



Initial Issue Paper on Oregon OSHA Infectious Disease Rulemaking for the General Workplace

Background

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. Oregon OSHA is pursuing both a rule that would apply to health care and closely related activities and to the general workplace. This paper addresses the general workplace rule.

Oregon OSHA plans to rely upon as much collaboration and consultation with experts and with stakeholders as the timeframes involved and other circumstances allow. In the case of the temporary rule, this will primarily be through targeted virtual forums and then the circulation of a draft prior to a decision on adoption. In the case of the permanent rule, Oregon OSHA is empaneling a rulemaking advisory committees in addition to employing targeted virtual forums and circulation of preproposal drafts.

Oregon OSHA believes that such rulemaking, even on an emergency basis, will allow many Oregon workplaces to move beyond the necessary but inevitably unstable measures adopted through Executive Orders and public health guidance issued by the Oregon Health Authority. It is clear that the COVID-19 emergency will not come to an end soon – Oregon OSHA believes that during this next phase the temporary rule will provide both clearer and more stable guidance than has been possible during the height of the emergency. The temporary rule will necessarily focus on the measures necessary to address COVID-19 – the permanent rule will likely continue some of those measures but also will provide a structure to address future disease outbreaks as well.

Addressing Concerns about Rulemaking

Oregon OSHA realizes that some groups, particularly those representing employers, have concerns not just about the details of such a rulemaking but about the fact of the rulemaking itself. Several of those concerns are listed in below, along with Oregon OSHA's discussion of the issues raised.

Concern 1: The emergency continues to unfold and any rulemaking is therefore likely to be outpaced by future developments regarding appropriate protective measures.

Oregon OSHA agrees that the rulemaking will need to proceed cautiously so as not to forestall future protective measures that may be superior to those developed by the rule. However, we believe that the science – at least as it relates to the primary protective measures that can be employed in the workplace – has reached a level of relative stability. And the stability and predictability that even a temporary rule provides is one of the strengths of moving toward rulemaking rather than continuing to rely upon workplace applications of evolving public health guidance. Finally, the rule can – if truly necessary -- be revised if new developments truly merit such a revision.

Concern 2: The Legislature decided not to move forward with a concept to authorize and require such a rule during the recent special session.

When asked, Oregon OSHA has consistently indicated it has sufficient authority to engage in such rulemaking under our existing authority to adopt rules addressing workplace health and safety. Following conversations prior to the interim legislative committee hearings, and additional conversations immediately prior to the special session, Oregon OSHA agreed to move forward with rulemaking. Oregon OSHA and the Governor's Office advised advocates for such legislation that it was not necessary, that any legislative action should not restrict Oregon OSHA's existing authority, and that the August 1 effective date reflected by the legislative proposals would not allow for even accelerated stakeholder involvement. Some opponents of legislative action even based their opposition, at least in part, upon the fact that Oregon OSHA already has the necessary authority. In this context, Oregon OSHA does not believe the Legislature's decision not to move forward with infectious disease legislation reflects a legislative expectation that Oregon OSHA would not use its existing authority.

Concern 3: The rule would impose permanent control measures across every sector to reduce workplace exposures to any infectious disease: COVID-19, the seasonal flu, and potentially even the common cold.

First of all, any concern about "permanent" measures would relate only to the permanent rulemaking, not to the temporary rule that Oregon OSHA hopes to have in place this summer. It is true that the rule would set out to impose similar measures based on the nature of the hazards involved – it is not clear why such consistency, where practicable, would be a cause for concern. Finally, the concern about other diseases seems to be misplaced. While the control measures required by a rule would be targeted to COVID-19 in the temporary rule and to similar public health emergencies in the permanent rule, it is not clear to Oregon OSHA why a rule that might also result in decreased exposure to the season flu and the common cold would be undesirable.

Concern 4: It layers new costs and new mandates on employers, many of whom are struggling to survive.

To the degree that the rule requires things that are not currently required, the cost of such new requirements should indeed be considered in the temporary rule and explicitly must be addressed as part of a proposed permanent rule under the Administrative Procedures Act. But fear over such potential costs should not prevent a discussion, nor should limited costs cause a proposed worker protection to be dismissed out of hand. Oregon OSHA considers this issue to be an appropriate consideration as part of the rulemaking process, but does not consider it to be a persuasive reason not to engage in such a process at all.

Concern 5: By creating a new class of workplace hazard, it creates adds liability at a time when employers are seeking greater certainty.

The hazards, whether they represent a "new class" of such hazards or not, already exist. Oregon OSHA is already holding employers accountable for how they address such recognized hazards, relying both on OHA guidance and on the various "general obligation" requirements of existing Oregon OSHA rules. Further, Oregon OSHA believes that the adoption of rules will provide greater certainty, which employers and their workers certainly have legitimate reason to expect.

Concern 6: The rulemaking will create overlapping regulations in addition to the guidance already adopted by OHA, the Centers for Disease Control, federal OSHA, and industry groups.

None of the listed items represent regulations in any sense, other than the public health requirements found in OHA guidance. It is not unusual that other sources provide advisory guidance that supplements the minimum requirements found in Oregon OSHA rules. Oregon OSHA anticipates that its rules will replace the OHA workplace guidance to the degree that there would otherwise be "overlapping" requirements. Therefore, Oregon employers and their workers will be subject to only one set of requirements – those found in Oregon OSHA rules.

Concern 7: It gives Oregon OSHA unchecked authority to mandate new and permanent workplace controls.

This appears to be a concern about the legislative proposals. Oregon OSHA's rulemaking does not (and cannot) give Oregon OSHA any authority it does not already have. Even in relation to the legislative proposals, such a concern appears to be misplaced, because the legislation would not have expanded the authority already provided by the Oregon Safe Employment Act.

Questions for Stakeholder Discussion

Although each stakeholder discussion will explore issues of concern to the particular industries or activities reflected by the participants, the following general questions will help Oregon OSHA craft a draft temporary rule addressing the COVID-19 emergency for further review by the public and stakeholders.

Question 1: Are there requirements imposed by current OHA guidance that seem excessive or unnecessary?

Question 2: Are there issues in your industry or workplace that are not adequately addressed by existing requirements?

Question 3: Are there apparent contradictions or inconsistencies in requirements that do not make sense to you?

Question 4: If a rule is adopted, what are the two or three things that you think are most important for the rule to address?

Question 5: What are the two or three areas where you think employers most need help to keep their workers safe?