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September 11, 2020

Office of the General Counsel
Department of Labor Standards
19 Staniford Street, Second Floor
Boston, MA 02114

Submitted via email to dlsFeedback@state.ma.us

RE: 454 CMR 31.00 - COVID-19 Workplace Safety Regulations

To Whom It May Concern:

Public Citizen, a nonprofit consumer advocacy group with more than 19,500 members and supporters in Massachusetts and more than 500,000 members and supporters nationwide, supports Massachusetts Department of Labor Standard's efforts to implement COVID-19 Workplace Safety Regulations. However, we are concerned that the proposed Regulations lack key provisions that are essential for adequately protecting workers in Massachusetts from risk of infection with the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), the virus that causes COVID-19. We therefore recommend several additions, described below, to the proposed Regulations.

Implementation of robust COVID-19 Workplace Safety Regulations by the Massachusetts Department of Labor Standards (DLS) is critical given the reckless refusal of the U.S. Occupational Safety and Health Administration (OSHA) to issue a mandatory federal Emergency Temporary Standard for protecting workers from COVID-19.

The ongoing COVID-19 pandemic, which continues to rage across the country, remains a national public health emergency that will continue for many more months, if not years, to pose a significant threat to the health and safety of workers at the forefront of exposure to the coronavirus, including health care workers, first responders, transportation workers, grocery store workers, social service workers, farmworkers, and meat-processing plant workers, among many others.

There have been 121,759 confirmed cases of COVID-19 in Massachusetts and 8,957 confirmed deaths.¹ Most of the information reported on these cases fails to identify the occupation of the individuals, making it difficult to assess the full extent of the problem. However, we know that

¹ Massachusetts Department of Public Health COVID-19 Dashboard (Sep. 10, 2020), <https://www.mass.gov/doc/covid-19-dashboard-september-10-2020/download>.

of the nearly 122,000 people who have tested positive for SARS-CoV-2, 87,000 are of working-age (ages 20-69).²

As of September 2, 2020, the DLS had 881 COVID-19-related worker health and safety cases open, 757 closed, 381 with action taken by local boards of health, 249 with verbal warnings, and 369 with violations. In addition, there have been 2,954 complaints of unsafe working conditions reported to the Fair Labor Division of the Massachusetts Attorney General's Office.³ There have been 689 reports to OSHA of unsafe working conditions related to COVID-19 in Massachusetts, but only one citation has been issued.⁴ OSHA currently has 21 Massachusetts COVID-19 workplace fatality cases open.

An adequate and immediate mandatory standard for COVID-19 is critical to preventing the rapid spread of the disease in the workplace setting, as well as the broader community. This is particularly the case for health care workers and first responders. If these workers contract COVID-19 or are subject to prolonged quarantine because of potential exposure, they will not be available to assist and treat other infected patients, which would impede severely the ability of Massachusetts' health care system to stem the COVID-19 pandemic, as well as handle the usual flow of patients with other acute and chronic diseases. In addition, infected health care workers and first responders who have no or minimal symptoms could transmit the infection to vulnerable patients at high risk of dying from COVID-19. These factors together would exacerbate this ongoing public health crisis.

To adequately protect workers in Massachusetts from the risk of SARS-CoV-2 infection, we recommend that the proposed COVID-19 Workplace Safety Regulations be amended as follows:

- (1) No industries should be exempt from the Regulations. To the extent that industry standards, Massachusetts Reopening Requirements,⁵ or applicable Sector-Specific COVID-19 Workplace Safety Rules are more protective than the requirements of 454 CMR 31.00, the industry standards, Massachusetts Reopening Requirements, or Sector-Specific Rules should apply.

² Dying for Work: Documenting the Pandemic's Deadly Toll on Massachusetts Workers, Massachusetts Coalition of Occupational Safety and Health and Massachusetts AFL-CIO (Sep. 10, 2020), <http://masscosh.org/sites/default/files/Dying%20for%20Work%20-%20Pandemic's%20Deadly%20Toll%20Sep%202020.pdf>.

³ Id.

⁴ Id.

⁵ E.g., Health and Human Services Reopening Approach: Required Public Health/Safety Standards, <https://www.mass.gov/doc/eohhs-health-care-phase-1-reopening-approach-may-18-0/download>; Massachusetts Department of Elementary and Secondary Education Initial Fall School Reopening Guidance (June 25, 2020), <http://www.doe.mass.edu/covid19/return-to-school/guidance.pdf>; Massachusetts Department of Early Education and Care, Massachusetts Child and Youth Services Program Reopening Approach: Minimum Requirements for Health and Safety (June 12, 2020), https://eelead.force.com/resource/1591036172000/Min_Req; Department of Corrections Preparation and Response to COVID-19 (May, 2020), <https://www.mass.gov/doc/the-docs-preparation-and-response-to-covid-19/download>; and other requirements and guidance instituted by the Department of Youth Services, the Department of Mental Health, the Department of Public Health, and the Department of Developmental Services.

