Testimony in Opposition to HB 4212
OR-OSHA Infectious Disease Standards - Sections 37-39
Joint Interim Committee on the First Special Session of 2020
June 24, 2020

Members of the committee, my name is Hasina Wittenberg and this written testimony is in opposition to Sections 37-39 of HB 4212 on behalf of the 956 members of the Special Districts Association of Oregon (SDAO). Our membership includes rural fire protection, 9-1-1 telecommunications, park and recreation, library, water, sewer, and port districts.

Under existing law in ORS Chapter 654, the Department of Consumer and Business Services (DCBS), through Oregon OSHA (OR-OSHA), is statutorily vested with relatively broad authority to make and enforce reasonable rules and regulations to protect the life, safety, and health of employees in Oregon. OR-OSHA is a specialized agency with expertise in assessing matters impacting workplace safety and health. Using its expertise, the agency has promulgated hundreds of safety and health rules, some of which it has adopted from the federal system and others of which it has crafted on its own. In the vast majority of circumstances, rulemaking happens without significant input from the legislature.

HB 4212 would substantially depart from the way OR-OSHA rulemaking typically happens. Rather than having the agency use its expertise to decide which hazards and which workplaces warrant occupational safety and health regulation, HB 4212 would legislatively identify exposure to "infectious diseases" as a hazard OR-OSHA must regulate. HB 4212 outlines a specific regulatory framework for how the agency should craft new rules addressing "infectious diseases." In the context of occupational safety and health rulemaking, such specific direction from the legislature is highly unusual.

HB 4212: What Would HB 4212 Do? And When?

Although the concerns addressed by HB 4212 are being raised in the context of the COVID-19 pandemic, the bill is not limited to COVID-19. Instead, HB 4212 requires that OR-OSHA quickly adopt and implement a regulatory scheme that very broadly addresses exposure to all sorts of infectious diseases. Nowhere in sections 37 through 39 of HB 4212 is there any reference to COVID-19. Instead, in the definition for "occupational exposure" it is clearly articulated that the intent of the bill is to address all "reasonably anticipated exposure to agents of transmissible infectious diseases resulting from a worker's performance of job duties." In addition to COVID-19, this bill would thus also broadly regulate diseases ranging

from colds and the seasonal flu that may be present essentially anywhere to diseases such as MRSA[1] that might be much more specific to only certain types of employment.

The relevant provisions in the bill begin with a list of 11 defined terms in subsection (1) of section 38. For purposes of what the bill attempts to accomplish—protecting workers from "infectious diseases"—only four of those terms have substantive value. In addition to "occupational exposure," there are definitions for "administrative controls," "engineering controls," and "personal protective equipment." The remaining seven of the defined terms are used exclusively for purposes of legislatively establishing, for reasons which are unclear, that certain specified classes of workers "may be susceptible to elevated levels of risk of occupational exposure [to infectious diseases] while working."[2]

Subsections (2) and (3) would mandate that the agency promptly adopt "temporary rules" under provisions of the Administrative Procedures Act (ORS Chapter 183) that would not require any sort of notice or comment period. Such temporary rules would have to go into effect by August 1, 2020, so even if the agency were to allow for limited notice to and comment from interested parties, there would be essentially no time for the agency to do so. Again, although this bill is being proposed while the state, country, and world are in the midst of the once-in-100-years COVID-19 pandemic, the mandate for an emergency-type temporary rule is not limited to addressing hazards associated with COVID-19. HB 4212 requires the agency to rush through a (likely complex) rule addressing all manner of employment-related exposures to infectious diseases.

As noted above, the bill would require that the temporary rule "categorize workers who may be susceptible to elevated levels of risk of occupational exposure while working, including but not limited to" seven specific groups of workers. HB 4212 is silent with respect to the purpose of such "categorization," but it would be a required part of the temporary rule. In addition, this categorization does not mean that the temporary rule would only apply to those workers. Instead, HB 4212 mandates that OR-OSHA address all "occupational exposure," meaning all "reasonably anticipated exposure to agents of transmissible infectious diseases resulting from a worker's performance of job duties," regardless of the particular type of work involved.

In addition to this seemingly unnecessary "categorization," the bill would require that the temporary rule have a "framework" for prioritizing use of control methods. The control methods are preferentially ranked with engineering controls (i.e., more permanent "fixes") first, followed by administrative controls (i.e., policies and procedures), safe work practices, and lastly, personal protective equipment (PPE). Although PPE would appear to be the "last line of defense," the bill would nevertheless require that the temporary rule establish specific

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[1] Methicillin-resistant Staphylococcus aureus, a type of antibiotic-resistant bacteria to "occupational exposure," there are definitions for "administrative controls," "engineering controls," and "personal protective equipment." The remaining seven of the defined terms are used exclusively for purposes of legislatively establishing—for reasons which are unclear—that certain specified classes of workers "may be susceptible to elevated levels of risk of occupational exposure [to infectious diseases] while working."

