to the idea of controlling the source of potential infection (in this case a person). So a face covering that is designed to minimize the spread of contaminants from the wearer to others is "source control."

Q: How can non-respirator face coverings provide protection to others but not the wearer? Where is the science on this?
A: It significantly reduces the expulsion of droplets, which remain a significant route of transmission. It is discussed extensively by the Oregon Health Authority, the Centers for Disease Control, and federal OSHA on their website. And it has always been the rationale. Put simply, facial coverings protect others for the same reason and in roughly the same way that they prevent the wearer from blowing out a candle. [301]

Early in the COVID-19 pandemic, both the World Health Organization (WHO) and the Centers for Disease Control and Prevention (CDC) minimized the value of the general public's use of facial coverings, primarily in order to avoid diverting respirators and procedure masks from the health care workers who needed them most. However, by April 3, the CDC had reversed its position[302] and the WHO did so some time later. The primary reason for the reversal in position resulted from three, inter-related factors: first, there was a growing recognition that the virus could be transmitted by individuals who were not visibly symptomatic; second, there was a increasing recognition of the likelihood of droplet transmission as a mechanism of infection; third, a supply of cloth and other masks was rapidly developing that allowed facial coverings to be worn more generally without affecting the supply available to health care workers.

In April of 2020, Oregon OSHA adopted a rule addressing COVID-19 in employer-provided housing and in agricultural field sanitation and transportation, which included the first Oregon requirements outside health care for facial coverings to protect against COVID-19 risks in certain situations.[303] In June, the Oregon Health Authority (OHA) imposed facial covering requirements based on the reopening status of certain counties, and OHA established the first general statewide requirement in early July.

The consistent and correct use of facial coverings remains a key public health source control strategy for mitigating the effects of the COVID-19 pandemic in Oregon. When Oregon OSHA adopted the temporary COVID-19 rule addressing all Oregon workplaces in November 2020, the rule recognized such "source control" and essentially adopted the OHA requirements into the workplace rule by reference. The permanent rule continues that approach.

The Use of Face Coverings as Source Control

Oregon OSHA's COVID-19 standard requires the use of source control (specifically face masks, face coverings, or face shields) as a key mitigation strategy. One commenter argued that "[t}he term 'source control' is being used in novel way, apparently to sidestep existing Respiratory Protection Rules."[304] However, there is nothing "novel" about the term, nor does its use in this context originate with Oregon OSHA.[305] The term has been regularly used by researchers assessing how well various measures (including masks) work to prevent a potentially infected individual from infecting others, both in general and in relation to particular diseases.

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[301]This exchange comes from the question and answer session that preceded public comment during a hearing on the rule; such information is not normally treated as part of the public record, but this and several other exchanges were submitted to the record by Erik Harper in his written comments, February 23, 2021
[302]Huo Jingnan, "Why There Are So Many Different Guidelines for Face Masks for the Public," NPR, April 10, 2020; https://www.npr.org/sections/goatsandsoda/2020/04/10/829890635/why-there-so-many-different-guidelines-for-face-masks-for-the-public
[303]OAR 437-001-0749 "Temporary rule addressing the COVID-19 emergency in employer-provided housing, labor-intensive agricultural operations, and agricultural transportation," https://osha.oregon.gov/OSHARules/adopted/2020/ao2-2020-text-emergency-rules-ag-covid.pdf
[304]Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021
[305]Nor, for that matter, is there any need to "sidestep" the Respiratory Control Standard, as explained later in this section.

For example, a 2016 study specifically assessed the protection provided by the "source" wearing a mask or respirator to that provided if the "receiver" was wearing such protection:

> *With cough, source control (mask or respirator on Source) was statistically superior to mask or unsealed respirator protection on the Receiver (Receiver protection) in all environments. To equal source control during coughing, the N95 respirator must be Vaseline-sealed. During tidal breathing, source control was comparable or superior to mask or respirator protection on the Receiver. Source control via surgical masks may be an important adjunct defense against the spread of respiratory infections.*[306]

Another study reached a similar conclusion about the relative value of controlling disease spread at its source rather than through the use of respiratory protection.

> *Improved fit significantly enhanced the effects of source control protection. A Vaseline-sealed N95 respirator on the receiver offered less protection when compared with any mask on the source. Respiratory source control can offer more protection to HCW and potentially decrease the spread of aerosolized infections.*[307]

Yet another study attempted to quantify the infection risk reduction from the use of medical masks:

> *The study indicates a potential benefit of medical masks for source control, but is limited by small sample size and low secondary attack rates. Larger trials are needed to confirm efficacy of medical masks as source control.*[308]

The list of such usage is extensive. Far from being "novel," Oregon OSHA's use of the term "source control" is entirely consistent with its use in the scientific literature for many years, and the term is well-known to those who have considered the utility of using face masks in health care as a means of protecting patients from the health care workers with whom they come into contact.

The recognition on Oregon OSHA's part of the distinction between the use of facial coverings as source control, which protects others from the wearer, and the use of respiratory protection, which protects the wearer from airborne hazards, is essential to the decision to enforce the use of such "masks" in the workplace. Unfortunately, a failure -- or even a refusal -- to recognize that distinction on the part of many commenters led them to misunderstand not only the COVID-19 rule, but existing worker protections related to the use of respirators.

Use of Masks as Source Control Does not Violate the Respiratory Protection Standard

The recognition on Oregon OSHA's part of the distinction between the use of facial coverings as source control, which protects others from the wearer, and the use of respiratory protection, which protects the wearer from airborne hazards, is essential to the decision to enforce the use of such "masks" in the workplace. Unfortunately, a failure -- or even a refusal -- to recognize that distinction on the part of many commenters led them to misunderstand not only the COVID-19 rule, but existing worker protections related to the use of respirators.

Some comments focused on the inadequacy as respiratory protection of the facial coverings that can be used to address COVID-19. For example, one commenter made the following observation:

> *As you are well aware, these masks DO NOT COMPLY WITH ANY OSHA mask guidelines, even at the lowest level for minor dust situations.*
>
> *So why are you mandating that Oregon workers wear a non compliant mask? Kind of ironic, isn't it?*
>
> *I have been in industrial situations where the company was fined by OSHA for the use of dust masks.*[309]

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[306]*Patel RB, Skaria SD, Mansour MM, Smaldone GC. Respiratory source control using a surgical mask: An in vitro study. Journal of Occupational and Environmental Hygiene 2016 Jul;13(7):569-76, doi: 10.1080/15459624.2015.1043050. PMID: 26225807; PMCID: PMC4873718*

[307]*Mansour MM, Smaldone GC. Respiratory source control versus receiver protection: impact of facemask fit. J Aerosol Med Pulm Drug Deliv. 2013 Jun;26(3):131-7. doi: 10.1089/jamp.2012.0998. Epub 2013 Apr 1. PMID: 23544951.*

[308]*MacIntyre CR, Zhang Y, Chughtai AA, Seale H, Zhang D, Chu Y, Zhang H, Rahman B, Wang Q. "Cluster randomised controlled trial to examine medical mask use as source control for people with respiratory illness." BMJ Open. 2016 Dec 30;6(12):e012330. doi: 10.1136/bmjopen-2016-012330. PMID: 28039289; PMCID: PMC5223715.*

[309]*E-mail from Marvin Robinson, March 9, 2021*

Another commenter made a very similar point:

> *OSHA.Gov also states only NIOSH approved respirators are effective for prevention of workplace contaminates. And according to OSHA Respiratory Standard # 1910.134 -- disposable surgical masks are not tested by NIOSH. So mandating face masks in the workplace actually **goes AGAINST your own standards!**[310]*

Another commenter was somewhat more direct, writing, "Wow, you used to protect employees from masks. Now you are pathetic, demonic liars."[311]

Yet another commenter got a bit closer to an accurate statement of the rules when he wrote, "There previously was strict guidance on who should wear masks in the work place and ***depending on the type***, a stress and fit test."[312] [emphasis added]

If a respirator is required to address an existing respiratory hazard in the workplace, it is true that "dust masks" are not sufficient to satisfy that requirement. It is not true, however, as comments such as these appear to suggest, that either federal OSHA or Oregon OSHA has ever prohibited the use of either informal facial coverings or "dust masks" in the workplace. In many situations, both workers and consumers have long worn "nuisance masks" for a variety of purposes. As long as they are not used to protect against a respiratory hazard that exists in sufficient concentration to require the use of a respirator, the use of such masks is neither prohibited nor restricted by the Respiratory Protection Standard or any other workplace health and safety rule. For example, in Oregon OSHA's *Breathe Right* publication, the text notes that a "dust mask" that has not been NIOSH-approved is not a respirator.[313] It does *not*, however, say that their use for any purpose is prohibited, because it is not.

> *Q: Are you aware that OSHA states in their faq page at https://www.osha.gov/coronavirus/faqs#cloth-face-coverings that cloth face coverings and surgical masks "will not protect the wearer against airborne transmissable infectious agents due to loose fit and lack of seal or inadequate filtration"? If this is something Federal OSHA states on their own webpage, how can any mask rulings be justified in the name of protecting us from something like covid?*
> *A: Oregon OSHA is not only aware of it but agrees with it. That is why both Oregon OSHA and federal OSHA consider cloth face coverings to provide protection to others but they should not be relied upon to protect the wearer (although they provide some reduction in risk even for the wearer). OHA, CDC, Federal OSHA, and Oregon OSHA all agree that the purpose of facial coverings is as Source Control, not as protection for the wearer.[314]*

In addition to its own reply to the question, Oregon OSHA finds it useful to provide additional information from the same federal OSHA link used in the question. Federal OSHA answers the question, "Should workers wear a cloth face covering while at work, in accordance with the Centers for Disease Control and Prevention recommendation for all people to do so when in public?

> *Yes.*
>
> *Consistent with the Centers for Disease Control and Prevention (CDC) recommendation for all people to wear cloth face coverings when in public and around other people, wearing cloth face coverings, if appropriate for the work environment and job tasks, conserves other types of personal protective equipment (PPE), such as surgical masks, for healthcare settings where such equipment is needed most.*
>
> *Note that cloth face coverings are not considered PPE and cannot be used in place of respirators when respirators are otherwise required.[315]*

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[310] *Written comments from Michelle McDevitt, April 1, 2021*
[311] *E-mail received March 20, 2021*
[312] *E-mail from Lindsay Briggs, February 24, 2021*
[313] *Breathe Right! Oregon OSHA's guide to developing a respiratory protection program for small-business owners and managers, published by Oregon OSHA's Standards & Technical Section, June, 2016, p. 11.*
[314] *This exchange comes from the question and answer session that preceded public comment during a hearing on the rule; such information is not normally treated as part of the public record, but this and several other exchanges were submitted to the record by Erik Harper in his written comments, February 23, 2021*
[315] *COVID-19: Frequently Asked Questions, USDOL-OSHA, COVID-19 - Frequently Asked Questions | Occupational Safety and Health Administration (osha.gov)*

There is no difference between the approach used by federal OSHA and by Oregon OSHA on this issue.

The Respiratory Protection Standard covers a wide range of respiratory protection, beginning with the relatively modest effects of an N-95 "filtering facepiece" respirator and extending to the use of much more complex methods of protection, which might include either an air-supplied respirator or a self-contained breathing apparatus. The need for medical evaluation prior to respirator use is largely driven by the use of these more demanding means of respiratory protection. N-95s and other filtering facepiece respirators are less restrictive than other respirators but still likely to be more restrictive when it comes to breathing than procedure masks or cloth facial coverings.

For filtering facepiece respirators, the burden they create on the body is relatively modest – in fact, in contrast to any other type of respirator, the Respiratory Protection Standard specifically permits their voluntary use by employees without the need for a medical evaluation or the other elements of a respiratory protection program.[316] The employer need only share Appendix D of the standard with employees who make such use of an N-95. And it is unquestionably the filtering facepiece respirators that are most similar in both form and burden to a procedure mask or a cloth facial covering.

Use of Masks Does not Create an Oxygen-Deficient Atmosphere

In certain discussions over the past year, as well as in the rulemaking record, Oregon OSHA has encountered the surprising claim that the use of facial coverings violates the protections against an oxygen deficient atmosphere. For example, one commenter wrote, "Your own governing body has strict rules about oxygen content that all masks violate."[317] The comment's use of "governing body" apparently refers to federal OSHA, which reflects something of a misunderstanding of the relationship between federal OSHA and Oregon OSHA. However, the more significant error is in believing that there is an oxygen rule that "all masks" violate. There is no such rule. Those individuals who claim otherwise apparently misunderstand the rules they are claiming to apply.

Ironically, the authority to which some individuals have pointed in making this claim is a modified version of a page of Oregon OSHA's own *Breathe Right* publication, already referenced. Oregon OSHA has seen several reproductions of the general discussion of respiratory hazards, but with language added to the text purporting to highlight an oxygen monitoring requirement that does not appear in the text itself – because it does not exist.

The page in question includes two statements about oxygen deficiency. The body of the text itself includes the following statement:

> *When the oxygen concentration in normal breathing air drops below 19.5 percent by volume, the air becomes oxygen deficient — a significant concern for those who work in confined spaces. Harmful effects include impaired thinking and coordination, unconsciousness, and death.*[318]

The text box on the side of the same page highlights the same issue as one example of a respiratory hazard:

> *Oxygen-deficient atmosphere. Normal air has an oxygen concentration of 20.8 percent by volume. When the concentration drops below 19.5 percent, the air is oxygen deficient and considered immediately dangerous to life and health (IDLH).*

This text is discussing the atmosphere of a room or other space occupied by an employee. It is *not* referring to the gap between the wearer's lips and a facial covering or other mask, and it certainly does not prohibit the use of any mask other than one that supplies its own oxygen. If that were the purpose of this language, the entire publication could be shortened considerably, since fully half of it is a discussion of the use of respirators that such an interpretation would deem to be illegal.[319] There is no rule prohibiting the use of facial coverings, nor is there any rule requiring that the oxygen levels inside a respirator be monitored.

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[316] *29 CFR 1910.134(c)(2), adopted by reference by Oregon OSHA.*
[317] *E-mail from Roxanne Steward, March 23, 2021*
[318] *Breathe Right! Oregon OSHA's guide to developing a respiratory protection program for small-business owners and managers, published by Oregon OSHA's Standards & Technical Section, June, 2016, p. 7*
[319] *Ibid.*

Oregon OSHA recognizes that at least some of the people making this argument are doing so sincerely. Certainly that would seem to be the case with the 68 individuals who had filed a Complaint about State Program Administration (CASPA) with federal OSHA against Oregon OSHA at the time the rule was adopted. Apparently, these documents were all similar in content to the one that made the following argument:

> *Respiratory standards are documented law and recorded in the Federal Register, Volume 64, p. 11159. Even* ***Oregon OSHA's Breathe Right Guide*** *To Respiratory Health provides a clear understanding that employers need to be testing their employees daily for their oxygen concentration levels when required to wear a mask. It says so on page 7.*
>
> *The Governor's Executive Order 20-66 and ensuing and most recent Face Mask Guideline of December 3, 2020, requires all subject employees to wear masks or their employers will suffer fines, loss of licenses and/or lockdown. Nowhere in this mandate does it state to follow the current laws requiring testing of oxygen concentration levels of employees wearing masks.*
>
> *Even Doctors are fitted by OSHA respiratory experts who understand the proper fitting of a mask. Oregon OSHA is in violation of the Federal Standards and needs to either enforce current law or stop harassing business owners about mandatory masks without proper fitting and testing.*[320]

The letter continues with an extended quotation from Richard Fairfax of federal OSHA in a letter written some years ago.[321] Federal OSHA has responded to these complaints by indicating that there is no basis for a further investigation:

> *This is in response to your March 30, 2021 phone call and email to the Occupational Safety and Health Administration (OSHA) regarding a complaint about State Program administration (CASPA) concerning the state of Oregon. In your letter, you allege that Oregon OSHA is in violation of federal standards and needs to either enforce current law or stop harassing business owners about mandatory masks without proper fitting and testing.*
>
> *We have carefully considered your request. However, we have determined that a CASPA investigation is not warranted in this case. Oregon OSHA's temporary emergency rules have been reviewed and approved by OSHA, including the requirements for the use of masks, face shields, or facial coverings to prevent the spread of COVID-19. This rule was determined to be at least as effective as OSHA standards.*[322]

Oregon OSHA notes that, had there been a problem that was causing multiple Oregon workers to face IDLH atmospheres, federal OSHA would certainly have acted, and done so quickly. The federal response (including the prior approval of the temporary rule) appears to confirm Oregon OSHA's assessment of the issue.