- (2) For the purposes of 454 CMR 31.00, the terms ‘employee’ and ‘worker’ should be defined to cover both permanent and temporary employees, as well as contract workers and undocumented workers.
- (3) For the purposes of 454 CMR 31.00, the term ‘workplace’ should be defined to include any place of employment and any worker transportation vehicles owned or operated by the employer or occupied for the purpose of work for the employer.
- (4) Section 31.06 should be amended to require the Department of Public Health, working with the DLS and Local Boards and Regional Boards of Health, to collect information on all confirmed cases of SARS-CoV-2 infection about occupation, industry, and employment at the time of testing or COVID-19 disease onset, as well as race and ethnicity, in the public health surveillance system for COVID-19. The Department of Public Health should routinely report on patterns of COVID-19 by occupation and industry to identify high-risk worker groups. All aggregate information under this subsection should be made publicly available in a manner that protects worker privacy and is consistent with laws protecting patient privacy.
- (5) The Regulations should clarify that different job tasks at the same place of employment can have different levels of exposure risk that may range from low to exceptional.
- (6) The Regulations should specify factors that should be considered in determining exposure risk level. Such factors should include the work environment (for example, indoors or outdoors); the number of employees and other persons in relation to the size of the work area; the duration and frequency of employee exposure through contact inside of six feet with other employees or persons; the potential exposure to the airborne transmission of SARS-CoV-2 virus via large droplets expelled by infected persons who cough, sneeze, etc. and via aerosol micro-droplets that float for distances in the air and are transmitted via breathing, talking, singing, sneezing or coughing; potential contact with contaminated surfaces or objects, such as tools, workstations, or break room tables; and the use of shared spaces such as shared workstations, break rooms, rest rooms, locker rooms, transportation vehicles, and entrances/exits to the facility.
- (7) The Regulations should prohibit the termination of an employee and any form of retaliation against an employee because they:
 - (a) Have tested positive for SARS-CoV-2;
 - (b) Have been diagnosed with COVID-19;
 - (c) Report having symptoms associated with COVID-19; or
 - (d) Report contact with anyone who has tested positive for SARS-COV-2, has been diagnosed with COVID-19, or is awaiting results of a test for SARS-COV-2.
- (8) The Regulations should prohibit the termination of an employee and any form of retaliation against an employee for:

- (a) Communicating to any person, including other employees, government agencies, or the public about unsafe job conditions or failure of an enterprise to meet the requirements under 454 CMR 31.00 or the Sector-Specific Rules; or
 - (b) Refusing to work under conditions that the employee reasonably believes would expose him or her, other employees, or the public to an unreasonable threat of illness or injury on the job.
- (9) The Regulations should require that workers who have quit their jobs or refused to work under conditions that the employee reasonably believes would expose him or her, other employees, or the public to an unreasonable threat of illness or injury on the job should be granted “just cause,” and deemed eligible for unemployment insurance.
- (10) The Regulations should require all vehicles designated for transportation of employees that contain three or more rows of seating to be equipped with impermeable barriers that provide a “droplet buffer” between seats.
- (11) Section 31.03(3) should be amended to require that employers institute procedures for medical removal of employees needing to be isolated or quarantined because of known or suspected SARS-CoV-2 exposure or infection as follows:
- (a) Employers should provide information to all workers who are required to stay out of work for any COVID-19-related reasons regarding their right to pay continuation under federal or state law, or under the enterprise’s own policies, whichever might apply.
 - (b) The employer must allow workers to use leave to which they are entitled under the Families First Coronavirus Response Act (FFCRA).⁶ If the employer is not covered by the FFCRA or has previously opted out of the paid sick leave provisions of the FFCRA, then the employer must provide up to two weeks of paid reassignment leave in addition to whatever benefits to which the worker would otherwise be entitled (such leave will be provided at 40 hours per week for full-time employees and on a pro-rata basis for part-time employees). Paid reassignment leave for piece rate workers should be paid at minimum wage or higher based on a 40-hour work week.
 - (c) For employees who need to be isolated or quarantined because of known or suspected SARS-CoV-2 exposure or infection, the employer must develop and implement policies and procedures for such employees to return to work using either a symptom-based or test-based strategy, depending on local healthcare and testing circumstances, return-to-work guidance issued by the Massachusetts Department of Public Health and the Centers for Disease Control and Prevention (CDC), and guidance from the employees’ medical providers or from the involved public health officials.
 - (d) The Regulations must guarantee return to work for all workers who have a positive COVID-19 test, or who have been quarantined due to exposure to a COVID-19 positive person. Workers should be guaranteed the right to return to work after the COVID-19 related absence, assuming that work is still available.

