

**TESTIMONY**  
**OF**  
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**BEFORE THE**  
**WORKFORCE PROTECTIONS SUBCOMMITTEE**  
**OF THE**  
**COMMITTEE ON EDUCATION AND LABOR,**  
**U.S. HOUSE OF REPRESENTATIVES**  
**ON**  
**“CLEARING THE AIR: SCIENCE-BASED STRATEGIES TO PROTECT WORKERS**  
**FROM COVID-19 INFECTIONS”**  
**ON MARCH 11, 2021**

Good morning, Chair Adams, Ranking Member Keller, and members of this Subcommittee. I am grateful for the opportunity to speak before this Subcommittee on this issue today.

I am Manesh Rath, and I am a partner at the law firm Keller and Heckman LLP, here in Washington, D.C. In large part, my practice is focused on occupational safety and health (OSHA) law. I have represented industry groups and employers in collaborating with labor, professional associations, the scientific community, and government to develop and maintain a safer and more healthful workplace. I have taught several thousand safety and health professionals, labor-management professionals, attorneys, and university students on matters involving OSHA law, litigation, employment and labor law, and legal ethics. With a few esteemed OSHA law attorneys, I have co-authored and edited two authoritative books in the field of OSHA law.

For over twenty-six years, I have dedicated my life’s work to the proposition that well-intentioned employers are uniquely well-positioned to implement rapid adaptations to improve the welfare, safety, and health of the American workforce.

In my testimony today, I am expressing only my own understanding of, and experience in, the fields of occupational safety and health law and administrative law, and I am not here as a representative of any other entity.

Today I will address some of the efforts we have seen employers undertake in response to COVID-19 and some of the conclusions that we have drawn in the past year by working with the employer community.

## **I. Employers Have Already Implemented a Variety of Interventions to Reduce the Transmission of COVID-19 at the Workplace**

During this pandemic, employers with whom I have worked have engaged in a continuous cycle of evaluation and improvement as scientific and healthcare understanding about COVID-19 has evolved.

### **A. Employers Have Implemented Fundamental Interventions.**

Some simple interventions implemented from the beginning have endured because they work: universal use of face masks, hand washing, disinfecting frequently touched surfaces, and social distancing where achievable.

### **B. Employers Have Also Willingly Undertaken More Complex Interventions.**

Many employers have also implemented more complex and costlier interventions – some of which have also proven effective. These include: work-from-home policies, isolation and quarantine, generous symptom-based leave policies, and travel policies.

At the worksite, many employers I have worked with have shut down alternating workstations, created one-way traffic flow, and, where distancing is not feasible, installed temporary barriers. Some employers have created private transportation services for workers as an alternative to higher-exposure public transportation options.

### **C. We Have Seen Creative Solutions That Only The Private Sector Could Have Developed.**

Then there are employer innovations that have gone beyond the reasonable scope of government guidance because they were intuitive, sensible, and responsive to real-life risks. For example, we have worked with employers that have imposed a capacity limit on break rooms. We have seen instances where employers have provided catered boxed lunches to protect workers from having to venture into the community during their lunch breaks, where a few workers' exposure at local lunch vendors could have created risks for the whole workforce. One employer fabricated cooling booths, equipped with air conditioning, allowing manufacturing workers to take periodic maskless heat-stress breaks.

Many employers significantly increased their janitorial staff, thus adding to their communities' employment opportunities. Some employers we have worked with brought in temporary portable adjunct space for meetings and additional break rooms. Employers have deployed wearable proximity sensors, otherwise used in traffic safety, to help maintain distancing.