With regard to the first paragraph of the complaint, nowhere on page 7 (or any other page) of the *Breathe Right* publication does it say anything about "testing employees daily for their oxygen concentration levels when required to wear a mask." The publication refers to the level of oxygen concentration *in the air*, not in the blood. And, if it were indeed an IDLH environment, daily monitoring would presumably be too late; most, if not all, of the workers in question would already have died – that's what the publication means when it says "*immediately* dangerous to life and health."

With regard to the second paragraph, Oregon OSHA agrees. Nothing in the executive orders or any guidance related to facial covering use says "to follow the current laws requiring testing of oxygen concentration levels of employees wearing masks." But this is not an oversight or an omission. As already mentioned, there are no such current laws.

Oregon OSHA finds the third paragraph puzzling in several respects. First, while medical professionals wearing respirators are indeed fit-tested as required by the standard, they generally are *not* wearing respirators but procedure masks (frequently called "surgical masks"), which are not respirators and in relation to which fit-testing is typically not conducted. Second, fit-testing is a requirement of the respiratory

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[320]CASPA filed by an unknown complainant with Cecil Tipton, federal OSHA Area Director, Portland Area Office, on March 30, 2021 and provided to Oregon OSHA (as is routine with such complaints) in redacted form to protect the identity of the complainant
[321]Oregon OSHA would have asked Mr. Fairfax to personally correct the complainants' misunderstanding of the situation to which his words should be applied. Unfortunately, he retired from the agency in 2013.
[322]Letter from Cecil Tipton to unknown CASPA complainant, April 12, 2021

protection standard, which need not be applied to source control (although a well-fitted mask is certainly a good idea, even when applied as source control).

The most significant issue is that the comment about fit-testing highlights the contradiction in the complainant's understanding of the rule and how it applies to the current situation. The OSHA and Oregon OSHA respiratory protection rules require fit-testing *to ensure against leakage* around the edges of a close-fitting respirator. But if the concern is truly that the mask somehow creates an oxygen-deficient environment, it appears clear than a well-fitted mask where no leakage could occur around the edge of the mask would make the problem worse, not better. If requiring employees to wear facial coverings were truly the problem the complainant believes it is, requiring those same employees to wear well-fitted facial coverings would obviously not be the solution.

To the degree that there are any legitimate concerns about the inhibition of breathing when wearing a respirator, a mask, or any other facial covering, they do not involve oxygen-deficient IDLH atmospheres. If there is a moment following exhalation when the small space within a cloth mask experiences a lower than ideal oxygen concentration, the solution is generally a simple one: inhale.

Do Facial Coverings Work? The Non-Existent "Stanford Study"

Earlier this year, there was considerable discussion about a study that was typically dubbed "the Stanford Study," which was also referenced by several of those who commented on the rule. One of the more rigorous references to the study was made in the following comment:

> *Not only are masks proven to be harmful to children without any benefits of protection from viral infection, but they're harmful to adults. On November 22, 2020, Dr. Vainshelboim published research on US National Library of Medicine National Institutes of Health the following:*
>
> *"Although, scientific evidence supporting facemasks' efficacy is lacking, adverse physiological, psychological and health effects are established. It has been hypothesized that facemasks have compromised safety and efficacy profile and should be avoided from use. The current article comprehensively summarizes scientific evidences with respect to wearing facemasks in the COVID-19 era*".[323]

The comment continued with additional quotations from the "research" in question and then accurately identified the paper[324] as having been published in a journal entitled *Medical Hypotheses.* Unlike most of those referencing the paper, this particular commenter avoided referring to it as a "Stanford Study" or describing it as research actually conducted by the National Institutes of Health. However, the problems with the paper itself – which Oregon OSHA had identified in its own analysis of the document – are probably best summarized by the retraction notice that came to Oregon OSHA's attention in its pre-publication form:

> *This article has been retracted at the request of the Editor-in-Chief.*
>
> *Medical Hypotheses serves as a forum for innovative and often disruptive ideas in medicine and related biomedical sciences. However, our strict editorial policy is that we do not publish misleading or inaccurate citations to advance any hypotheses.*
>
> *The Editorial Committee concluded that the author's hypothesis is misleading on the following basis:*
>
> *1. A broader review of existing scientific evidence clearly shows that approved masks with correct certification, and worn in compliance with guidelines, are an effective prevention of COVID-19 transmission.*
>
> *2. The manuscript misquotes and selectively cites published papers. References #16, 17, 25 and 26 are all misquoted.*
>
> *3. Table 1. Physiological and Psychological Effects of Wearing Facemask and Their Potential Health Consequences, generated by the author. All data in the table is unverified, and there are several specu-lative statements.*

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[323] *Written comment from Darlene Bartlow, March 30, 2021*

[324] *2021--Vainshelboim : Vainshelboim B. "Facemasks in the COVID19 era: A health hypothesis". Medical Hypotheses. 2021;146:110411. doi:10.1016/j.mehy.2020.110411 ----* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7680614/

> *4. The author submitted that he is currently affiliated to Stanford University, and VA Palo Alto Health Care System. However, both institutions have confirmed that Dr Vainshelboim ended his connection with them in 2016.*
>
> *A subsequent internal investigation by the Editor-in-Chief and the Publisher have determined that this article was externally peer reviewed but not with our customary standards of rigor prior to publication. The journal has re-designed its editorial and review workflow to ensure that this will not happen again in future.*
>
> *The Editor-in-Chief and the Publisher would like to apologize to the readers of The Journal for difficulties this issue has caused.*

Facial Coverings Work to Reduce the Spread of COVID-19

> *I will address only masking in this missive. The evidence is VERY clear in scientific research that masks do not stop viruses from spreading. I can provide many references, but I imagine the actual research is not unknown to those running this project. Masks DO NOT stop a virus.*[325]

Like many such comments, the commenter quoted above chose not to provide the actual references but simply to suggest that they are available. Another commenter suggested, "It has been proven masks do not provide protection from any virus."[326] Yet another commenter suggested that the problem was not necessarily that masks were proven to be *ineffective* but that "masks are not scientifically proven to work in the prevention of disease."[327]

Although it is possible that a number of such comments are based on the so-called "Stanford Study" Oregon OSHA has carefully reviewed the general scientific literature to try to determine the source of such claims, as well as to assess the truth of the matter. As already noted, the CDC continues to believe the balance of research supports their effectiveness.[328] Also as discussed previously, one of the studies to which some critics point to support their own argument actually provides one of the strongest arguments in favor not only of wearing facial coverings, but of mandates requiring their use.[329]

One of the most clearly sourced criticisms of requiring the use of facial coverings was the following comment:

> *While debate on mask effectiveness continues, there have been many studies showing that masks are ineffective at reducing viral transmission. This study by Xiao et al. (1) reviewed ten randomized control trial (RCT) studies and found "no significant reduction in influenza transmission with the use of face masks." This study by Bundgaard, et al. (2) specifically looked at SARS-CoV-2 transmission and found "a recommendation to wear a surgical mask when outside the home among others did not reduce, at conventional levels of statistical significance, incident SARS-CoV-2 infection compared with no mask recommendation." Though they do note that "the trial did not test the role of masks in source control of SARS-CoV-2 infection."*[330]

With regard to the two papers referenced in the first comment, the first was discussed extensively in a previous section in relation to inaccurate claims that were made about it. The above comment does not make the error of claiming that the paper or any of the studies on which it was based specifically addressed COVID-19. However, that is also the obvious limitation of the study. Not all viruses are alike in their modes of transmission and in their virulence. While the study by Xiao et al may well give one reason to suspect that

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[325] *E-mail from Carol B. Low, February 16, 2021*

[326] *E-mail from Patricia Searls, March 5, 2021*

[327] *E-mail from Stephanie Gilbert, February 21, 2021; Oregon OSHA notes that her claim may be overbroad in a different respect. There seems to be little doubt in the literature that masks can reduce the spread of bacteriological disease; the open question concerns viruses, and the virus that causes COVID-19 in particular.*

[328] *"Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2," CDC, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fmore%2Fmasking-science-sars-cov2.html*

[329] *Guy GP Jr., Lee FC, Sunshine G, et al. "Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020." Morbidity Mortality Weekly Report 2021;70:350–354. DOI: http://dx.doi.org/10.15585/mmwr.mm7010e3external icon*

[330] *Written comments by Kelly Kane, March 28, 2021*

the use of facial coverings may be of limited utility in preventing flu transmission,[331] it does not provide a firm basis to transfer that assessment to COVID-19. The CDC was aware of the body of research in question with regard to the use of masks in influenza prevention when it determined that facial coverings might be useful in addressing COVID-19, and the research conducted in the past year was obviously not accounted for by the paper in question.

With regard to the Bundgaard et al study,[332] the commenter acknowledges one of the major limitations of its application to the use of facial coverings as source control: It simply did not evaluate that issue. Therefore it has, at best, limited value in considering the question here. A closer evaluation of the study suggests that it may indeed be relevant, because the study acknowledges that mask use appears to have an effect on overall transmission rates (although at the time the evidence supporting this conclusion was modest), and the question it raises is whether that is from a "protective effect" or from "source control":

> *Observational evidence suggests that mask wearing mitigates SARS-CoV-2 transmission, but whether this observed association arises because masks protect uninfected wearers (protective effect) or because transmission is reduced from infected mask wearers (source control) is uncertain. Here, we report a randomized controlled trial that assessed whether a recommendation to wear a surgical mask when outside the home among others reduced wearers' risk for SARS-CoV-2 infection in a setting where public health measures were in effect but community mask wearing was uncommon and not recommended.*[333]

The study evaluated the use of masks to determine whether they protect the wearer from COVID-19 and concluded that the evidence did not support such a conclusion; the reported reduction in infection rates in comparison to the control group was not statistically significant. The paper includes the following discussion of the application of the study:

> *These findings do offer evidence about the degree of protection mask wearers can anticipate in a setting where others are not wearing masks and where other public health measures, including social distancing, are in effect. The findings, however, should not be used to conclude that a recommendation for everyone to wear masks in the community would not be effective in reducing SARS-CoV-2 infections, because the trial did not test the role of masks in source control of SARS-CoV-2 infection. During the study period, authorities did not recommend face mask use outside hospital settings and mask use was rare in community settings. This means that study participants' exposure was overwhelmingly to persons not wearing masks.*

At the very least, it is worth noting that if it is true "that mask wearing mitigates SARS-CoV-2 transmission," then the study in question appears to have resolved the question in favor of "source control" rather than "protective effect." If this study has any relevance to the question at hand, it tends to suggest that requiring the use of facial coverings as source control – the approach settled upon by Oregon OSHA – is likely to be much more useful than simply allowing those individuals who are concerned about their own risks to wear such facial coverings for self protection.

In light of the foregoing discussion, Oregon OSHA simply cannot agree with the individual who said of this study in relation to Oregon OSHA's proposed rule, "…the nail in the coffin was the Danish mask study last fall. It has been the best structured study on this issue anywhere in the world, and it shows conclusively that mask wearing does not prevent or reduce the spread of the virus.[334] If he has reviewed the study closely enough to determine it is the "best structured" study in the world, it is surprising that he apparently failed to note that the authors themselves said, "The findings, however, should not be used to conclude that a recommendation for everyone to wear masks in the community would not be effective." Their warning notwithstanding, that is exactly the argument the commenter is making in the present instance.

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[331]Oregon OSHA notes that the practical "laboratory" created by the last year may provide additional insights on the question of influenza transmission as well.

[332]Bundgaard H, Bundgaard JS, Raaschou-Pedersen DET, von Buchwald C, et al "Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Controlled Trial," Annals of Internal Medicine, 2021 Mar;174(3):335-343. doi: 10.7326/M20-6817. Epub 2020 Nov 18. PMID: 33205991; PMCID: PMC7707213.

[333]Ibid..

[334]Written comments by John Liljegren, April 2, 2021

Oregon OSHA notes that even some of those critical of one aspect of the rule or another acknowledged the value of facial coverings (at times based their argument on an assessment of their effectiveness). For example, one commenter who argued in favor of fewer cohorting and other restrictions in schools noted, "We have multiple studies that show schools are not an environment for disease spread **when masks are worn**."[335] [emphasis added] Another making the same argument wrote, "There are simple measures we can take to assure physical safety but we should only embrace the measures supported by science. **Kids can and should wear masks**.[336] [emphasis added] Similarly, a commenter arguing in favor of relaxing requirements in relation to outdoor sports wrote, "Masks are an important tool in preventing the spread of COVID-19. We are NOT anti-mask."[337]

Oddly enough, even one commenter who questioned the value of facial coverings seemed to acknowledge their potential utility in a comment about another provision in the rule: "There is insufficient evidence that the "exposure" definition means a worker was exposed to SARS-COV-2, especially if both employees were wearing face coverings."[338] Oregon OSHA is aware that the commenter is actually suggesting that if Oregon OSHA believes facial coverings are effective then no other protective measures are necessary. But that involves an overly simplistic approach to risk reduction, similar to that reflected by the following exchange:

> *Q: What about aerosolized particles and viruses themselves that can pass freely through a cloth face covering through the normal act of respiration? These particles are so tiny you would have to wear plastic wrap over your mouth to keep them from entering and leaving your body. Does OSHA acknowledge that this is another transmission mode and that it can't be entirely stopped through a simple cloth face covering?*
> *A: The virus does not travel freely outside of droplets. Even the aerosolized transmission involves very small aerosolized droplets. However, the question is correct that wearing facial coverings alone does not provide complete protection. That is why the rule relies upon other protection methods as well. But it is probably also true that the single most useful protective measure is the use of facial coverings. Very few protective measures in relation to any workplace hazard provide absolute protection.*[339]

Very few protective measures in any sphere are absolute. That is why many Oregon OSHA rules rely upon layered protections that provide varying incremental reductions in the overall risk. Any workplace health and safety practitioner who seeks a single "silver bullet" to solve any problem is likely to be disappointed. In the context of the pandemic, Oregon OSHA is unaware of any public or occupational health official who has argued that any single protective measure will fully address the risks. Oregon OSHA has certainly not done so.

Finally, Oregon OSHA turns to the claims by some individuals that experience in other states shows that facial covering requirements are ineffective. For example, one commenter wrote, "As shown by the comparison of masking in Oregon to not masking in S.D., masking has no benefit! I emphatically vote NO on

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[335] *"Physicians' Letter," delivered electronically by Leslie Bienem, DVM, MFA, Faculty Member, OHSU-PSU School of Public Health., and also signed by the following physicians: Amy Dechet, MD; Anna Bar, MD; Meera Jain MD, FACP; Cindy McPhee, MD; Julie Currin, MD; Heather Long, MD; Kathleen Oldread, MD, FAAP; Sarah Powers, MD, FAAP; Nisha Desai, MD; Alison Skalet, MD; Melissa Sheiko, MD; Fawn Wolf, MD; Farzana Molvi, MD; Karen Oyama, MD; Heather Hansen-Dispenza, MD; Annie Mack, MD; Chrissie Ott, MD; Andrea Matsumura, MD; David O'Brien, MD; Sahra Rahimtoola, MD; Todd Borus, MD; Amber An, DO; Kelsey Brody, MD; Rebecca Bremner, MD; Emily Hu, MD; Stephanie Trautman, MD; Kevin White, MD; Brinton Clark, MD; Tracy Funk, MD; Lisa Turner, MD; Maeran Landers, MD; Julia Ho, MD; Justin Leitenberger, MD; Sabra Leitenberger, MD; Joseph Obadiah, MD; Amy Marr, MD; Lance Marr, MD; Jon Alexander, MD; Jessica Mehta, MD; Jeanne Robinson, MD; Amy Frankel, MD; Donna Givens, MD; Tricia James, MD; Rachel Young, MD; Danna Ogden, DO; Lyndsey McCartney, MBBS; Laura Sanderson, MD; Claire Kassakian, MD; Olga Senashova, MD; Shannon O'Brien, MD; Lorinna Lombardi, MD; Kathryn Moyer, MD; Claudia Taylor, MD; Kelsie Storm, MD; Alex Foster, MD; Tatyana Shaw, MD; Anne Breitinger, MD; Tricia James, MD; Ben Pedroja, MD; Rachel Plotinsky, MD; Brinton Clark, MD; Jesse Powell, MD; Ron Dworkin, MD; Nicholas Stucky, MD; Jason Heino, MD; Emma White, MD; Amy Barnes, MD; Michelle Benton Babaie, MD; Jeffrey Degen, MD; Jeremy Lynn, MD.*

[336] *Physicians' Letter*

[337] *E-mail from Wally Lierman*

[338] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

[339] *This exchange comes from the question and answer session that preceded public comment during a hearing on the rule; such information is not normally treated as part of the public record, but this and several other exchanges were submitted to the record by Erik Harper in his written comments, February 23, 2021*

continued Covid restrictions, including masking."[340] The comment was accompanied by a table that compared Oregon's 165,000 cases and 2,396 deaths to South Dakota's 118,000 cases and 1,935 deaths.[341] However, what the table (and the commenter) fail to acknowledge is the simple reality that Oregon's 2020 population was 4,237,256,[342] while South Dakota's population was 886,667.[343] Without adjusting for that difference in population the numbers have no meaning.