⁶ Public Law 116-127, <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>.

(12) The Regulations should require ALL employers to do the following:

- (a) Assess their workplace for hazards and job tasks that can potentially expose employees to SARS-CoV-2 or COVID-19 disease.
- (b) Classify each job task based on the level of exposure risk according to the hazards to which employees are potentially exposed, including low, moderate, heightened, and exceptional risk.
- (c) Provide all workers with face coverings or masks and additional personal protection equipment (PPE) appropriate to the level of hazard associated with each job task. Employers should train all workers on the types of respiratory protection needed in multiple circumstances of varying degrees of exposure risk, proper disposal of single use PPE, and fit-testing and proper cleaning of respirators when used. The Regulations must, at a minimum, meet the OSHA Respiratory Protection standards to protect against inhalation hazards.⁷
- (d) Inform employees of the methods of self-monitoring for signs and symptoms of COVID-19 if they suspect possible exposure or are experiencing signs of an oncoming illness and encourage implementation of such self-monitoring.
- (e) Develop and implement policies and procedures for employees to report when they are experiencing symptoms consistent with COVID-19. To the extent that an employee is reliant upon employer-provided transportation, such policies must require employers to transport the employee to receive healthcare and/or testing for SARS-CoV-2.
- (f) Develop and implement policies and procedures for workers determined to be at risk of severe illness due to COVID-19 as described by the CDC⁸ to be reassigned to duties that do not involve in-person contact with other workers or the public. Such reassignment should be based on guidance from the employee's medical provider or from the involved public health officials. If reassignment to duties with no in-person contact is not possible, such at-risk employees should be reassigned to tasks or shifts that require the least amount of contact with customers and other workers. Any reassignment under this subsection must not result in a decrease in wages.
- (g) Notify any of its own employees who may have been exposed, within 24 hours of discovery of their possible exposure, while keeping confidential the identity of the person known to be infected with SARS-CoV-2 in accordance with applicable laws.
- (h) Offer enhanced medical monitoring of employees during COVID-19 outbreaks.
- (i) Ensure employee access to their own SARS-CoV-2 and COVID-19 disease-related exposure and medical records in accordance with the standard applicable to its industry.
- (j) Unless otherwise provided in the standard, ensure that employees observe physical distancing while on the job and during paid breaks on the employer's property, including policies and procedures that (i) use verbal announcements, signage, or visual cues to promote physical distancing; and (ii) decrease worksite density by limiting non-employee access to the place of employment or restrict access to only certain workplace areas to reduce the risk of exposure.

⁷ 29 CFR 1910.134, <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134>.

⁸ Coronavirus 2019: People with Certain Medical Conditions, CDC (Aug. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

- (k) Control access to common areas, breakrooms, or lunchrooms.
 - (l) Ensure use of only disinfecting chemicals and products indicated in the Environmental Protection Agency List N for use against SARS-CoV-2.
 - (m) To the extent that industry standards are more protective than simple use of face coverings or masks, ensure compliance with respiratory protection and personal protective equipment standards applicable to the industry. This applies when employees are at a workplace and when employees are occupying a vehicle for work purposes.
 - (n) Ensure appropriate air-handling systems are installed and maintained in accordance with manufacturer's instructions in facilities where there is a moderate, heightened or exceptional risk of SARS-CoV-2 exposure and comply with minimum applicable American National Standards Institute/American Society of Heating, Refrigerating and Air-Conditioning Engineers standards.
- (13) The Regulations should require employers with hazards or job tasks with heightened or exceptional risk of exposure to SARS-CoV-2 or COVID-19 disease to do the following:
- (a) Prior to the commencement of each work shift, ensure prescreening or surveying to verify each covered employee does not have signs or symptoms of COVID-19.
 - (b) For healthcare and other facilities where there is a heightened or exceptional risk of SARS-CoV-2 exposure, follow existing guidelines and facility standards of practice for identifying and isolating infected persons and for protecting employees.
 - (c) Limit non-employee access to the place of employment or restrict access to only certain workplace areas to reduce the risk of exposure.
 - (d) Post signs requesting visitors to immediately report symptoms of respiratory illness on arrival at the facility and use disposable face coverings.
 - (e) For employees having exceptional exposure risk, provide and ensure use of gloves, a gown, a face shield or goggles, and a respirator when in contact with or inside six feet of patients or other persons known to be, or suspected of being, infected with SARS-CoV-2.

Thank you for the opportunity to comment on this urgent public health matter.

Sincerely,

/s/

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/s/

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