### **D. In Addition, Employers Have Willingly Tried Interventions Of Diminishing Prominence.**

Other interventions have had their moment, and then were overcome by new scientific studies and greater data. For example, initially employers would quarantine inventory for 24 hours if it

may have been exposed to a positive worker.<sup>1</sup> This is a practice that is no longer widely considered necessary, effective, or cost-effective, in part because the CDC later stated that contaminated surfaces comprise an uncommon transmission vector.<sup>2</sup> In another example, while the CDC still identifies a “runny nose” as a symptom of coronavirus<sup>3</sup>, some employers have discontinued them on their symptom screening questionnaires in the belief that it is non-specific or less predictive for Covid-19.<sup>4</sup>

And while employers are still dedicating considerable resources to symptom screening and temperature checking at worksites nationwide, recent studies now provide better data about the asymptomatic and pre-symptomatic fraction of all positive cases<sup>5</sup> and their contribution to disease spread – thus we have observed that fewer employers still believe that symptom questionnaires can achieve the same reductive effects as universal face masks, handwashing, distancing, and remote work.

## **II. Our Observations: Elementary Employer Interventions and Universal Employee Participation Have Been the Most Effective Means of Reducing the Transmission of COVID-19 in the Workplace**

Employers with whom we have worked have observed over time that the fundamentals of infectious disease control – facemasks, distancing, and handwashing – have been the most effective interventions, and they can be rapidly deployed and individually tailored to fit the unique needs of each workplace. These only work through daily diligence and universal adoption – that is, when everyone at the worksite is scrupulous about doing their part.

One example illustrates this point well. I observed a manufacturer for the past year; they have over two dozen manufacturing sites around the nation. All of their establishments have adopted the same policies and protocols for coronavirus management. Some establishments have seen high case rates even though their surrounding community had low transmission rates at the time; other plants were the obverse, experiencing zero or very low case rates even though the surrounding community was experiencing a conflagration of positive cases. That manufacturer concluded that variations between plants - the workers’ dedication to the daily regimens of mask usage, distancing, handwashing, and self-reporting of symptoms - resulted in their significantly different experiences.

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<sup>1</sup> Centers for Disease Control and Prevention, *Cleaning and Disinfecting Your Facility* (April 1, 2020).

<sup>2</sup> Centers for Disease Control and Prevention, *How COVID-19 Spreads*, (October 28, 2020) (stating that “(s)pread from touching surfaces is not thought to be a common way that COVID-19 spreads”).

<sup>3</sup> Centers for Disease Control and Prevention, *Symptoms of Coronavirus* (updated Feb. 21, 2021).

<sup>4</sup> Narayan, S., Emerson Hospital, *Allergies, Cold, Flu or COVID-19? How to Tell the Difference* (Oct. 16, 2020) (identifying “runny nose” and “sneezing” as symptoms associated with the common cold and with allergies but designating them as “rarely” symptomatic of COVID-19.)

<sup>5</sup> See, e.g., Johansson, M., Quandelacy, T., *SARS-CoV-2 Transmission From People Without COVID-19 Symptoms* Journal of the American Medical Association (JAMA), Jan. 7, 2021, JAMA Netw Open. 2021;4(1):e2035057. doi:10.1001/jamanetworkopen.2020.35057; see also, Meyerowitz, E., Richterman, A., *Towards an accurate and systematic characterization of persistently asymptomatic infection with SARS-CoV-2*, The Lancet, December 07, 2020DOI:[https://doi.org/10.1016/S1473-3099\(20\)30837-9](https://doi.org/10.1016/S1473-3099(20)30837-9).

This demonstrates that an establishment with unacceptable case rates will experience the most gains by rededicating the workforce towards universal adoption of basic interventions, not by compounding its burden with additional and more complex regulatory requirements.

### **III. Emergency Standards are Immutable and Ill-Adapted to Evolving Conditions. A Countervailing Example: The California Emergency Standard**

On November 30, 2020, the State of California's Occupational Safety and Health Standards Board adopted an emergency standard on COVID-19 prevention.<sup>6</sup> The emergency standard was hastily approved, and stakeholders were prevented from assisting in making the standard more workable or more effective. The California emergency standard requires employers to take the place of public health agencies: to conduct continuous testing, engage in contact tracing, provide paid time off during quarantine, and reduce density in housing and transportation. The California emergency standard went into immediate effect without adequate review or time to prepare for compliance.