Oregon OSHA does believe these numbers are illustrative of the different approaches used by the two states during the pandemic. Using the numbers provided by the commenter,[344] an individual resident of South Dakota would have a 13.3% chance of having contracted COVID-19 and a 0.22% chance of having contracted *and* died from it. The average Oregon resident, on the other hand, would have a 3.9% chance of having contracted COVID-19 and a 0.06% chance of having contracted *and* died from it. With South Dakota residents 3.4 times more likely to have contracted the disease and 3.67 times more likely to have contracted it and died, Oregon OSHA does not believe the numbers encourage Oregon to follow in South Dakota's footsteps. Oregon OSHA does note for the record that the approach to the use of facial coverings was not the only difference between the two states in responding to the pandemic, and it would be inappropriate to attribute Oregon's relative success in controlling the pandemic to masking alone (or to any single cause, for that matter).

Based on its review of the relevant research and its evaluation of the totality of the record, Oregon OSHA remains convinced – as do OHA and the CDC – that the use of facial coverings by individuals who do not know whether they are infected with COVID-19 is an important proactive measure, in the workplace and elsewhere. Therefore, Oregon OSHA has retained the reference to the OHA facial covering guidance, as well as an independent provision for those limited circumstances where OHA's guidance might not apply.

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[340]E-mail from Sanna Powell

[341]Ibid.

[342]U.S 2020 Census Data, https://www.census.gov/library/stories/2021/04/2020-census-data-release.html, updated April 26, 2021

[343]Ibid

[344]An earlier discussion in the section on assessing the COVID-19 risks used somewhat different numbers, based on data gathered by Oregon OSHA, but the essential conclusion remains the same.

Section IX: The Question of Sanitation

Although the principal modes of SARS-CoV-2 transmission are through airborne exposure to respiratory droplets and to aerosols, the CDC continues to believe that contact transmission from contaminated surfaces or fomites can also occur,[345] although it appears much less frequent than was anticipated at the outset of the pandemic.

The proposed rule included the same sanitation requirements that Oregon OSHA had adopted as part of the temporary rule in November.

As several commenters noted, the CDC reevaluated the likelihood of surface transmission earlier this year. For example, one commenter focused specifically on the frequency of sanitation:

> *We would like OSHA to consider changing the rules specifically regarding to cleaning surfaces. Recent information shows that contaminated surfaces are not a likely source of COVID transmission.*
>
> *We currently spend an additional 2 hours daily for COVID cleaning (our facility is in use for less than 12 hours daily) to clean tools, trucks, and counters and other high touch surfaces. This is a burden on our small company.*
>
> *We would request that the cleaning for COVID be reduced in frequency to 1 time per week (with the exception of restrooms and production areas).*[346]

Although Oregon OSHA determined it could not justify such a significant reduction in cleaning frequency, given that the CDC continues to recommend cleaning be conducted at least daily,[347] the rule as adopted does significantly reduce the sanitation expectations. Oregon OSHA also notes that the rule retains the language providing flexibility for infrequent use facilities, as well as providing a certain amount of latitude to employers in identifying high-touch areas.

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[345] *"COVID-19: Cleaning and Disinfecting Your Facility," CDC, updated April 5, 2021; https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html*

[346] *E-mail from Sue Zeni on behalf of Hummingbird Wholesale, March 3, 2021*

[347] *"COVID-19: Cleaning and Disinfecting Your Facility," CDC, updated April 5, 2021; https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html*

Section X: The Question of Ventilation

Although the earliest efforts to combat the pandemic focused on surface contamination and on relatively large airborne droplet transmission, it has become increasingly clear that aerosol transmission of the virus is a reality. While there remains uncertainty about the relative balance between droplet transmission and purely aerosol transmission, Oregon OSHA's proposed rule – and the temporary rule on which it was based – attempted to strike a balance between the reality of aerosol risks and the challenges of addressing those risks in the context of a temporary (albeit it not a brief) emergency.

The rule as proposed largely retained the provisions from the temporary rule focusing on the best use of existing ventilation systems without requiring the installation of new systems. It also added a one-time requirement for employers to certify that they were operating their systems in compliance with the rules.

Some commenters questioned the effectiveness of efforts to improve ventilation in workplaces. For example, one wrote, "…scientific studies have not shown this [ventilation] to be an effective avoidance measure for COVID-19 infection and spread."[348]

Oregon OSHA finds this argument unpersuasive. While direct study in the COVID-19 context has been limited, it seems clear that there is an increasingly robust body of evidence regarding aerosol transmission.[349] Oregon OSHA previously recognized the potential for such transmission in the temporary COVID-19 rule, and there is no basis to back away from that conclusion in this rulemaking. And, if the virus is subject to genuine aerosol transmission, there can be little doubt that the ventilation system and the infusion of outside air matters when it comes to protecting workers inside a building.

Other comments focused on concerns over the costs of regular maintenance:

> *New ventilation requirements will add significant cost burdens. It can be quite expensive to get service providers out annually, let alone quarterly. This is even truer if there are wildfires and/or smoke damage again, prompting the need to change filters again.*[350]

Still other comments by employers and employer organizations focused on the challenges of the new certification requirement. For example, one employer made the following observation concerning the bottleneck that would be created under his reading of the certification requirement:

> *HVAC certification would require time and payments for inspectors. This would create a market where inspectors are required, putting businesses at the mercy of the inspectors schedule and cost. Some businesses may require temporary closure if they cannot have an inspection prior to the proposed June 1 deadline, which is likely to happen when all businesses are required to have this done.*[351]

One employer association wrote,

> *The requirement for certification will mean that dental offices will need to bring in an HVAC specialist, which will be a logistical nightmare. As well, many clinics operated by ODA members are housed within buildings that are not owned by the clinic, and they may have no control over, or access to, the HVAC system.*[352]

The business coalition addressed the same requirement in its comments:

> *The proposed rules also require an employer to attest in writing their HVAC systems are in compliance with this rule. Is this writing to be submitted to OR-OSHA? What are the clear requirements to satisfy compliance? We recommend deleting this new requirement.*[353]

In contrast, labor and worker advocates argued for several additional requirements. The Oregon AFL-CIO argued that the proposed rule "only scratches the surface" of the needed protections:

> *As an airborne infectious disease, data continues to substantiate that air flow and filtration is critical for limiting the spread of COVID-19 and future airborne diseases. And while we appreciate the addition of a*

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[348] *E-mail from Ryan Israelson, M.D., February 9, 2021*

[349] *See, for example, Greenhaigh, T, et al "Ten scientific reasons in support of airborne transmission of SARS-CoV-2," The Lancet, Published April 15, 2021; DOI: https://doi.org/10.1016/S0140-6736(21)00869-2*

[350] *Written comments from Mark Bigel on behalf of Al's Garden Center and Greenhouses*

[351] *E-mail from Ryan Israelson, M.D., February 9, 2021*

[352] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*

[353] *Memo from Paloma Sparks on behalf of the Business Coalition, previously identified, March 26, 2021*

> *written certification (although not on an annual basis) of the ventilation compliance with the rule, the underlying rule still lacks the fundamental requirement that ventilation systems meet the American National Standards (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standards 62.1 and 62.2 and ventilation certification should be on an annual basis, at a minimum. Employers would be better served with this level of clarity, in addition to detailed language such as inspecting and calibrating controls, repairing ducts and leaving ports open when spaces are not occupied. And again, by June 1 2021, the rule steps up requirements for ventilation with some level of specificity, but lacks requirements on ASHRAE, highest rated HVAC filters, MERV-13 filters or higher, or protective policies and procedures like portable air machines or purifiers if ASHRAE standards cannot be met by the HVAC system. Simply put, the permanent rule only scratches the surface of necessary short and long-term protections on airborne infectious disease. Investing in quality ventilation systems now is critical to Oregon's containment and safety efforts*.[354]

Similarly, the Oregon Law Center argued that all employers needed to be required to do more than "simply open windows:"

> ***Require employers to maintain ventilation system at least annually and meet the provisions of the ANSI/ASHRAE Standards 62.1 and 62.2****: Workplaces should be required to comply with the industry standard for minimum ventilation rates for workplace safety. It goes without saying that frequent maintenance of ventilation system is important to workers working inside a building with other workers for long hours during a pandemic caused by a virus that is transmitted from person to person via droplets or airborne particles. Given that the pandemic has provided ample time and reason to upgrade ventilation systems at workplaces, and that there may additional federal funds that could be allocated to enhancing basic systems, such as HVAC filters, now seems like the opportunity to require workplaces to meet more robust industry standards. Short of upgrading the HVAC filters, an establishment must be asked to put in air purifiers appropriate for the space and density. Asking establishments to simply open windows is not sufficient protection.*[355]

The issue of ventilation is one of the most challenging issues to address within the context of this rulemaking, because unlike many other available control measures the cost of ventilation – even of portable air purifiers – can be significant in relation to the size of any particular establishment.

Ultimately, Oregon OSHA determined that the proposed rule – at least as Oregon OSHA intended it to be read – struck the appropriate regulatory balance. Therefore, the only change in the final rule related to ventilation is language making it clear that the employer's attestation does not require independent certification or verification, but can be made based on the employer's reasonable knowledge. Oregon OSHA also committed to provide a sample form for use in documenting the employer's attestation.

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[354] *Written comments from Jess Giannettino-Villatora on behalf of Oregon AFL-CIO, April 2, 2021*

[355] *Letter from Nargess Shadbeh and David Henretty on behalf of the Oregon Law Center, April 2, 2021*

XIII. The Question of Vaccines

> *Please vote **NO o**n the mandatory vaccine law for Oregon Workers.*[356]
>
> *Many people have been vaccinated and the rules are not lifting in any way, so you are not incentivizing more people to get vaccinated since there appears to be no benefit in doing so.*[357]

The language about vaccination in the proposed rule, as well as the way in which it was represented by others, generated a significant number of comments. In addition, a number of other commenters suggested that either that vaccination rates or vaccination eligibility should be given more weight in the context of the rulemaking.

The Proposed Rule Did Not Require Vaccination

The proposed rule would have required employers to cooperate with on-site vaccination efforts if requested to do so by the Oregon Health Authority (OHA) or by a local public health agency. Even in such circumstances, it would not have required anyone to get a vaccination, nor would it have granted either employers or public health authorities any ability to require vaccinations that they do not otherwise have. Simply put, no person would have been required to get a vaccination as a result of the adoption of the Oregon OSHA rule.

However, the rule included a discussion about how to handle such requirements if they were put into place, and it included the use of a "vaccine declination form" patterned after the existing provision found in the Bloodborne Pathogens standard.[358]

Some commenters who read the proposed rule, or who relied upon other sources to learn about what was in it, wrote expressing their opposition to mandatory vaccinations. The comment that opens this section is one such. The following comment reflects a similar misunderstanding (as well as several other misunderstandings, in the case of the first one):

> *I just seen this letter floating around saying there is a proposal for mandatory vaccines, face coverings, and social distancing even after this "pandemic" is over. My question...why? And how can you force me and my family to take a vaccine that we do not want to put in OUR own bodies. You may say well I'm not forcing anyone to...well you are if you are requiring all businesses of employment to enforce this. This is not right! This is America and you have the freedom to choose what's right for yourself. Not to mention this virus has a 98% recovery rate and the vaccine doesn't even guarantee u still won't get it. This is foolish think on whoever came up with this proposal.*[359]
>
> *There should never be a required or mandated vaccine of any kind. Vaccines work, and if the public is given good, honest and clear information, then citizens should want to get the vaccine. Regardless, it should be a personal choice.*[360]

Another commenter inquired, "Please inform me, as I read the rules this could include employers requiring employees to get the Experimental CoVid-19 vaccination to work... Correct?"[361]

Yet another comment offered the following criticism of the vaccines as a reason to avoid requiring them:

> *Scientific research has established that prophylaxis using Ivermectin and Iota Carageenan is at least as effective as any vaccine for prevention of severe COVID-19 symptoms.* ***There is no research to demonstrate that the vaccines prevent anyone from being infected by COVID-19 or from transmitting it to others.*** *There is no long-term evidence of vaccine safety. Vaccines are being used only under emergency use authorization, and safety trials have not been completed. For all these reasons, vaccination should be strictly voluntary.****[362]***

While Oregon OSHA has a very different perspective on the value of the vaccines and joins OHA in strongly encouraging all Oregonians who are able to do so to become vaccinated (not least because widespread

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[356] *E-mail from Lynnette Okula, April 2, 2021*
[357] *E-mail from Charlene Kuipers, March 22, 2021*
[358] *29 CFR 1910.1030 (f)(2), which Oregon OSHA has adopted by reference*
[359] *E-mail from Nate Pratt, March 16, 2021*
[360] *E-mail from Tim Freeman, Douglas County Commissioner*
[361] *E-mail from Susan Waite, February 14, 2021*
[362] *Written comments from Jerry Russell, March 26, 2021*

vaccination will enable a more rapid repeal of the Oregon Workplace COVID-19 Rule), the proposed rule did not require vaccination.

Addressing the Vaccination Language of the Proposed Rule

Even among those who recognized that the rule did not require vaccinations, several commenters had concerns about the declination language and other provisions in the proposed rule related to vaccines. For example, the business coalition offered the following:

> ***Delete Confusing and Burdensome Vaccine Tracking:*** *(C) on pg. 29 seems to both remove employers ability to require vaccinations and simultaneously applies a new mandate on employers to document employees declination. Since employers are not managing nor administering the distribution of vaccines, OR-OSHA appears to propose requiring the employer to proactively seek this information from workers…..Employers have significant concern with this new mandate, which was not discussed during any of the stakeholder conversations and strongly urge its removal. Since vaccines are not mandated by OR-OSHA, the documentation attesting vaccination or no-vaccination appear to serve only to violate the workers personal privacy and potentially expose the employer to liability with no clear workplace safety benefit.*[363]

Not all comments opposed the vaccination language in the rule, however. For example, one organization representing workers made the following comment about its value and suggested additional language:

> *…we appreciate that the agency added information into Section 3(m) on worksite vaccination. We continue to urge the agency to follow the model of the bloodborne pathogen standard which requires that employees receive training on the vaccine in advance of administration of the shots. This approach has proven effective at improving vaccine uptake among healthcare workers. We believe strongly that everyone benefits when workers have the opportunity to be educated and ask questions so that they may make an informed decision for themselves.* [364]

A number of commenters suggested that the declination provision of the rule would violate federal law. For example, one county made the following argument:

> *Additional paperwork in tracking employees 'declining' vaccinations and keeping these records is a violation of HIPPA [sic], will lead to lawsuits against businesses and local governments that must keep the records, and infringes on individual's Constitutional rights to privacy. Paperwork will not stop the virus, only add additional expenses to those that can ill-afford to waste money.*[365]

Because a number of commenters shared this confusion about the application of the federal Health Insurance Portability and Accountability Act (HIPAA) to worker records, Oregon OSHA notes for the record that HIPAA has no application here. Put simply, HIPAA does not apply outside context of records held by an actual health care provider, health insurer, or health information clearinghouse (of those businesses working with them on associated functions).