[2] Section 38, subsection (4)(a).

requirements for the use of, and care for, PPE that would be based on particular workplace risks and on concerns about the availability of PPE.

HB 4212 would then vaguely require an undefined "risk-based model" to help employers assess their individual risks, identify exposure sources, and adopt measures to address the risks identified. All of this is to be prepared and published for implementation by August 1, 2020.

The temporary rule would then apply until a permanent rule is adopted, which the bill mandates happen no later than July 31, 2021. One year may seem like a long time for an agency to develop, propose, tweak, and adopt a permanent rule. As compared to the amount of time the bill gives for promulgation of a temporary rule, it is. But in the context of typical, well-considered rulemaking, it is not, especially for a rule that would broadly cover essentially all workplaces. It took federal OSHA over two years from the October 1989 publication of a proposed rule governing bloodborne pathogen occupational exposure to adoption of a final rule in December 1991. That two-year timetable does not factor in the time it took to develop the proposed rule before publication in October 1989 or the additional three to four months between the publication of the final rule in December 1991 to its effective date in March 1992.

Top Three Points of Concern re: HB 4212

- No new legislation is required for OR-OSHA to promulgate rules addressing either COVID-19 specifically or infectious disease exposures more generally.

- The OSHA provisions of this bill are NOT limited to COVID-19. They would require regulation with respect to ALL exposure to infectious diseases.

- The OSHA provisions of the bill are NOT limited in application to certain types of employment. The bill's identification of "categories" of workers including "health care workers," "emergency medical service providers," "grocery store or food market personnel," "clinical laboratory personnel," "food processors," "agricultural workers," and "public transit operators" DOES NOT limit the bill's application to employers with those types of workers. Instead, the bill would require promulgation of OSHA rules applicable to all places of employment where there may be exposure to infectious diseases (i.e., nearly all workplaces).

Specific Concerns re: HB 4212

The "temporary" rule mandated by the bill will likely create significant financial impacts without the regulated community (including, but not limited to, local governments and small businesses) having any opportunity to provide input in the temporary rulemaking process. The bill specifically requires that the temporary rule "be adopted in accordance with ORS 183.335(5)." This subsection of the Administrative Procedures Act specifically exempts this temporary rulemaking from the notice requirement of ORS 183.335(1) and (2) and the comment requirement of ORS 183.335(3).

Therefore, without advance notice or the opportunity for the regulated community to comment, the bill calls on OR-OSHA to promulgate a "temporary" rule that will require employers to use "engineering controls"—i.e., permanent fixes—preferentially over all other potential control methods. As just one example of this, OR-OSHA could require employers to meet increased ventilation requirements—costing employers potentially thousands or tens of thousands of dollars to install new equipment that would effectively be permanent—all through a "temporary" rule.

The impact of the temporary rulemaking process on small businesses is even more concerning. Although OR-OSHA generally does not need to substantively consider or mitigate financial impacts on large businesses in promulgating its rules, ORS 183.335(2)(b)(E) and 183.336 of the Administrative Procedures Act does generally require that all agencies, OR-OSHA included, consider the impact of new rules on small businesses. More importantly, in rulemakings where fiscal impacts on small businesses are considered under ORS 183.335(2)(b)(E) and 183.336, the agency has an obligation under ORS 183.540 to reduce any significantly adverse impacts on small businesses, to the extent it can be done consistent with the public health and safety purpose of the rule. But in this temporary rulemaking, none of those limitations would apply. That is, because the temporary rulemaking would be done "in accordance with ORS 183.335(5)," OR-OSHA would not have to address or mitigate the fiscal impact on small businesses. Many SDAO members local governments are very small with very few or no employees. The impact on these smaller employers particularly concerning to our association.

A regulatory scheme governing certain kinds of infectious diseases already exists—the bloodborne pathogens standard, 29 CFR 1910.1030, adopted in Oregon by OAR 437-002-0360. This complex standard, including its appendices, spans about 30 pages of text. If one wants to see what an "infectious diseases" rule might look like, the voluminous bloodborne pathogens rule[3] is a good place to start.

The bloodborne pathogens standard requires employers to offer Hepatitis B vaccinations to employees with occupational exposure to bloodborne pathogens. It can be expected that one of the controls OR-OSHA may require in either the temporary or final infectious diseases rule would be a requirement that an employer provide essentially all employees with yearly influenza vaccinations, if not vaccinations to other infectious diseases, as well.

Thank you for the opportunity to submit written testimony. We urge your opposition to sections 37-39 of HB 4212.

[3] https://osha.oregon.gov/OSHARules/div2/div2Z-1030-bloodborne.pdf