After California published its emergency standard, the state realized that it had to release multiple additional guidance documents – Frequently Asked Questions that were revised three times<sup>7</sup>; a Fact Sheet that was revised once<sup>8</sup>, a Model COVID-19 Prevention Program,<sup>9</sup> and two Press Releases<sup>10</sup> to clarify ambiguities noted by stakeholders who could have helped address these unfortunate defects in the first place.

Two industry groups filed lawsuits challenging the emergency standard in the Superior Court of California.<sup>11</sup> In addition to the standard's legal and procedural deficiencies, the plaintiffs noted that California rushed an emergency standard and then promptly issued clarifications, some of which contradict the standard itself.

### **IV. Congress Intended That OSHA Promulgate Emergency Temporary Standards With Restraint Because They Exclude Stakeholder Involvement**

When Congress passed the Occupational Safety and Health Act<sup>12</sup>, in its wisdom it required the Occupational Safety and Health Administration to promulgate standards only after publishing a

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<sup>6</sup> 8 C.C.R. §3205, *et seq.*

<sup>7</sup> The COVID-19 Emergency Temporary Standards Frequently Asked Questions were released on December 1, 2020, and updated on January 8, January 26, and February 26, 2021.

<sup>8</sup> *COVID-19 Emergency Temporary Standards- What Employers Need to Know*, Cal/OSHA. Released December 1, 2020 and updated December 18, 2020 available at:

[https://www.dir.ca.gov/dosh/dosh\\_publications/COVIDOnePageFS.pdf](https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf).

<sup>9</sup> *A Model COVID-19 Prevention Program*, released December 1, 2020:

[https://www.dir.ca.gov/dosh/dosh\\_publications/PPP.doc](https://www.dir.ca.gov/dosh/dosh_publications/PPP.doc).

<sup>10</sup> Press release published November 20, 2020: <https://www.dir.ca.gov/DIRNews/2020/2020-98.html>; Press release published on December 1, 2020 available at: <https://www.dir.ca.gov/DIRNews/2020/2020-99.html>.

<sup>11</sup> *National Retail Federation et al. v. California Department of Industrial Relations et al.*, Case No. CGC-20-588367; *Western Growers Association et al. v. California Occupational Safety and Health Standards Board et al.*, Case No. CPF-21-517344.

<sup>12</sup> 29 U.S.C. § 655(b)

notice about a proposed rule, and to consider comments from affected stakeholders, including small businesses. These features also appear in the Administrative Procedure Act<sup>13</sup> and the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>14</sup>

Congress also empowered OSHA to promulgate an Emergency Temporary Standard (ETS), permitting the Agency to bypass these critical notice and comment requirements, but only under a strict set of conditions: a.) that an ETS remain in effect for only 180 days; b.) that it be implemented only in cases where employees are exposed to a grave danger; and c.) that only an Emergency Temporary Standard will suffice to protect employees from such danger.<sup>15</sup>

The Fifth Circuit of the United States Court of Appeals noted that the Agency must establish data that shows with certainty, and not speculation, that the Emergency Temporary Standard will reduce fatalities, injuries, or illnesses during the 180 days of its efficacy.<sup>16</sup>

#### **V. The Numerosity of Changes in the CDC Coronavirus Guidance Teaches Us That an Emergency Temporary Standard, in Its Intransigence, is Less Suited to Success Than Employer Initiatives and Agency Guidance**

The Centers for Disease Control and Prevention (CDC) has revised its COVID-19 guidance many times. This has taught the employer community that an evolving scientific and medical understanding of the coronavirus is best met by Agency guidance that can be published and revised quickly and iteratively. By contrast, an emergency temporary standard, once set, is intransigent against evolving data.

For example, on April 6, 2020, the CDC recommended avoiding all non-essential travel within the United States, regardless of destination.<sup>17</sup> Within 48 hours, the CDC replaced this with its pre-April 6 guidance, recommending against travel to spots with higher case rates, and the use of precautions when travelling. This guidance was updated again on February 16, 2021, wherein the CDC issued stronger language requiring air passengers to have a negative COVID-19 test result or documentation of recovery, and requiring masks on planes, buses, and trains.<sup>18</sup>

On February 10, 2021, the CDC released an updated mask recommendation in which it recommended wearing a disposable mask underneath a cloth mask.<sup>19</sup> Even a full year after the onset of the pandemic, the CDC's data-driven guidance about something as simple as mask wearing continues to evolve.