The U.S. Department of Health & Human Services provides the following about HIPAA's application:

> ***Who Is Not Required to Follow These Laws***
>
> *Many organizations that have health information about you do not have to follow these laws.*
>
> *Examples of organizations that do not have to follow the Privacy and Security Rules include:*
>
> - *Life insurers*
> - *Employers*
> - *Workers compensation carriers*
> - *Most schools and school districts*
> - *Many state agencies like child protective service agencies*
> - *Most law enforcement agencies*
> - *Many municipal offices*[366]

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[363] *Memo from Paloma Sparks on behalf of the Business Coalition, previously identified, March 26, 2021*
[364] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*
[365] *Letter from Bill Harvey on behalf of the Baker County Commission, March 30, 2021*
[366] *"Your Rights Under HIPPAA," US Department of Health & Human Services, last reviewed November 2, 2020; https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html*

What Information Is Protected

- *Information your doctors, nurses, and other health care providers put in your medical record*
- *Conversations your doctor has about your care or treatment with nurses and others*
- *Information about you in your health insurer's computer system*
- *Billing information about you at your clinic*
- *Most other health information about you held by those who must follow these laws*[367]

Oregon OSHA had proposed the language modeled after the testing requirement that was part of the temporary rule, as well as the declination provision modeled after the Bloodborne Pathogens requirement, in the early days of the vaccine roll-out in Oregon and throughout the country. Although Oregon OSHA does not find all the concerns shared about the provision to be well-founded, Oregon OSHA agrees that the provision is not necessary and has omitted it from the final rule.

The Relationship Between Vaccination and the Need for the Rule

A number of commenters suggested that the increasing number of vaccinations makes the rule unnecessary. For example, one wrote, "Please do not make the temporary emergency rule permanent for the covid-19 restrictions. The negative effects of the restrictions outweigh the positive effects, plus many people are becoming vaccinated."[368]

Others appeared to argue that the actual vaccination level is less important than that vaccinations are becoming available to anyone who chooses to get one:

> *On May 1, every Oregonian will be eligible for vaccination. We should be in a position to reduce burdens on Oregonians, not pile on more. As such, I am opposed to elements of the OR-OSHA rules that add new and more burdensome regulations for businesses and ask you to take a different approach.*[369]

Still others argued that the fact that the rules themselves would undercut the effort to promote vaccination:

> *In addition to driving up costs further at a time when many businesses are struggling to get by, they inadvertently send the message that the vaccine does not offer any actual protection and that government agencies have no confidence in it. I have heard constituents who have asked why they should take the vaccine, if nothing is going to change policy wise as a result; when agencies take actions like this, their frustration and hesitancy are understandable.*[370]

> *…OR-OSHA is also contributing to vaccine hesitancy among Oregonians. Some workers are asking why they should take the vaccine if the state's response to COVID-19 is not going to change as a result.*[371]

Oregon OSHA acknowledges the progress Oregon has made toward its vaccination targets, but the vaccination has not yet reached the level that it can be taken for granted. On April 28, 2021, the Oregon Health Authority Director reported that 1,753,789 Oregonians had received at least one dose of the vaccine, with just over 2/3 of them having completed the series.[372] That means that 27.2 percent of the population had been fully vaccinated (although some of them were still in the two-week window before the vaccine takes full-effect). Another 13 percent of the population had begun the process, meaning that just over 4 in 10 Oregonians had at least begun the process of vaccination.[373]

The same OHA report indicated that the vaccination levels of working-age Oregonians ranged from 6.6 percent fully vaccinated in the 16 through 19 age group up to 34.1 percent fully vaccinated in the 60 through 64 age group.[374] Only one of those groups had more than half of its members receive at least one shot – the 60 through 64 age group at 53.7 percent, although the 50 through 59 age group was just under 50

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[367] *Ibid.*
[368] *E-mail from David and Susan Mann, March 23, 2021*
[369] *Letter from Vikki Breese-Iverson, Oregon State Representative*
[370] *Letter from Tim Knopp, Oregon State Senator, April 1, 2021*
[371] *E-mail from John Binford*
[372] *Testimony of Oregon Health Authority Director Patrick Allen before the House Committee on Health Care Subcommittee on COVID-19, April 28, 2021*
[373] *Ibid.*
[374] *Ibid.*

percent.[375] While large numbers of Oregonians have been vaccinated in the past months, a large number of them have yet to do so. Oregon OSHA has determined that vaccinations have not yet eliminated the need for workplace health and safety protections specific to COVID-19, although the pace of such vaccinations (accompanied by reports of their apparent effectiveness) is encouraging.

Oregon OSHA is sensitive to the concern that the rulemaking itself might discourage individuals from becoming vaccinated because they see "no hope" of improvement. However, certain requirements already reflect the effect of vaccines, as at least one commenter noted in a complaint about the fact:

> *The proposed rule operates to conceal possible discrimination against unvaccinated workers because it requires employers to enforce any OHA quarantine recommendation made to the employer. OHA quarantine guidance clearly discriminates against unvaccinated employees.*[376]

Not all distinctions between individuals represent unlawful or even inappropriate discrimination. In contrast to the commenter, Oregon OSHA recognizes this as one such example.

At the time of the rule's adoption, existing guidance provided only a few such examples; however, Oregon OSHA fully expected to see changes in the months ahead as vaccinations become a more widespread fact of life in Oregon. Oregon OSHA also believes that advertising the process for repealing the rule, described in some detail earlier in this document will encourage workers and others to seek vaccination when they understand the significant role that vaccination levels will play in the timing of the rule's repeal.

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[375] *Ibid.*

[376] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

Section XIII: The Question of Schools

The largest number of comments received on specific issues within the rule, beyond general concerns about facial coverings, clearly concerned the effect the rule would have on schools.

Many viewed the distancing requirements found in the K-12 Schools Appendix as barriers to reopening the schools, even though they were themselves based on existing "Ready Schools, Safe Learners" guidance from the Oregon Health Authority and the Oregon Department of Education. The agency received hundreds of comments that were either completely or nearly identical to the following:

> *I am writing to share my concerns about Appendix A-13, Workplace safety for K-12, in "Oregon OSHA's Proposal on Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces" that is proposed to be made "permanent" in May 2021. Please make schools exempt from this document or, eliminate or significantly simplify Appendix A-13.*
>
> *With 100% of teachers and staff eligible to have been vaccinated, the safety this document seeks to ensure for teachers and staff is no longer relevant. As OSHA staff recognized during the public hearings, students are not within OSHA's jurisdiction. Thus, because teachers and staff no longer face any measurable risk of COVID (the vaccines are 100% effective against serious disease and death), there is no longer any basis for OSHA to issue regulations for schools. Issuing workplace safety regulations for COVID post-vaccination of teachers is akin to issuing regulations to prevent teachers from catching colds or the flu. In this way, schools are unique from virtually every other workplace in Oregon, and should be exempted from these permanent rules.*
>
> *If, for whatever reason, it is not possible to simply exempt schools from the new rules, I ask that Appendix A-13 be significantly simplified to avoid any possibility of being disconnected from evolving public health policy in Oregon. There are already procedures and metrics in the proposed rules that are significantly out of step with ODE's "Ready Schools, Safe Learners" (RSSL). There are many, but the most egregious are: C. distance guidance has changed and sports are in full occurrence with spectators; and D. cohorts have been eliminated from RSSL. RSSL has been updated twice already since OSHA released its draft rules and will continue to be changed in coming weeks and months. This document risks being out-of-date as soon as it is published for schools, and will become a barrier to school policy statewide that has a stated goal of delivering in-person education. If OSHA insists upon including schools, then it should simply incorporate the most recent version of RSSL to avoid inconsistent regulations governing schools. Our kids have been largely out of school for a year - having rules that continue to hamper a full return to in-person learning is detrimental to children's health and well-being.*
>
> *In summary, please consider making schools exempt from these new rules as all teachers and staff have had the opportunity to be vaccinated and thus are at no greater risk from COVID than from the cold or flu, or greatly simplify the rules to ensure they are not out of date as soon as they are published and they evolve with OHA and ODE guidance.*[377]

A group of physicians also signed a detailed letter addressing their concerns about the need for schools to fully reopen, which included the following comment:

> *In the spring of 2020 we knew little about the virus, its infectivity, or its evolution. While we did know that taking children out of schools would have negative consequences for our youth's development, we opted for a potentially safer physical environment by keeping children in their homes. Since then, we have learned much about Covid-19. We have multiple studies that show schools are not an environment for disease spread when masks are worn.*[378]

The same commenters noted that, while all students are likely to be affected by school closures, they are not all likely to be affected in the same way:

> *Some communities are suffering more than others. Families who are more affluent can hire babysitters, employ pod teachers, work from home, buy better technology to facilitate learning, or enroll their kids in club sports for social interactions. People who are struggling financially cannot. Chronic absenteeism has risen 3% for all students from 2 years ago but 7% for Latinx students and 10% for Black students, with rates of 34% and 41% respectively. Historically, Portland has prided itself on attending to disadvantaged communities, and yet by keeping kids out of schools we are falling gravely short of our mission. Additionally, face-to-face interactions*

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[377] *E-mail from Emily Pinkerton*

[378] *"Physicians' Letter," previously described*

> *allow for a better understanding and appreciation of each other's differences, especially when facilitated by a caring adult such as a teacher. These opportunities are lost on distance learning and segregation of students within their own peer groups becomes more restrictive. Our nation sits at a time when exposure to and celebration of differences are desperately needed more than ever. Our schools will have the biggest impact on our youth than any other institution, yet we are limited in what we can do when interactions are restricted to a computer screen.*[379]

Although the majority of comments supporting a significant reduction in the requirements as they apply to schools, some commenters did sound a contrary note. For example, one school employee offered the following concern about the move to reopen rapidly:

> *…I am a school counselor at Chapman Elementary School in Portland, Oregon. I have serious concerns about returning to full-time regular school prior to our community reaching herd immunity for Covid-19.*
>
> *The student population of my school is quite low at the moment, only around 360 students enrolled right now. Last March, the enrollment number was closer to 420. I serve all students at my school, so when we return to the building, I will be in close contact with all students plus approximately 45 professional and classified staff members and then also a host of parents. I need the proposed OSHA Rules that address workplace safety to be in place during this global health emergency. I will not be safe if I am exposed to hundreds of students, staff and parents each day while I am at work.*
>
> *Chapman School was built in 1923. The ventilation system is suspect even though my employer states that they have cleared the ventilation system for community use. As an Oregon educator, I need these OSHA rules to protect me.*
>
> *I know that many parents of frustrated students will also be writing to advocate that OSHA vacate these important safety precautions. Please remember that there are more people in the schools who work with the entire student body- counselors, PE teachers, music teachers, art teachers, librarians etc.*
>
> *Professional educators who are not classroom teachers are often overlooked and have a much higher exposure to the entire school populations. Please remember that we need these OSHA safety protections as much if not more than our classroom teacher colleagues.*
>
> *Thank you for looking out for my health and safety.*[380]

Another commenter provided a parent's perspective on the value of school health protections, writing, "I do not feel comfortable continuing to have my child attend school unless the proposed permanent OSHA rules continue. I fully support making the temporary rules permanent.[381]

Others viewed the risks very differently, such as the commenter who wrote, "Children have been proven to not spread the virus and yet they continue to be required to wear a mask for a virus that they do not have and cannot spread." [382] Oregon OSHA is confident that neither of the claims made by this comment are accurate. The physicians' letter's attempt to assess the relative risks involved is more persuasive:

> *Covid will most likely be with us for years to come. There may be new strains or new surges. We cannot keep sacrificing our children's health and future as a reactionary process. No situation can provide a 100% guarantee that disease transmission will not occur; if we are seeking that we would need to avoid all trips to grocery stores, restaurants, and businesses. As with our decision to drive with our children in our car, we choose to absorb the risk in exchange for the benefit to arrive at our destination.*[383]

While Oregon OSHA agrees that "zero risk" cannot realistically be achieved, it is worthwhile to note that one of the challenges in this particular case is that the risks and benefits are distributed asymmetrically – students are at a much lower risk from COVID-19 than the teachers and staff who work at the schools, yet it is the students who will benefit most directly from the schools being opened. Nonetheless, the purpose of schools is to educate children and youth, and no Oregon OSHA rule can impose a burden that cannot feasibly be achieved.

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[379] *Ibid.*
[380] *E-mail from Ariel Frager, February 11, 2021*
[381] *E-mail from Sean Kelly, April 1, 2021*
[382] *E-mail from Charlene Kuipers, March 22, 2021*
[383] *Physicians' Letter, previously described*

When Oregon OSHA accepted the recommendation of its stakeholders to focus the rule on COVID-19 alone and to use the temporary rule as the basis for the proposed rule, the result was that Appendix A-13 from the temporary rule was incorporated into the proposed rule without significant change. The provisions of the "Ready Schools; Safe Learner" document had been changing, although not generally in relationship to those items carried over into the proposed rule appendix.

During the weeks after the rule was proposed, an additional revision to the "Ready School Safe Learners"[384] was published on April 2, 2021. This included a revision based on changed CDC guidance that reduced the distancing requirement between students to three feet. The distance between employees and others, including students, remains six feet following the update. Oregon OSHA had viewed the 6-foot distancing requirement, as well as provisions such as the use of cohorts and square footage limitations, both as student protections (which fall outside Oregon OSHA jurisdiction) and as capacity limitations that helped enforce sufficient distancing to protect workers. But Oregon OSHA rules also must take into account the feasibility of those rules. Unlike public health measures that can be justified in extraordinary circumstances, Oregon OSHA rules never prohibit work or make it impossible to do the work. To the extent that they do (and only to the extent that they do), employers need not follow them.

The April version of "Ready Schools; Safe Learners" includes a discussion of the role of in-person learning as a fundamental purpose of any school:

> *The Oregon Department of Education (ODE), in coordination with the Oregon Health Authority (OHA), is updating the Ready Schools, Safe Learners guidance for the 2020-21 School Year in accordance with Governor Brown's Executive Order 21-06 and Governor Brown's March 5, 2021 decision to "return to the learning environment we know serves [students] best: in-person instruction."*
>
> *….*
>
> *Returning to in-person instruction is one of Oregon's highest priorities. This priority goes hand-in-hand with supporting the health and safety of our students, staff and the families they return to each day. Schools not only provide the education that Oregon's children need to succeed, but schools also provide for social-emotional growth and support, nutritious meals, and access to medical care. We have been living with COVID-19 for approximately one year in Oregon and it will be with us for a long time to come. Vaccinations have begun being administered in Oregon, including vaccinations for the educator workforce. We have also learned a lot about how to reduce the spread of the illness in structured and regulated environments like schools. Through a measured and thoughtful approach, we can prioritize a quality education for Oregon's children. Oregon's experience with the COVID-19 global pandemic is dynamic and we must continually adjust or add to our tactics to address changes in our circumstances. This includes integrating new knowledge about how the disease spreads; information regarding the effectiveness of safety protocols; impact of new virus variants on transmissibility and disease severity in people of various ages and risk levels; as well as the impact of community vaccination rates.*

Schools cannot reasonably or appropriately be exempted from the Oregon COVID-19 workplace rules; the workers in those settings deserve the same protections as other workers, at least to the degree that such protections can feasibly be provided. However – as a result of the process described in the following section, as well as in response to the comments received specifically in relation to schools, what is now Appendix A-8 focuses specifically on those provisions that protect workers, operating in tandem with the general requirements of the base rule.

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[384] *"Ready Schools Safe Learners," Oregon Department of Education and the Oregon Health Authority, April 2, 2021; https://www.oregon.gov/ode/students-and-family/healthsafety/Documents/Ready%20Schools%20Safe%20Learners%202020-21%20Guidance.pdf*

Section XIV: A Changing Approach to the Appendices

When Oregon OSHA first developed the industry-specific appendices as part of the temporary COVID-19 rule adopted in November, one purpose of those appendices was to ensure that Oregon OSHA's requirements aligned with sector-specific requirements found in guidance from the Oregon Health Authority (OHA). Another was to provide clearer information about the application of certain general provisions – especially those related to the use of facial coverings and the application of physical distancing. In order to reinforce the consistency of the Oregon OSHA documents with the OHA guidance, Oregon OSHA used a relatively broad approach to issues of worker protection, incorporating requirements from sources that might, in certain circumstances, relate to worker risk rather than risks to the public alone.

As Oregon OSHA worked with the two Rulemaking Advisory Committees (RACs) to develop a genuinely permanent rule, the regulatory approach was not expected to rely upon such appendices. However, when Oregon OSHA accepted the recommendation of both RACs to focus the rulemaking on COVID-19 and to based the proposed rule on the temporary rule, the appendices were included in the proposal. At that point, they were placed in the proposed rule with very little substantive change.

In reviewing the comments received about the rule, it became clear that one of the recurring issues concerned the very breadth of the language used and the incorporation of provisions that would rarely if ever be applied to issues involving workers exposure (and therefore would rarely, if ever, be enforced by Oregon OSHA because of the limits of the agency's jurisdiction). The value of such provisions in a temporary rule at a relatively early stage is entirely distinct from the value of such provisions in the current rule. Therefore, Oregon OSHA "scrubbed" the provisions of the appendices to focus entirely on issues that clearly implicated the protection of workers. The process shortened the overall length of the appendices, eliminating six of them in their entirety and shaving 50 pages off the page count.

The remainder of this section discusses comments received in relation to each of the appendices, and how they were addressed.

Former A-1; still A-1: Restaurants, Bars, Brewpubs, and Public Tasting Rooms at Breweries, Wineries, and Distilleries

Most comments regarding restaurants and bars did not actually relate to the provisions of the rule, but to the dining room closures and similar restrictions that Oregon OSHA has enforced based on the County Risk Level requirements. The appendix, however, was shortened considerably in the review that was already described.

Former A-2; still A-2: Retail Stores

Relatively few comments related to the retail stores appendix were received, given the size of the overall record. Again, the appendix was shortened considerably with the removal of requirements that focused on public health rather than worker health.

Former A-3: Outdoor/Indoor Markets REMOVED

A number of comments were received in relation to issues concerning outdoor markets that did not appear to relate to worker protection. After completing the review described above, Oregon OSHA determined that there was noting in the appendix that was not sufficiently addressed by the base rule and Appendix A-2. Therefore the appendix was removed in its entirety.

Former A-4; now A-3: Personal Services Providers

A number of personal services providers provided comments about specific elements of the what was then Appendix A-4, including examples such as the following:

> *Section E (Sanitation), point 4 requires providers to use gloves for every service. This is in excess of OHA guidelines and other healthcare practices (e.g. people administering vaccines are not required to wear gloves) and a waste of scarce PPE supplies. Furthermore, it is impractical and has not been adopted by the vast majority of LMTs. Aligning OSHA rules with pragmatic and effective practices will facilitate compliance and*

> *safety much better than over-protective measures like gloving for every service. Please remove language requiring gloving for personal services (unless not otherwise required, for example, administering tattoos).*[385]
>
> *Likewise, Section E, point 7 requires that providers change clothes between every service. Again, this is in excess of OHA guidelines and other healthcare practices (nurses and PCPs do not change clothes between each patient, despite close contact). OHA rules do require aprons, which can be readily changed between services. Please remove language requiring changing clothes between clients.*[386]

Both issues were addressed in the revisions to the appendix.[387]

Former A-5; now A-4: Construction Operations

Representatives of the Oregon construction industry, who had participated in developing the previous appendix, suggested that the requirements within construction could be less stringent:

> *Oregon's construction industry is unique. Unlike other industries that are based on customer interactions, Oregon's construction work happens largely on closed jobsites. This results in far less contact with members of the public, and therefore less risk for virus spread. Also unique is the outside nature of many construction jobsites. While most of Oregon's workers find themselves in office buildings, shops or other indoor locations, much of Oregon's construction work is done outside. The free moving air afforded by an outdoor location helps further prevent virus spread and keeps jobsites safer. Also, in guidelines given across the state, nation, and world, there have been distinctions made for the different virus spread inside versus outside.*[388]

In the rule as adopted, Oregon OSHA eliminated the construction-specific requirements that the temporary rule (and the proposed rule) had included that exceeded the provisions of the general rule.

Former A-6: Indoor and Outdoor Entertainment Facilities REMOVED

Oregon OSHA's review of the appendix on entertainment facilities determined that the worker protection issues are addressed sufficiently by the general rule, and the appendix was removed.

Former A-7: Outdoor Recreation Organizations REMOVED

A number of commenters[389] wrote about the need to allow outdoor recreation and sports activity. Although such activities are addressed primarily in the context of OHA guidance, Oregon OSHA did decide that the appendix should be removed in order to ensure that the Oregon OSHA Rule did not present an obstacle to renewing such activities.

Former A-8; now A-5: Transit Agencies

Transit continues to represent a unique challenge in ensuring both distancing and the proper use of facial coverings; therefore the appendix was retained with minor modifications.

Former A-9: Collegiate, Semi-Professional and Minor League Sports REMOVED

The circumstances involved in these activities represent relatively little worker risk and can appropriately be addressed by the base requirements of the rule.

Former A-10; now A-6: Professional, Division 1, PAC-12, West Coast Conference and Big Sky Conference Sports

Oregon OSHA received at least one comment that was highly critical of what was then Appendix A-10:

> *The third rule is particularly offensive because it requires sports teams to submit activity plans based on an emergency situation that hopefully will soon have no meaning, and to wait for specific approval from the Governor, OHA, and OSHA before they are allowed to play in Oregon. OSHA compliance is decided by such approval.*
>
> *…*

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[385] *Mark Retzlaff, on behalf of the Oregon Chapter of the American Massage Therapy Association*
[386] *Ibid.*
[387] *See similar comments in the context of hair salons in, for example, the e-mail from Lyn Johnson on behalf of The Salon, Corvallis*
[388] *Letter from Mark Long on behalf of the Oregon Homebuilders Association and Mike Salsgiver on behalf of the Columbia-Willamette Chapter of the Associated General Contractors, April 2, 2021*
[389] *See, for example, the e-mail from Anna Bain, February 1, 2021; the e-mail from Wally Lierman; the e-mail from Peggy Schindler, March 3, 2021; and the e-mail from Michelle Mastalski, February 16, 2021.*

> *Appendix A-10 could be tremendously simplified by reducing it to what it means: "You can play sports in Oregon only if the Governor decides you can."*[390]

If the appendix did not exist, such employers would need to navigate the requirements of the general rule (and, indeed, they could choose to do so now). The opportunity to have an operational plan approved provides an option for the industry – and Oregon OSHA knows from the discussions with the industry during the development of the temporary rule that at least some in the professional sports industry view the option as a critically imporatn one. Therefore the appendix – now A-6 – has been retained.

Former A-11: Licensed Swimming Pools, Licensed Spa Pools and Sports Courts REMOVED

The worker-protection provisions of the former Appendix A-11 are sufficiently addressed by the base rule and by what is now Appendix A-7. Therefore the appendix has been removed.

Former A-12; now A-7: Fitness-Related Organizations

As in the case of restaurants, most comments received related to such businesses did not relate to the appendices, but to Oregon OSHA's enforcement of the restrictions based on the county Risk Levels.

Former A-13; now A-8: K-12 Educational Institutions (Public or Private)

As discussed in the previous section, what is now Appendix A-8 was shortened considerably and focused on worker protection (and the necessary modifications to certain worker protection provisions related to the use of facial coverings by students).

Former A-14; now A-9: Employers Operating Child Care and Early Education Programs

What is now Appendix A-9 also became much shorter, with the elimination of sanitation language that really was focused on protecting participants in the program, as well as other provisions that were not focused primarily on worker protection.

Former A-15: Institutions of Higher Education (Public or Private) REMOVED

Oregon OSHA received an extensive comment regarding what was then Appendix A-15, which included the following discussion:

> *Thank you for the opportunity to provide comments on OSHA's proposed permanent rule addressing the COVID-19 Public Health Emergency and the Mandatory Appendix A-15 applicable to all higher education institutions. We are submitting these comments on behalf of the public community colleges and universities and private, non-profit universities that we represent. We remain committed to ensuring the health and safety of students, faculty and staff who work and pursue their educational goals on our campuses and in our local communities.*
>
> *As we move toward summer and fall terms and a broader re-opening of campus activities as cases decline and vaccinations increase, we urge you to review the proposed permanent rules and Mandatory Appendix A-15 to ensure consistency with current federal and state guidance. Mandatory Appendix A-15 currently aligns for the most part with the existing HECC/OHA guidance on the conduct of instructional activities. We expect the HECC/OHA guidance to change again in the coming weeks as we move to an easing of the current limitations on face-to-face instruction and other college activities. We urge OSHA to add language to clarify that higher education institutions will be considered in compliance with the OSHA rule if they are following the most recent CDC and/or HECC/OHA guidance related to issues such as quarantine, social distancing, classroom capacity, housing, and dining facilities. For example, currently Appendix A-15 Section I references a 72-hour quarantine requirement after a person's fever is gone even though current CDC and HECC/OHA guidance only requires 24 hours. We request that you change this reference in Appendix A-15, so it is consistent with current guidance. With the loosening of restrictions related to dining, athletic/recreational facilities, pools, etc… we are also concerned that the static language in other mandatory appendices will continue to create confusion about the applicability of these standards on higher education institutions.*[391]

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[390] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*

[391] *Written comments from Brent Wilder, on behalf of the Oregon Alliance of Independent Colleges and Universities, Cam Preus, on behalf of the Oregon Community College Association, and Dana Richardson, on behalf of the Oregon Council of Presidents, February 2, 2021*

After evaluating the issues raised and as part of a similar review to that completed for the other appendices, Oregon OSHA concluded that the appendix was not necessary.

Former A-16; now A-10: Veterinary Care

What was Appendix A-16 is only slightly modified from the previous version, focusing as it already did primarily on protecting the workers involved.

Former A-17; now A-11: Emergency Medical Services: First Responders, Firefighters, Emergency Medical Services and Non-Emergency Medical Transport

At least one commenter[392] questioned the provision of this guidance that allows the removal of facial coverings for employees in shared living areas. While the original provision was primarily a recognition of the feasibility issues involved, Oregon OSHA notes that the CDC and OHA guidance on facial covering use by vaccinated individuals interacting in small groups – although otherwise not applicable to the worksite – has relevance here. What was previously Appendix A-17 was adopted with little substantive change.

Former A-18; now A-12: Law Enforcement Activities

What was then Appendix A-18, which had been developed by Oregon OSHA as part of the temporary rule specifically to address issues related to worker protection, was adopted essentially unchanged.

Former A-19; now A-13: Jails, Prisons and other Custodial Institutions

What was then Appendix A-19 which also had been developed by Oregon OSHA as part of the temporary rule specifically to address issues related to worker protection, was adopted essentially unchanged.

[392] *See written comments by Sean Grey, February 21, 2021*

Section XV – Other Suggested Changes

In the extensive record of public comment, Oregon OSHA received and considered comments regarding a number of other suggested changes. Many of those suggestions, as well as any changes Oregon OSHA made as a result of them, are described in this section.

OAR 437-001-0744(1) – Scope and Application

OAR 437-001-0744(1) – Definitions

> *As currently drafted, the definition of "Place of Employment" only exempts places where employment involves workers not covered by worker's compensation **and** employed in or around a private home. (h) Employment, Place of – has the meaning provided in OAR 431-0015 and excludes any place where the only employment involves workers not covered by workers' compensation **~~and~~ or** employed in or around a private home, as well as any corporate farm where the only employment involves the farm's family members.*
>
> *We believe OSHA's intent in this section was for the "**and**" to be "**or**" to ensure that patients' homes are not treated as workplaces with the same required compliance as a traditional healthcare setting.*
>
> *We are concerned that the current language could be interpreted to include our providers and the patient homes in which they operate – placing exceptional burden on vulnerable Oregonians receiving home care. **To address this concern, we encourage OR-OSHA to change the and in section (h) to or before implementing the permanent rules.*** [393]

The definition of "place of employment" in the rule reflects that in other Oregon OSHA rules and, ultimately in the Oregon Safe Employment Act. Oregon OSHA does not intend to exempt any workplaces subject to its jurisdiction from the COVID-19 rule, and therefore did not change the definition. However, Oregon OSHA acknowledges the concern about how "the rule could be interpreted." For the record, the requirements of the rule must be followed only to the degree that the employer controls the workplace in question. So patients' homes are workplaces and the requirements related to staff conduct in those workplaces (as well as to assessment, planning, and training) apply. Those related to the facility itself do not.

OAR 437-001-0744(3)(a) – Physical distancing

OAR 437-001-0744(3)(b) – Mask, face covering, or face shield requirements

Separate and apart from the extensive discussion of the facial covering requirements already provided in this document, Oregon OSHA considered several specific comments related to particular aspects of the rule.

> *Many of our employees have an individual vehicle and machine and can easily distance themselves physically all day long without much modification. But not all jobs allow for that. If you are outside and follow basic protocols you should not have to wear a mask whatever distance you maintain.*[394]
>
> *In manufacturing, when employees are at least 6' apart it makes NO SENSE to have to wear a face covering at their work station. It is bad for morale. I agree if they are up away from their work area or less than 6' apart, then yes.*[395]
>
> *There are many circumstances where individuals have their own work space far away from anyone in a building with good ventilation. The rule on masks seems a little to restrictive and doesn't take into account these situations. Also to be considered is some certain cubicle types. I can't find the science on this matter.*[396]

Ultimately, with regard to all comments such as these, Oregon OSHA's rule defers to Oregon Health Authority guidance with regard to facial coverings (unless there is no such applicable guidance. With regard to the first comment, Oregon OSHA expected to see that question revisited in the near future at the time the rule was adopted, but could not address it in the rulemaking itself. With regard to the second (and to a lesser extent the third) comment Oregon OSHA notes that six-foot distancing is a risk *reduction* measure, not a risk *elimination* measure. The risk of indoor aerosol transmission remains real even when individuals are separated by more than six feet.

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[393] *Letter from Fawn Barrie on behalf of the Oregon Association for Home Care, April 2, 2021*
[394] *Comments from Bighorn Logging Safety Committee, March 23, 2021*
[395] *E-mail from Karen Holt, March 25, 2021*
[396] *E-mail from Steve, February 24, 2021*

The language in the rule about face shields was the subject of a variety of comments, several of them reflecting a misunderstanding either of the rule or of the OHA guidance. Oregon OSHA believes the following change, submitted to the record, addresses the questions appropriately.

> *Q: What about OHA's ruling on face shields? It currently says they alone are not sufficient, so I'm wondering if OHA is going to lessen that restriction. Places like New Seasons don't let you come in with just a face shield on.*
> *A: The OHA language on face shields strongly recommends that they not be relied upon exclusively but does not actually prohibit their use as an exclusive means of source control. Oregon OSHA agrees with that determination and this proposed rule reflects the same approach: Use of face shields alone is discouraged (because they are not nearly as effective) but it is not prohibited.*[397]
>
> *Q: Sorry, meant to include that question's answer in this question: so New Seasons is breaking the rules when they disallow me from entering their store with a face shield on?*
> *A: New Seasons appears to be exceeding the requirement. They are not prohibited by Oregon OSHA or OHA from enforcing a stricter requirement.*[398]

Face shields remain a compliant option, although not a recommended one.

OAR 437-001-0744(3)(b)(F) – Vehicle Requirements

> *Shared Transport Considerations: The proposed rule requires that separate vehicles be used unless there are no other options available. This is a very high standard to meet, and will prohibit most employers from being able to have their employees share transport. There are instances where there are might be other options available, but safety or practicality make shared transport the better option than having all employees drive separate vehicles. We request that the shared transport language from the temporary rule be adopted instead.*[399]
>
> *I am very concerned about the new requirements around vehicles. These rules will be difficult to enforce if a manager isn't present in every vehicle. During the peak harvest time, we have many vehicles coming and going. Any regulations relating to vehicles should go no further than the temporary rules that are already in place!*[400]
>
> *I am concerned about the new requirements with regard to vehicle use. These rules will be challenging and costly to enforce if a manager isn't present in every vehicle. Regulations regarding vehicles should remain as in current temporary rules.*[401]

OAR 437-001-0744(3)(f) – Cleaning and Sanitation – Hazard Communication

A number of employer organizations objected to a note that Oregon OSHA had included in two parts of the rule when the use of cleaning chemicals was being discussed.