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<sup>13</sup> 5 U.S.C. § 551, *et seq.*

<sup>14</sup> 5 U.S.C. § 611(a), *et seq.*

<sup>15</sup> 29 U.S.C. § 655(c)(1).

<sup>16</sup> *Asbestos Information Association/North America, et al. v. OSHA*, 727 F. 2d. 417 (5th Cir. 1984).

<sup>17</sup> Centers for Disease Control and Prevention, *Coronavirus and Travel in the United States* (April 6, 2020).

<sup>18</sup> Centers for Disease Control and Prevention, *Travel During COVID-19* (Feb. 16, 2021) available at:

[https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Ftravelers%2Ftravel-in-the-us.html](https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Ftravelers%2Ftravel-in-the-us.html).

<sup>19</sup> Centers for Disease Control and Prevention, *Improve How Your Mask Protects You* (Feb. 13, 2021) available at: <https://www.cdc.gov/coronavirus/2019-ncov/your-health/effective-masks.html>.

The CDC recommendation for how long an individual should spend in quarantine has changed from seven to ten to fourteen days, and then back to ten.<sup>20</sup>

The CDC's list of COVID-19 symptoms has expanded, been bifurcated into two levels of specificity, and compressed into a single list again.<sup>21</sup>

Increasing access to vaccination is now the next workplace frontier in COVID-19 management. Employers with whom I work now look to the CDC to provide guidance to employers on matters such as isolation and quarantine, ending remote work, business travel, and the types of tasks that can be safely performed as employees sort into three cohorts: those that have been vaccinated, those with naturally acquired immunological response, and those who decline vaccination.

If OSHA had adopted strict standards on any of these issues in an Emergency Temporary Standard a year ago, those requirements would have quickly become antiquated by science; dismissed by the public; and a discredit to the Agency. In its wisdom, OSHA recognized the inadequacy of an Emergency Temporary Standard in the face of a rapidly evolving knowledge set and elected instead to issue guidance documents. From April 3<sup>rd</sup> to April 26<sup>th</sup>, OSHA issued 13 guidance documents, some of which were industry-specific, all of which could be quickly reevaluated and revised as necessary to meet changing conditions in the pandemic.<sup>22</sup>

#### **IV. Conclusion**

An Emergency Temporary Standard is not a suitable vehicle for government intervention in a continuously changing dynamic such as the COVID-19 pandemic. First, an ETS is only permitted when the Agency has certainty that its ETS requirements will have a reductive effect during the 180-day efficacy period. Second, the many changes we have already seen in CDC guidance teach us that an ETS is intransigent to evolution in data-driven science. Third, as with the examples I discussed above, employers have already demonstrated an ability to quickly adapt and implement new interventions faster than government can develop policy. Fourth, employers that have failed in keeping case rates down have often been challenged in implementing the most fundamental interventions with universality. An ETS, by its nature cannot solve the problem of coronavirus in the workplace. Employers will prevail against coronavirus spread through rapid adoption of evolving scientific and healthcare data, commitment to basic and effective interventions, and universal adoption by all workers.

Thank you for the opportunity to appear before you, I look forward to addressing any questions you may have.

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<sup>20</sup> Centers for Disease Control and Prevention, *Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings* (May 3, 2020); Centers for Disease Control and Prevention, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)* (May 6, 2020); Centers for Disease Control and Prevention, *Options to Reduce Quarantine Using Symptom Monitoring and Diagnostic Testing* (Dec. 2, 2020);

<sup>21</sup> Centers for Disease Control and Prevention, *Symptoms of Coronavirus Disease 2019* (March 16, 2020); Centers for Disease Control and Prevention, *Symptoms of Coronavirus* (May 13, 2020).

<sup>22</sup> See United States Department of Labor, *News and Updates* (Mar. 6, 2021) available at: <https://www.osha.gov/coronavirus/news-updates#otherguidance>.