> *Buried in a "Note" on pg. 25 the OSHA rules attempt to link to a federal standard for the use of certain cleaning chemicals and disinfectants. If there are specific cleaning chemicals that trigger this requirement, OSHA should clearly post and delineate these rather than referencing very complicated federal rules.*[402]

The note actually appeared in two places within the proposed rule and read as follows: "Oregon OSHA's Hazard Communication standard (29 CFR 1910. 1200) may apply to the use of certain cleaning chemicals, sanitizers, and EPA-registered disinfectants."[403]

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[397] *From question and answer session prior to the formal public comment period at an Oregon OSHA hearing. These are not normally included in the formal record, but this was one of several such exchanges placed into the record as part of written comments from Erik Harper, February 23, 2021*
[398] *Ibid.*
[399] *Letter from Mark Long on behalf of the Oregon Homebuilders Association and Mike Salsgiver on behalf of the Columbia-Willamette Chapter of the Associated General Contractors, April 2, 2021*
[400] *E-mail from Wally Lierman*
[401] *Letter from Vikki Breese-Iverson, Oregon State Representative*
[402] *Memo from Paloma Sparks on behalf of the Business Coalition, previously identified, March 26, 2021*
[403] *"Oregon OSHA's Proposal on Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces," January 29, 2021. https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf.*

Oregon OSHA found the comments from employers about "The New Hazard Communication Standard"[404] both puzzling and troubling, for several reasons:

First, the Hazard Communication Standard is not new. In its 1994 minor update of the standard, federal OSHA included the following brief history of the rule:

> *The development of OSHA's Hazard Communication Standard (HCS) was initiated in 1974. The process has been lengthy and is discussed in detail in the preambles to both the original and revised final rules (see 48 FR 53280-81 and 52 FR 31852-54), and in the August 1988 NPRM (53 FR 29822-25). This discussion will focus on the sequence of events which has occurred since the original final rule was published in the Federal Register on November 25, 1983, and in particular, those which have occurred since the NPRM was published.*
>
> *The original rule, which was promulgated on November 25, 1983 (48 FR 53280), covered employees in the manufacturing sector of industry. That rule was modified on August 24, 1987 (52 FR 31852) to expand the coverage to all industries where employees are exposed to hazardous chemicals. Complete implementation of the standard's requirements in the non-manufacturing sector was subsequently delayed by various court and administrative actions. However, the August 24, 1987, rule is now fully effective and has been so since January 24, 1989, and is being enforced in all industries. (See Notice of Enforcement, 54 FR 6886, Feb. 15, 1989).*[405]

Second, this is not simply a federal standard. As with all federal OSHA Rules, Oregon OSHA was required to adopt a standard that is "at least as effective as" the federal rule. Oregon OSHA did so, as if often the case, by adopting the federal rule by reference. That is why the note correctly referred to the rule as "Oregon OSHA's Hazard Communication standard." It is published along with other rules (both state-initiated and adopted by reference) in Oregon OSHA's Division 2, Subdivision Z, and it is the subject of a number of Oregon OSHA publications and other training materials.

The rule's "Scope and Application" reads as follows:

> ***This section requires** chemical manufacturers or importers to classify the hazards of chemicals which they produce or import, and **all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, safety data sheets, and information and training**. In addition, this section requires distributors to transmit the required information to employers. (Employers who do not produce or import chemicals need only focus on those parts of this rule that deal with establishing a workplace program and communicating information to their workers.)*[406] *[emphasis added]*

Third, the rule's coverage in a workplace can be triggered by the use of any potentially hazardous "consumer product" when its use exceeds a duration or frequency of exposure "greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended."[407] Separate and apart from its potential application to cleaning chemicals in the context of the current pandemic (which is undeniably the case), Oregon OSHA finds it disturbing that the representatives of so many Oregon employers seem largely unaware of its requirements.

Oregon OSHA chose to remove the note from the final rule, but that decision does not reflect any doubt about its application when chemical use exceeds normal consumer use. Oregon OSHA expects to reach out to employer organizations to seek opportunities to train their members about the need to comply with this rule and how to do so.

OAR 437-001-0744(3)(g) – Exposure risk assessment

Several employers and employer organizations expressed concern that several requirements retained from the previous temporary rule would need to be completed again:

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[404]Memo from Paloma Sparks on behalf of the Business Coalition, previously identified, March 26, 2021
[405]"Final Rule Publication, Hazard Communication," USDOL/OSHA, February 9, 1994, Federal Register #59:6126-6184

[406]29 CFR 1910.1200(b)(1), adopted by Oregon OSHA by reference
[407]29 CFR 1910.1200(b)(6)(ix), adopted by Oregon OSHA by reference

> *To clarify that employers do not have to perform another risk assessment, draft new infection control plans or require additional employee training, the rules should explicitly state that those plans, assessments, and trainings that were performed for the temporary rule satisfy the requirements of the permanent rule. This will avoid confusion and frustration, by those who might read this as requiring a new assessment, plans, and trainings.*[408]
>
> *Risk assessments and infection control plans completed under the temporary rules should be called out as sufficient under the permanent rules.*[409]

Similarly, the business coalition requested, "Language confirming that Risk Assessments, Infection Control Plans and Worker Training under the Temporary COVID-19 OSHA Rules satisfy all new requirements in the permanent rules." [410] It had always been Oregon OSHA's intention that work completed under the temporary rule would satisfy the requirements of the new rule (indeed, that is exactly why Oregon OSHA resisted suggestions to make any changes to those provisions). The final rule includes an explicit statement to that effect in relation to the Exposure Risk Assessment, the Infection Control Plan, and the Infection Control Training.

OAR 437-001-0744(3)(j) – COVID-19 infection notification process

Oregon OSHA received relatively few comments in relation the infection notification process, which was part of the temporary rule. However, one commenter challenged its value based on his believe that the diagnoses are unreliable:

> *Unless OSHA adopts a more reliable way to diagnose COVID-19 and estimate the risk of exposure; rules about notifying "exposed" and affected employees are likely to create unwarranted fear. In the worst case such notifications might lead to hysterical reactions or panic attacks among employees that mimic COVID-19 symptoms.*[411]

Oregon OSHA disagrees. Oregon OSHA has long joined many workplace health and safety practitioners, as well as professionals in risk communication, in recognizing that withholding information is almost always more likely to cause problems than providing it. And the experience of the past six months (longer, for many employers who engaged in the practice even before the temporary rule) has provided little if any evidence of the sort of panic and hysteria that caused the commenter concern.

The final rule includes the provision as proposed.

OAR 473-001-0744(3(l) – Medical removal.

The medical removal provisions of the temporary rule were largely unchanged by the proposed rule. However, the rule did include one new requirement, that employers must notify employees who must take off work due to the medical removal provision of their return rights in writing. The proposed rule also included a recommendation that employees "be provided any relevant information about the employer's paid time off, sick leave, or any other available benefits in accordance with local, state, or federal law."[412]

A number of employer and employer organizations objected to recommended language, which they viewed as a new requirement:

> *Further employee notifications are redundant and unnecessary. Human resources departments already notify employees regarding eligibility for specific types of leave, and other notification processes are in place now. Piling additional notification requirements on top of previously established procedures is nothing but busy work and pointless paper pushing.*[413]

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[408] *Letter from Mark Long on behalf of the Oregon Homebuilders Association and Mike Salsgiver on behalf of the Columbia-Willamette Chapter of the Associated General Contractors, April 2, 2021*
[409] *Letter from Tyler Janzen on behalf of Association of Oregon Counties, April 1, 2021*
[410] *Memo from Paloma Sparks on behalf of the Business Coalition, previously identified, March 26, 2021*
[411] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[412] *"Oregon OSHA's Proposal on Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces," January 29, 2021. https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf.*
[413] *Letter from Jana Jarvis on behalf of the Oregon Trucking Association, March 31, 2021*

> *The entirely new requirement that employers provide written notices of all potential available paid time off (PTO) or sick time under local, state or federal law is unnecessary and burdensome. Existing law already imposes significant notification requirements. Additional requirements will require additional steps and provide the possibility for mistakes that the employer could then be liable for even if they have provided the information previously.*[414]
>
> *The entirely new requirement that employers provide written notices of all potential available paid time off (PTO) or sick time under local, state or federal law is unnecessary and burdensome. Existing law already imposes significant notification requirements. Additional requirements will require additional steps and provide the possibility for mistakes that the employer could then be liable for even if they have provided the information previously. Are you all going to do that too?! This is a control issue on your part.*[415]

Labor representatives, on the other hand, recognized that the language was not a requirement and asked that it be made into one:

> *The final rule should also require employers to give written notification to their employees about their rights to use paid time off, sick leave and other state and federal leave, as well as their legal protections from retaliation and their right to return to their previous job after quarantine or isolation.* [416]

And another individual who commented on a number of provisions mistakenly suggested the prohibition of adverse action was not enforceable:

> *l. (3)(L) Medical Removal: is fine, however, it should be noted that Oregon being a no-cause termination state negates the inclusion of language about protection from discrimination or retaliation.*[417]

Oregon, like the rest of the country, is an "at will"[418] state that allows termination without cause as a general principle in the absence of an enforceable contract. However, the commenter is incorrect in suggesting that at-will status "negates" existing statutory protections against retaliation for exercising one's rights under the Oregon Safe Employment Act.[419] The reality of the "at will" doctrine may make a case more difficult to prove in certain circumstances, but such retaliation is nonetheless illegal (just as it is illegal to engage in employment discrimination in a number of other areas, the "at will doctrine notwithstanding).

After considering the record, Oregon OSHA adopted the rule as originally proposed, including the provision recommending that additional information be shared.

OAR 437-001-0744(4)(c) – Infection control plan for exceptional risk

Oregon OSHA received a limited number of comments related to the provisions of the Infection Control Plan that were being proposed without any revision. But at least one commenter raised concerns about the need for reevaluation:

> *Clarity is also needed regarding the infection control plan (as defined under the temporary rules) being "reevaluated as frequently as necessary" or in "response to updated guidance published by the OHA including*

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[414] *Written comments from Mark Bigel on behalf of Al's Garden Center and Greenhouses*

[415] *See, for example e-mail from Rea Branch on behalf of Terra-Sol Landscaping, e-mail from Wally Lierman, and letter from Vikki Breese Iverson, Oregon State Representative*

[416] *Letter from Carl Wilmsen on behalf of the Northwest Forest Worker Center/Lomakatsi Restoration Project*

[417] *Written comments from Daniel Kennedy, Future Systems Enterprises, April 2, 2021*

[418] *"Employment At-Will Exceptions by State," National Conference of State Legislatures, https://www.ncsl.org/research/labor-and-employment/at-will-employment-exceptions-by-state.aspx*

[419] *ORS 654.062(5) reads "It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has: (a) Opposed any practice forbidden by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780; (b) Made any complaint or instituted or caused to be instituted any proceeding under or related to ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780, or has testified or is about to testify in any such proceeding; (c) Exercised on behalf of the employee, prospective employee or others any right afforded by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780; or (d) In good faith reported an assault that occurred on the premises of a health care employer as defined in ORS 654.412 or in the home of a patient receiving home health care services."*

> *COVID-19 community spread." Employers need a more definite timeframe or trigger for the review and updating process.*[420]

Because the commenting organization does not represent employers in the exceptional risk category, Oregon OSHA first notes that the provision in question only applies to such employers, not to the vast majority of such employers. Employers in the exceptional risk category are much more familiar with the applicable OHA guidance and are already aware of the need to adjust their plans when that guidance changes. The final rule retains the requirement.

OAR 473-001-0744(4)(c)(C)– PPE supply and crisis management plan

The same association commented about the PPE supply and crisis management plan, which was a new element in the proposed rule that was not in the temporary rule, and which was specifically limited to health care employers:

> *Specifically, further explanation is needed on how and why employers develop and implement a personal protective equipment supply and crisis management plan when a hazardous awareness plan is already in place. While this is based on CDC guidance alone, will employers be expected to keep a stockpile of PPE on hand at all times if it becomes a requirement?*[421]

In this case, however, certain health care employers who would be affected by the provision also raised concern about it:

> *Additional crisis management plans for PPE are unnecessary and administratively burdensome. ODA believes dental offices and clinics should be permitted to follow Guidance for Non-Emergency and Elective Procedures Recommendations to the Oregon Health Authority July 20, 2020. If PPE availability is limited, such employers may follow OHA- Oregon OSHA Interim Guidance: Use of Personal Protective Equipment by Healthcare Personnel in Resource Constrained Settings, as well. ODA was at the table in drafting this.*[422]

Given the experience of health care employers and their workers early in this pandemic with regard to PPE shortages, Oregon OSHA does not believe such a planning activity is wasted. Indeed, the agency expects that this provision may be one of the last elements of the final rule to be repealed.

OAR 473-001-0744(4)(e)(A)– PPE during aerosol-generating procedures

Although the question of whether respirators should be required during all aerosol-generating procedures was a significant issue not only during the advisory committee discussions but also at the time the temporary rule was being developed, Oregon OSHA did not propose to change that provision from what was expected in the temporary rule. As a result, several commenters suggested that the requirement should be strengthened. Most labor organizations offered comments such as the following:

> *The language in 4(e)(A) continues to allow employers too much discretion on whether to provide respirators for aerosol generating procedures (AGPs) for patients without evidence of COVID-19 infection. Since this rule will only apply during the course of the pandemic and at least one third of all infected people are asymptomatic, we believe that respirators should be required for any AGPs. In a study of all patients admitted to a hospital over a 12-week period, 37 percent of those found to be infected with COVID-19 were asymptomatic. Most of these patients were admitted for trauma-related injuries or for labor and delivery. We urge Oregon OSHA to require the use of N95 or stronger respirators for all AGPs for all patients during the term of the permanent standard.*[423]

A private consultant also encouraged clearer – and stronger – language:

> *Please explicitly state that All healthcare providers who are performing AGP's are REQUIRED to wear respirators (ex. N95). - Many healthcare facilities are NOT wearing N95's for two reasons: 1) they don't know that an N95 is considered a respirator, and 2) it is not explicitly spelled out in your rules. Under (4)(e)(A) it*

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[420] *Letter from Jana Jarvis on behalf of the Oregon Trucking Association, March 31, 2021*
[421] *Ibid.*
[422] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*
[423] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*

> *directs them to CDC website but they would have to actually go hear and wade through everything - and they aren't.*[424]

Others expressed concern about the possibility that the requirement would be strengthened:

> *I would like to raise my objection to the possible change in rules for wearing this type of mask on a permanent bases. This mask interferes with my ability to complete my task of dental hygiene on several levels….The person to whom an N95 protects is me and I'm not asking you to protect me other than using universal precautions which when used correctly is more than sufficient protection.*[425]

Ultimately, Oregon OSHA determined that the proposed rule struck and appropriate balance, and the final rule includes the language as proposed.

OAR 473-001-0744(4)(e)(B) – PPE when caring for COVID-19 patients

However, in light of the increasing documentation about the risks of aerosol transmission *and* the reality that the constraints on respirator availability of earlier in the pandemic have largely subsided, Oregon OSHA did propose stronger language related to the use of PPE when caring for patients with confirmed or suspected positive COVID-19. This reflects an understanding on Oregon OSHA's part that any employee who is exposed to an individual who is known to have COVID-19 in the workplace should receive appropriate protection under the existing requirements of the Respiratory Protection Standard.

Organizations representing the affected workers offering comments such as the following:

> *We thank you for strengthening the language in Section 4(e)(B), requiring a NIOSH-approved respirator for workers providing direct patient care to patients with confirmed or suspected COVID-19. We are grateful that you heard our representatives on the Rulemaking Advisory Committee who were able to speak through their experience as bedside nurses about the need for respiratory protection. This is a major improvement over the ETS and per public reporting it is clear hospitals in Oregon are not facing any constraints on obtaining adequate quantities of respirators.*[426]

Health care employers generally objected to the requirement, with arguments similar to the following:

> *In the proposed permanent rule, OSHA is deviating from OHA's guidance by not allowing "…a medical-grade mask" as acceptable PPE when an employee is providing direct patient care for a patient known or suspected to be infected with COVID-19. This deletion disconnects OSHA's rules from OHA's guidance and the IDSA, making the OSHA rule more restrictive and fails to allow for any changes to forth coming recommendations or guidance.*
>
> *The deletion says that the only acceptable PPE for direct patient care would be gloves, a gown, eye protection and NIOSH-approved respirators such as N95. This is problematic since not everyone is fitted or can be fitted for N95 masks, nor does it take into consideration employee PPE fatigue. Furthermore, when supply was limited, many hospitals shifted to other acceptable and oftentimes preferred PPE such as a PAPR. Hospitals would like confirmation that PAPR is acceptable PPE under the proposed rule. If the PAPR is not accepted, then OSHA must extend the implementation date of this provision to allow hospitals and other health care facilities to transition back to N95s.*[427]

Oregon OSHA is uncertain as to why there would be any doubt as to whether a NIOSH-approved powered air purifying respirator (PAPR) would not satisfy the requirement of the proposed rule to require the use of "a NIOSH-approved respirator." It clearly would. A PAPR is generally superior to an N-95 for a number of reasons, and the proposed rule text did not, in fact, mention N-95s.[428] At the suggestion of OHA, in the final rule Oregon OSHA broadened the requirement to allow for the use of "either a NIOSH-approved respirator or a respirator with a current emergency use authorization by the United States Food and Drug Administration."

With regard to the concern that some individuals cannot be fitted with a respirator, Oregon OSHA notes that there are a variety of suitable respirators. If none of them are workable for a particular individual, Oregon

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[424] *Written comments from Kelli Ngariki, on behalf of Healthcare Compliance Associates, February 24, 2021*
[425] *E-mail from Cindy Page, February 19, 2021*
[426] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*
[427] *Letter from Andi Easton on behalf of the Oregon Association of Hospitals and Health Systems, April 2, 2021*
[428] *Oregon OSHA notes for the record that a NIOSH-approved N-95 would, of course, also be suitable.*

OSHA would expect the health care provider to assign them to other duties that do not involve caring for COVID-19 patients.

Oregon OSHA believes that respiratory protection requires the use of respirators, not masks that are not intended to be used as respiratory protection. While exceptions may have made out of necessity early in the pandemic, when the supply of respirators was genuinely at crisis levels, Oregon OSHA disagrees with employers who argue that such a crisis exists now. Oregon OSHA also does not consider "respirator fatigue" to be an appropriate reason to forego proper respiratory protection. The health care employers suggest that Oregon OSHA's rule will be too static and unable to adjust to changing guidance from the CDC and elsewhere. Oregon OSHA notes that the need to use a bona fide respirator when respiratory protection is required is not something that should be subject to frequent change. In addition, the employers in question appear to be advocating for a strategy that relies upon a guidance document developed last summer – and that even so does not indicate that those caring for COVID-19 patients should not be wearing respirators.

Oregon OSHA also notes that the current CDC guidance on the subject, updated in late February of this year, includes the following statement:

> *The PPE recommended when caring for a patient with suspected or confirmed COVID-19 includes the following:*
>
> *Respirator*
>
> *Put on an N95 respirator (or equivalent or higher-level respirator) before entry into the patient room or care area, if not already wearing one as part of extended use strategies to optimize PPE supply. Other respirators include other disposable filtering facepiece respirators, powered air purifying respirators (PAPRs), or elastomeric respirators.*
>
> *N95 respirators or respirators that offer a higher level of protection should be used when performing or present for an aerosol generating procedure. See appendix for respirator definition.*
>
> *Disposable respirators should be removed and discarded after exiting the patient's room or care area and closing the door unless implementing extended use or reuse. Perform hand hygiene after removing the respirator or facemask.*
>
> *If reusable respirators (e.g., powered air-purifying respirators [PAPRs] or elastomeric respirators) are used, they should also be removed after exiting the patient's room or care area. They must be cleaned and disinfected according to manufacturer's reprocessing instructions prior to re-use.*[429]

The same document also includes the following discussion of PPE scarcity:

> *CDC has provided strategies for Optimizing Personal Protective Equipment (PPE) Supplies that include a hierarchy of strategies to implement when PPE are in short supply or unavailable (e.g., use of a respirator approved under standards used in other countries that are similar to NIOSH-approved N95 filtering facepiece respirators or a well-fitting facemask* ***when NIOSH-approved N95 or equivalent or higher-level respirators are not available****). [emphasis added]*
>
> *NIOSH-approved N95 or equivalent or higher-level respirators are preferred; when shortages exist, they should be prioritized for situations where respiratory protection is most important and the care of patients with pathogens requiring Airborne Precautions (e.g., tuberculosis, measles, varicella). Information about the recommended duration of Transmission-Based Precautions is available in the Interim Guidance for Discontinuation of Transmission-Based Precautions and Disposition of Hospitalized Patients with COVID-19.* [430]

Oregon OSHA does not expect to return to such scarcity (indeed, reducing such a possibility is one of the reasons for the addition of the PPE contingency planning requirement). In the event that it does occur, the rule provides sufficient flexibility to allow health care employers to continue to treat patients using "a medical grade mask" in place of the respirator. Given the CDC guidance and the clear expectation of the existing respiratory protection standard, Oregon OSHA believes it is appropriate, however, to limit such use to situations when "the employer can demonstrate that the availability of respirators is genuinely limited."

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[429] *"Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic," CDC. Updated February 23, 2021; https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html*

[430] *Ibid.*

With the addition of the language already mentioned, the final rule includes the requirement to provide respirators whenever employees are treating COVID-19 patients.

The workers raised an additional concern related to respirator use:

> *We are concerned that environmental service workers who clean rooms for COVID-19 patients are not covered under 4(e)(B) and will be denied respirators. Operations or maintenance workers are similarly excluded if they come into close contact with COVID patients. It would be helpful if language is added to 4(e)(B), such as "workers providing direct patient care or cleaning, sanitizing or maintenance duties in close contact to patients with suspected or confirmed COVID-19." These workers are at risk when working in rooms that are occupied by COVID-19 patients or if they must work in them before six to twelve air exchanges have been completed.*[431]

Oregon OSHA believes that this issue can appropriately be addressed by application of the existing requirements of the Respiratory Protection Standard, which requires the use of appropriate respiratory protection whenever respiratory hazards are encountered.[432]

OAR 473-001-0744(4)(e)(C)– PPE when in limited supply

> *Additionally, in Section 4(e)(C) we recommend the reference to the Oregon Health Authority Guidance for Non-Emergency and Elective Procedures be removed as it is not as relevant as the OHA-Oregon OSHA guidance Use of Personal Protective Equipment by Health Care Personnel in Resource-Constrained Settings. The latter guidance provides the necessary information for employers. Including both documents does not provide clarity for them.*[433]

Oregon OSHA agreed with the above comment (as did OHA) and removed the reference.

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[431] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*

[432] *"Respiratory Protection Standard," 29 CFR 1910.134, adopted by Oregon OSHA by reference..*

[433] *Letter from Matt Calzia on behalf of the Oregon Nurses Association, April 2, 2021*

Section XVI: Discussion of Economic Impact and Mitigation

Oregon has required a lot of employers over the last 12-months and without any acknowledgement of the significant cost to local businesses.[434]

One of Oregon OSHA's obligations in relation to any rulemaking, found in the Administrative Procedures Act (APA), concerns the financial impacts of the proposed rule.

Description of the APA Fiscal Impact Requirements

The APA provides that the required notice of rulemaking, discussed in a previous section, must include the following:

A statement of fiscal impact identifying state agencies, units of local government and the public that may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected.[435]

The required statement of cost of compliance on affected small businesses must include the following:

(a) An estimate of the number of small businesses subject to the proposed rule and identification of the types of businesses and industries with small businesses subject to the proposed rule;

(b) A brief description of the projected reporting, recordkeeping and other administrative activities required for compliance with the proposed rule, including costs of professional services;

(c) An identification of equipment, supplies, labor and increased administration required for compliance with the proposed rule; and
(d) A description of the manner in which the agency proposing the rule involved small businesses in the development of the rule.[436]

As with the entire statement of fiscal impact, the statute states that the agency must "utilize available information in complying with the requirements of this section." [437]

In situations where the fiscal impact on small businesses represents "a significant adverse impact," the law requires the agency to reduce that economic impact "to the extent consistent with the public health and safety purpose of the rule…."[438] Such reductions are to be achieved by one or more of the following:

(1) Establishing differing compliance or reporting requirements or time tables for small business;

(2) Clarifying, consolidating or simplifying the compliance and reporting requirements under the rule for small business;

(3) Utilizing objective criteria for standards;

(4) Exempting small businesses from any or all requirements of the rule; or

(5) Otherwise establishing less intrusive or less costly alternatives applicable to small business.[439]

The consequences of a failure to adopt the required fiscal impact statement are described in ORS 183.335(11)(a).[440]

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[434]*E-mail from John Binford*
[435]*ORS 183.335(2)(b)(E).*
[436]*ORS 183.336(1).*
[437]*Ibid.*
[438]*ORS 183.540.*
[439]*Ibid.*
[440]*See ORS 183.335(11)(a), (1), which indicates that "…a rule is not valid unless adopted in substantial compliance with the provisions of this section…." See also ORS.335(12)(a) indicating that "an agency may correct its failure to substantially comply… by an amended filing, as long as the noncompliance did not substantially prejudice the interests of persons to be affected by the rule."*

The law further requires that, for Oregon OSHA rulemaking,[441] "…the statement of fiscal impact shall also include a housing cost impact statement as described in ORS 183.534."[442] The referenced statute in turn indicates that the required "housing cost impact statement is an estimate of the effect of the proposed rule or ordinance on the cost of development of a 6,000 square foot parcel and the construction of a 1,200 square foot detached single family dwelling on that parcel."[443] The consequences of the failure to prepare such a statement are described in ORS 183.538.[444]

If, as in this case, an advisory committee has been appointed to assist with the development of the rule, the APA requires the agency to "seek the committee's recommendations on whether the rule will have a fiscal impact, what the extent of that impact will be and whether the rule will have a significant adverse impact on small businesses," as well as to seek the committee's recommendation in mitigating any such impacts.[445] The APA further requires the agency to "consider" the advisory committee's recommendations in preparing the fiscal impact statement.[446]

As described in the section on the history of this rulemaking, Oregon OSHA established two Rulemaking Advisory Committees and, among other things, sought their input as to the required Fiscal Impact Statement. Based on information obtained throughout the rulemaking process, Oregon OSHA developed a draft Fiscal Impact Statement. Both committees approved it, as did a clear 30-12 majority of the combined membership of both groups. Oregon OSHA then proceeded with the proposed rule filing, including the Fiscal Impact Statement as approved by the two RACs.[447]

Although not discussed in the Fiscal Impact Statement itself (which did not identify a significant adverse impact on small business), the proposed rule did include several measures to minimize the potential impacts of the rule on small business. As had been the case with the previously adopted temporary rule, the proposed rule exempted the smallest businesses (those with fewer than 10 employees) from the rule's documentation and written plan requirements, unless they were subject to the exceptional risk provisions of the rule. In addition, Oregon OSHA made model programs and other supporting materials available as part of the temporary rule, which are particularly useful for small employers and other employers who do not have in-house own health and safety or human resource staff. The rule as proposed was intended to allow employers who had used those materials to comply with the rule to avoid future assessment, planning and training activities – and the final rule makes that explicit, as discussed previously. In addition, those materials remain available to assist any employers who failed to comply with the temporary rule when it was adopted.

Although Oregon OSHA had not made such a finding, some employers did see a disproportionate impact on small businesses. For example, one wrote, "Costs of the measures in these rules fall disproportionately on very small businesses. OSHA should provide funding to assist small businesses in costs of compliance."[448] While Oregon OSHA cannot provide such direct funding, it does provide resource such as those already mentioned. In addition, Oregon OSHA has a large onsite consultation staff, who are available to work with employers as they apply the rules to their worksites. Small employer requests for such consultation services receive priority over larger employers.

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[441] *See ORS 183.530(6).*
[442] *ORS 183.335(2)(b)(E).*
[443] *ORS 183.534.*
[444] *See ORS 183.538(1), which indicates that such a failure "shall not affect the validity or effective date or any rule…." See also ORS 183.538(2), which indicates that judicial review "shall determine only whether a housing cost impact statement was prepared and shall not make any determination as to the sufficiency of the housing cost impact statement."*
[445] *ORS 183.333(3).*
[446] *ORS 183.333(4).*
[447] *"Oregon OSHA's Proposal on Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces," January 29, 2021. https://osha.oregon.gov/OSHARules/proposed/2021/ltr-proposed-covid19-public-health-emergency.pdf.*
[448] *Written comments from Jerry Russell, March 26, 2021*

Specific Discussions of Fiscal Impacts

Several commenters suggested that the Fiscal Impact Statement had omitted significant costs. For example, several organizations and individuals raised concerns about the HVAC certification such as the following:

> *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. In order to certify compliance and maintain such certification, employers will be required to incur a quarterly HVAC inspection expense.*[449]

In this case, Oregon OSHA believes the cost described is not actually a result of either the proposed or final rule. As discussed previously (and as stated more clearly in the rule as adopted), the certification does not require the use of an "HVAC expert" to check the system (nor does maintaining the record require that the certification be repeated, quarterly or otherwise).

Other comments appeared to criticize the omission of what the commenter appeared to recognize were best practices not actually required by the rule. For example, one organization offered the following comments on two distinct issues:

> *The idea that you can physically distance in a vehicle without significant additional cost is uninformed at best and absurd at worst. You haven't considered our fuel bill.* [450] *While it is allowed to transport the vehicle maximum occupancy, it is not recommended. Limiting vehicles to four passengers has had the greatest impact on our business financially and the productiveness, safety and morale of the yarder crews. Generally a crew can ride together, five or six. They plan out the tasks for the day ahead and share stories about the day, talk about safety and any concerns on the way home. They no longer get to do that because they are split up to reduce capacity. Now, it is a struggle just to get everyone to work given the number of employees without driver's licenses which creates more fatigue and frustration. And the more vehicles you put on the road, the more accidents can happen.*[451]

The rule does not require physical distancing in or capacity restrictions on vehicles. What "is allowed" cannot be described as a cost of *compliance* with the rule, even if "it is not recommended." Similarly, the rule does not require the use of static work groups referenced by the same organization:

> *In another aspect of physical distancing, maintaining static work groups as a best practice has led to negative impacts on employee morale. During winter weather or fire season shutdowns when certain job sides are not working, layoffs should be handled by seniority, but static work groups prevent that. When the layoff is only a day or two, as so often happens, employees do not qualify for unemployment insurance*.[452]

A similar issue arises in relation to certain comments about personal protective equipment. The Fiscal Impact Statement must take into account reasonable pricing of items required for compliance, but more than one group appeared to go farther:

> *Prices are not accurate for PPE- our providers largely do not utilize Amazon, nor do they have the purchasing power that allows them to enjoy low costs. Small dental practices simply cannot compete with others on the market, and even some of our larger corporate entities indicate that the PPE priced in this fiscal is simply not representative of today's market. As well, this estimation does not capture surge pricing. We can easily see a 3-50% jump in prices if the pace of the demand keeps up.*[453]

Oregon OSHA makes no recommendation with regard to the best sourcing for PPE or other supplies. But if a business chooses for other, completely appropriate reasons to use a higher-cost option than the rule requires, the cost of that decision cannot appropriately be described as a cost of compliance with the rule. Oregon OSHA recognizes that pricing on many items can be volatile in the present market, but it cannot base a fiscal on a potential jump in prices any more than it would be appropriate to assume a reduction in those prices due to greater volume purchasing. The Fiscal Impact Statement developed by the agency and

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[449] *Letter from Cameron L. Krauss on behalf of Seneca, April 2, 2021*
[450] *Comments from Bighorn Logging Safety Committee, March 23, 2021*
[451] *Comments from Bighorn Logging Safety Committee, March 23, 2021*
[452] *Comments from Bighorn Logging Safety Committee, March 23, 2021*
[453] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*

approved by the RACs was based on the best available information Oregon OSHA could readily obtain, as the law requires.

Some organizations questioned the staff pricing and the assumptions about who would do certain work. For example, one health care association made several such criticisms of the fiscal analysis:

> *The fiscal notes estimations for nurses developing training materials. It is likely that dentists, as owners of dental practices, are developing training materials, and their salary, time and time away from patients bringing in revenue should be in the accounting.*[454]
>
> *Section 4b training- this includes estimates for EMS and nursing staff, but not for dentists. As well, their estimates are based off of the wage of the provider- rather than dollars lost from providers are spending time in training and not seeing patients (and billing for it).*[455]
>
> *While dentists have infection control plans under normal circumstances, these rules create additional requirements, which should be priced to appropriately reflect a dentist's salary to create and implement.*[456]

It is not clear to Oregon OSHA why dentists would find it necessary to do all the work themselves in developing these materials (which presumably have already been developed in response to the temporary rule in any case). Again, if that is a decision that is not required by the rule – nurses are certainly qualified to do the work – it is not a cost of compliance.

Overall, Oregon OSHA has reviewed the various criticisms of the Fiscal Impact Statement and has determined that none of them raise issues that are significant enough to create a material change in the overall analysis. However, Oregon OSHA acknowledges that others disagree:

> *OSHA has left significant employer costs out of its Fiscal Impact Statement. Perhaps the largest of these costs relates to social distancing rules. These rules force employers to dramatically modify workflows and re-arrange interior spaces. It is the author's opinion that OHA dramatically underestimated the time needed to plan and implement such changes.*[457]

In the face of such general assessments that the agency has made the wrong determination, Oregon OSHA returns to the fact that the Fiscal Impact Statement filed with the proposed rule not only represented its best assessment of the issue – it was approved by those empaneled to advise the agency.

Employer and Industry Efforts to Combat COVID-19

A number of comments echoed the sentiment that opens this section – that Oregon employers have made significant sacrifices and put forth significant effort, with sufficient acknowledgment on the part of the state. Oregon OSHA certainly agrees that many businesses – particularly those in certain hard-hit industries – have shouldered more than their share of the fight against this global pandemic. If Oregon OSHA has not been as diligent in acknowledging that reality as we should have been, we offer that acknowledgment now. And it seems worthwhile to share some of the comments that represent the efforts made by various employers and industries.

Several employer associations wrote of such efforts, of which the following is just one example:

> *Based on the data and our overall employment footprint, we believe our industry has been a model of success. Our response to the pandemic could be characterized in phases: first, early and robust training education and protocols to get in front of the disease; then, sharing of best practices, and expanded partnerships; and finally, refinement of our work practices and public information. Our formal rulemaking comments for the proposed infectious disease rules is in the context of our proactive work and the work practices we all have discussed and implemented thus far.*[458]

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[454] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*
[455] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*
[456] *Letter from Brad Hester on behalf of the Oregon Dental Association, March 31, 2021*
[457] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[458] *Letter from Mark Long on behalf of the Oregon Homebuilders Association and Mike Salsgiver on behalf of the Columbia-Willamette Chapter of the Associated General Contractors, April 2, 2021*

And the following statement by a state legislator offers a broader, and useful, perspective on the same issues:

> *Businesses in my district, and throughout the state, care deeply about the health and welfare of their employees and customers. The past 12-14 months of this pandemic has highlighted the commitment of businesses, who at considerable expense, have gone above and beyond to implement workplace safety standards and protocols. Businesses have created safe work conditions for their employees and customers. These businesses want to continue safe protocols to continue safe work spaces and retail opportunities; they need to have healthy employees and customers.*[459]

The burdens borne by both employers and their workers throughout this pandemic have been real ones, and many organizations have risen to the challenge. It is in no small measure because of their efforts – and their successes – that Oregon OSHA believes that the length of time until this rule will be repealed will be relatively brief.

[459] *Letter from Vikki Breese-Iverson, Oregon State Representative*

Section XVII: Discussion of COVID-19 Enforcement

The record includes several references to Oregon OSHA's enforcement activities in relation to COVID-19 (much of which was not actually tied to the temporary rule, but to workplace application of broader public health guidance).

A summary of Oregon OSHA COVID-19 enforcement activity

As noted in the section on the history of the rule, Oregon OSHA has received a record-breaking number of complaints throughout the months since the beginning of the pandemic. As of May 3, 2021, Oregon OSHA had logged a total of 24,046 complaints alleging at least one COVID-19 related violation. Oregon OSHA completed thousands of non-entry, non-inspection spot checks as part of the effort to investigate and resolve these complaints as efficiently as possible. And, when necessary, Oregon OSHA initiated formal inspections.

Oregon OSHA has issued at least[460] 154 citations to employers for violating requirements to protect workers from COVID-19 (these are the result of roughly 400 formal enforcement actions, the overwhelming majority of which were based on the complaints received).

Penalties for non-willful, but serious, violations have ranged from the minimum of $100 to $4,200 (well under the maximum penalty for a serious violation of $12,750), while penalties for willful violations have ranged from the minimum of $8,900 to the maximum of $126,749.

Penalties as a Source of Revenue

Several individuals suggested that the purpose of the rule was to generate penalty revenue. For example, one commenter wrote, "Your organization has a clear conflict of interest in collecting the fines from these permanent covid lockdown rules; leaving Oregon OSHA wide open for legal action."[461] Oregon OSHA routinely enforces the rules that it adopts. The statute directs it to perform both functions,[462] making successful legal action on that point unlikely.

Others echoed the belief that the purpose of the rule is to generate revenue, such as the individuals who wrote, "I believe this is just a ploy to get more money, fines are where its at. There is no science behind the mask, this is all a political mandate."[463] Another commenter made a similar suggestion: "I can't help but wonder if the reason a permanent rule is proposed is so that OSHA can continue to fine business."[464]

In normal years, penalties provide a very small portion of the revenue to the Premium Assessment Operating Account, which funds Oregon OSHA as well as a number of other workers compensation related programs. During the past year, that funding has decreased dramatically, not increased.

The Department of Consumer & Business Services responded to a legislative question earlier this year with the following:

> *Finally, the committee had questions about penalties as a revenue source. As noted, penalties paid by employers under the Oregon Safe Employment Act are deposited into the Premium Assessment Operating Account (PAOA). That fund, with primary funding coming from an assessment on workers' compensation insurance premiums, funds the various workers' compensation-related activities at DCBS, as well as programs at the Oregon Health and Science University's Institute of Occupational Health Sciences.*

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[460] *Citations related to COVID-19 restrictions must be identified and tracked manually, at least in part, making the number less exact than would otherwise be the case; it is possible that some citations have been inadvertently omitted from both the count and the list.*

[461] *E-mail signed "X X," April 1, 2021*

[462] *The statutory authority to adopt rules is discussed at some length in the section on that topic. The enforcement provision, which is found in ORS 654.067, ORS 654.071, and ORS 654.086, among others*.

[463] *E-mail from JoLinda Flanigan, March 20, 2021*

[464] *E-mail from Meryl Roberts, April 2, 2021*

The table below shows the Oregon OSHA penalty revenue, compared to the overall PAOA revenue, for the past four fiscal years:

Fiscal Year	Oregon OSHA Penalties[465]	Total PAOA Revenue, Including Federal Funding	Penalties as Percentage of Total PAOA Revenue
2018	$1,895,076	$72,029,115	2.6%
2019	$1,973,118	$80,700,710	2.4%
2020	$2,117,193	$80,461,141	2.6%
2021[466]	$506,680	$38,625,783	1.3%

In addition, as described previously, Oregon OSHA has done only a small number of COVID-19 inspections compared to the number of complaints that have been filed. If Oregon OSHA's goal were to maximize penalty revenue, the only way to achieve that goal would be to maximize the number of inspections, since the non-inspection investigative techniques used by the agency cannot generate citations or penalties.

Confusion about Enforcement

More that a few people in the record indicated their belief that individual members of the public would be subject to Oregon OSHA enforcement, such as the following:

On another incident, I was refused the right to buy groceries at a local market and I was threatened with a $1200 fine if I did not "comply" with the store mask policy. This particular market said that OSHA would issue a fine against me for non-compliance.[467]

If the store in question indicated that Oregon OSHA would or even could issue a penalty to individuals other than employers, it was mistaken. Denial of service in the face of a refusal to comply with the need to comply with either state requirements or the store's own policies is the expected enforcement mechanism in such cases, and Oregon OSHA has no other mechanism available to it beyond holding employers accountable for the control they need to exercise over their workplaces when workers are exposed to potential harm.

The Need for Enforcement

Oregon OSHA is an enforcement agency, although it also provides outreach, consultation and a range of other services in its efforts to promote the safety and health or Oregon workers. In general, Oregon OSHA pursues a balanced approach to enforcement, where penalties for most violations are relatively modest and where only willful or repeated refusals to comply are likely to result in the most significant penalties. That has also been the approach the agency has pursued with COVID-19, combined with an even more aggressive effort to educate employers who may not be clear on what is expected of them before any formal enforcement activity takes place.

While some commenters, such as those already mentioned, found Oregon OSHA's effort to balance its approach lacking, believing it was too "heavy-handed," others found it lacking for other reasons:

*•**Emphasize enforcement of these rules:** Oregon workers rely on Oregon-OSHA to ensure workplace safety. While in some situations consulting with employers can result in positive changes to the workplace over time, workers need safe workplaces now. When employers fail to provide safe and healthy workplaces, Oregon-OSHA should use its enforcement powers to protect workers without delay.*

OR-OSHA's work with willful violations at workplaces in the restaurant setting is important, but we encourage you to not confine your enforcement efforts and media on willful violations only or to one industry. We encourage you to highlight violations that are cited by you across all industries. At this stage of the pandemic,

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[465]*This revenue data reflects the year the revenue was collected, not necessarily the year the penalty was issued – Oregon OSHA penalties are not payable until 20 days after the citation becomes a final order, following any appeals.*
[466]*The FY 2021 data is current through December 2020.*
[467]*E-mail signed "Ananda"*

> *employers should be aware of what is required to keep workers safe, and motivated to do so. Workers are relying on them, and you.*
>
> *Many among our staff are concerned about the lack of adequate enforcement to encourage workers to make workplace safety complaints to OR-OSHA. We encourage you to enhance your enforcement resources and efforts across all industries but particularly in the high-risk areas, and ask that you rely less on complaints to do the inspections of high-risk workplaces, as many workers are afraid of losing their jobs if they complain.*[468]

Oregon OSHA will continue its efforts to seek an appropriate balance in its enforcement of the rules, just as it has endeavored to do so in the adoption of these rules.

[468] *Letter from Nargess Shadbeh and David Henretty on behalf of the Oregon Law Center, April 2, 2021*

Section XVIII: Evaluating the Rule and Assessing Its Effectiveness

ORS 183.335()(d) states that if the agency proposing a rule receives a request from "at least five persons before the earliest date that the rule could become effective after the agency gives notice," the agency must provide a statement that identifies the objective of the rule and a statement of how the agency will subsequently determine whether the rule is in fact accomplishing that objective." Because the original agency notice provided for public comment through April 2, 2021, the earliest date that the rule could have taken effect following that notice is April 3, 2021. During that time, the agency did indeed receive several requests for a statement of the objective and how the agency will assess its effectiveness.

The objective of the COVID-19 workplace rule that is the subject of this rulemaking is to provide a meaningful reduction in the risk of harmful COVID-19 exposure to workers subject to the jurisdiction of Oregon OSHA during the COVID-19 pandemic. The rule pursues that goal by a set of overlapping measures designed to reduce those risks, although Oregon OSHA recognizes that the measures reflected by this rule do not eliminate the risk, and it is likely that some workers will experience work-related exposure and resulting illness even if all of the provisions of this rule are fully implemented by their employers.

The clear purpose of the statute is to ensure that agencies can be held accountable for the need to continue to review and evaluate the rules that have been adopted to make sure that they work as intended, so that they can be adjusted or even repealed at some point in the future if they are not achieving the intended objective. However, the rule in this case will in fact be repealed in a matter of months, rather than of years. Therefore, the rule presents a unique situation in which an evaluation of the rule's effectiveness over a number of years is obviously inappropriate; the rule will not be in place that long.

However, the mechanism provided in the rule to allow the agency to determine whether and when it is appropriate to repeal the rule because it has served its purpose also provides a perfectly suitable mechanism to reconsider whether the rule or its various provisions are failing to serve that purpose in the first place. Therefore, the discussions that will occur at least every other month from now until the rule has repealed will also include a specific conversation with stakeholders to see whether the same data under review – information related to vaccination levels, infection rates, variant breakthrough, hospitalization and fatality rates, etc. – suggests that the rule has not been serving its intended purpose to provide a meaningful reduction in risk of workplace COVID-19 transmission.

It is worth noting that in this unique case, Oregon OSHA expects to reach a point where the agency will conclude that the rule *no longer* serves its purpose, not because it did not achieve its intended goal, but because that goal has been satisfied and the level of vaccinations and other data suggest that it is no longer needed. And that is when the rule will be repealed.

Section XIX: Conclusion – The Rule as Adopted Strikes an Appropriate Regulatory Balance

> *This has been a year of making lightning-fast policy decisions and, from what I have seen, both the Oregon legislature, governor's office, and our college administration, have done extraordinarily well.*[469]
>
> *…no element of Oregon's government has ever considered any consequences of face covering mandates or other parts of the lockdowns. How can any policy be deemed rational if it fails even to consider the costs and consequences? It cannot be.*[470]
>
> *We support the proposed permanent rule regarding COVID-19 in the workplace.*[471]
>
> *Enough is enough! Risks are inherent in almost everything we do in life. As individuals, we weigh the risks and decide to proceed or not. We appropriately guide our children in calculating risks as well. That is NOT the government's responsibility.*[472]

The Decision to Be Made

Ultimately, Oregon OSHA must make a decision on whether to adopt the rule as proposed, to adopt a modified version of the rule, or to withdraw the proposed rule. These same options exist in relation to each specific provision of the rule as well.

While it is true that the rule is an administrative rule under the Oregon Safe Employment Act (OSEA) and that the authority to adopt such rules is vested in Oregon OSHA in the person of the administrator, Oregon OSHA does not consider that authority to reflect the absence of accountability. Rather, the agency is accountable to use the authority granted it under the OSEA prudently and to balance the various interests reflected in the rulemaking record in an effort to best achieve the purposes of the Act. And, as previously noted, Oregon OSHA accepts an obligation not found in the law itself to explain the decisions it has made as part of the rulemaking.

Within that context, Oregon OSHA has made its decision on this rule and the individual provisions of it by considering the record and determining whether each provision is warranted by the circumstances reflected in the record, whether it is designed to appropriately serve that purpose, and whether the workers and employers of Oregon will be better served by the rule provision or by its absence.

Oregon OSHA is conscious of the wide range of opinions expressed in relation to this rule. As noted previously, in some cases the difference of opinion is the result of misinformation or misunderstanding of what the rule would do or how it relates to other requirements. In others, such as the following, Oregon OSHA has simply reached different conclusions about the science:

> *Rules implicitly assume that asymptomatic carriers of COVID-19 pose a major health threat in the workplace. There are good reasons to doubt that this is true.*[473]
>
> *At this time, it is irrational to believe that face covering mandates have any effect on COVID. But again, it is not opponents' burden or duty to prove that. It is your duty to prove that such mandates work.*[474]

Oregon OSHA agrees with the person who wrote, "OSHA 's job is not to protect employees from every conceivable risk they may face in employment situations."[475] However, unlike the commenter, Oregon OSHA recognizes that the rule before us does not do that, nor does it attempt to do so. Oregon OSHA knows that even full compliance with the rule will not prevent all workplace transmission of COVID-19.

One commenter summarized the issue as follows: "In short, Oregon OSHA's proposal for a permanent COVID-19 rule is needless and unjustified and, therefore, should not be adopted."[476] Oregon OSHA disagrees. The final rule is a measured and thoughtful approach. Oregon OSHA has adopted it in full awareness that the measures it requires will have a cost, and they will certainly present continued

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[469] *Letter from Ric Gettler on behalf of Portland Community College classified staff, March 31, 2021*
[470] *Written comments by John Liljegren, April 2, 2021*
[471] *Letter from Carl Wilmsen on behalf of the Northwest Forest Worker Center/Lomakatsi Restoration Project*
[472] *E-mail from Dan Whitney, April 2, 2021*
[473] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[474] *Written comments by John Liljegren, April 2, 2021*
[475] *Written analysis submitted by Neil M. Ruggles February 28, 2021, as revised and resubmitted March 25, 2021*
[476] *E-mail from Katie Parsons, March 24, 2021*

challenges. But Oregon OSHA is also convinced that it is necessary. The hazards created by the COVID-19 pandemic in Oregon workplaces have not passed. And they require action.