

# PETITION TO THE OFFICE OF ADMINISTRATIVE LAW CHALLENGING ALLEGED UNDERGROUND REGULATION

Use of this form is optional. It requests the information required by California Code of Regulations, title 1, section 260, for a petition challenging an alleged underground regulation. Whether you use this form or another format, the mandatory information required by California Code of Regulations, title 1, section 260, including the supporting documentation, must be included in your petition. If you create a separate petition, or if you use this form and need to add extra pages, ensure each page is clearly labeled.

Petitioner Contact Information (Title 1, Section 260(b)(1))

Name: Yaneer Bar-Yam, co-Founder World Health Network

Professor and President, New England Complex Systems Institute

Address: 125 Mt. Auburn St #38031, Cambridge, 02238

Telephone Number: OMITED

E-Mail Address: yaneer@necsi.edu

Name of Challenged Agency (Title 1, Section 260(b)(2))

**State of California Department of Public Relations, Division of Occupational Safety and Health (DOSH), known as "Cal/OSHA"**

Complete description of the Challenged Rule (Title 1, Section 260(b)(3))  
Attach an original or photocopy of the challenged rule. If the challenged rule is found in an agency manual, identify the specific provision of the manual alleged to comprise the challenged rule.

**Cal/OSHA Challenged Rule:**

**Title: Cal/OSHA's COVID-19 Prevention Non-Emergency Standards**

**Summary: Challenged Rule (Attachment A) Cal/OSHA Title 8 Regulations sections 3205, 3205.1, 3205.2, and 3205.3**

**<https://www.dir.ca.gov/Title8/3205.html>: Kindly refer also to Attachment B, which provides a summarized overview of the revised COVID-19 Prevention Non-Emergency Standards, please visit the following link:**

**<https://www.dir.ca.gov/dosh/coronavirus/Non-Emergency-regs-summary.pdf>**

Description of the actions of the challenged agency showing that it has issued, used, enforced, or attempted to enforce the challenged rule. (Title 1, Section 260(b)(4))

**The following events demonstrate the actions taken by the challenged agency to issue, use, enforce, or attempt to enforce the challenged rule:**

**Cal/OSHA Title 8 Regulations sections 3205, 3205.1, 3205.2, and 3205.3 are available on the Department of Industrial Relations website as is the summarized overview of the revised COVID-19 Prevention Non-Emergency Standards.**

Legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable. (Title 1, Section 260(b)(5)):

**[\[https://casetext.com/regulation/california-code-of-regulations/title-1-general-provisions/division-1-office-of-administrative-law/chapter-2-underground-regulations/section-260-submission-of-petitions-regarding-underground-regulations\]](https://casetext.com/regulation/california-code-of-regulations/title-1-general-provisions/division-1-office-of-administrative-law/chapter-2-underground-regulations/section-260-submission-of-petitions-regarding-underground-regulations)**

**According to the definition of "Regulation" ([CA Gov't Code Section 11342.600](#)) provided, as a rule, regulation, order, or standard of general application, or an amendment, supplement, or revision adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. The update on January 9, 2024, of COVID-19 Isolation Guidance constitutes a Regulation.**

**1. Rule, Regulation, Order, or Standard of General Application:**

**The Cal/OSHA COVID-19 Prevention – Non-Emergency Regulation, is a rule, regulation, order, or standard that applies to the vast majority of workers in the state of California. It provides specific guidelines and requirements for individuals who need to isolate due to COVID-19 infection or exposure.**

**2. Adopted by a State Agency:**

**Cal/OSHA, is a division of the State of California Department of Public Relations, which is a state agency, and is explicitly stated on the regulation that "These regulations apply to most workers in California who are not covered by the Aerosol Transmissible Diseases standard."**

**3. Implements, Interprets, or Makes Specific the Law Enforced or Administered by the CDPH and Cal/OSHA:**

The COVID-19 Isolation Guidance update provides specific guidelines for the enforcement and administration of actions related to COVID-19. It clarifies the requirements for workers who must isolate due to infection or exposure.

#### 4. Governs Procedure:

The January 9, 2024, Cal/OSHA update on COVID-19 Prevention – Non-Emergency Regulation includes procedural instructions and protocols that individuals must follow when isolating. It outlines the steps to be taken, such as testing, duration of isolation, monitoring symptoms, and when it is safe to discontinue isolation. Therefore, the guidance governs the procedure that individuals must adhere to when undergoing isolation, making it a regulation within the defined scope. It should be noted that Cal/OSHA's regulations came into effect on February 3, 2023, and will remain in effect for two years from the effective date, except for the recordkeeping subsections that will remain in effect for three years.

5. The Cal-OSHA Regulation is linked to the California Department of Public Health (CDPH) issued updates to its COVID-19 Isolation Guidance, COVID-19 Testing Guidance, and State Public Health Officer Order that occurred also on January 9, 2024, which can be found at Attachment C and <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Isolation-Guidance.aspx>. The CDPH guidance did not follow requirements for public comment that apply to the Regulation by Cal-OSHA and therefore Cal-OSHA does not have a supportable claim that it followed the requirements of a regulation based upon CDPH's guidance.

6. An exception might be claimed if the Cal-OSHA Regulation was issued during the period of time during California's COVID-19 State of Emergency. Due to special conditions under that Emergency Order. However, the emergency order has ended as of Feb 28, 2023 and does not provide a basis for exemption (Appendix D) <https://www.gov.ca.gov/2023/02/28/governor-newsom-marks-end-of-californias-covid-19-state-of-emergency/>

In conclusion, The COVID-19 Prevention – Non-Emergency Regulation January 9, 2024, of COVID-19 Isolation Guidance constitutes a regulation as defined by the provided definition. It is a rule, regulation, order, or standard of general application, adopted by a state agency, which implements, interprets, or makes specific the law enforced or administered by Cal-OSHA, and governs the procedure to be followed during the isolation period.

Information demonstrating that the petition raises an issue of considerable public importance. (Title 1, Section 260(b)(6))

The revised regulation issued by Cal-OSHA regarding COVID-19 isolation raises a significant issue of public importance due to the following

reasons:

1. Inconsistency with CDC Guidance: The Cal-OSHA guidance contradicts the Isolation and [Precautions for People with COVID-19 issued by the Centers for Disease Control and Prevention \(CDC\)](#) (Attachment E). The CDC guidelines clearly state that individuals who test positive for COVID-19 should isolate for at least 5 days, irrespective of symptoms, as they are most infectious during this period. The inconsistency between Cal-OSHA and CDC guidelines is of considerable public importance, as COVID-19 infections pose significant risks to students, employees, and their households.

Recent rumors that CDC will change its guidance <https://www.washingtonpost.com/health/2024/02/13/covid-isolation-guidelines-cdc-change/> (Attachment F) do not relieve Cal-OSHA of its responsibility for public comment in California.

2. Concerns raised by Secretary of HHS Becerra: Secretary Becerra has expressed concern about the deviation from the CDC isolation guidance and opposition to the California guidelines. As reported in an [article](#) titled "Health Secretary Becerra defends CDC's COVID isolation guidance that California shortened," (Attachment G) Secretary Becerra emphasized the importance of adhering to the CDC guidance and stated that those who downplay the COVID threat are "playing with fire." This further highlights the public importance of the matter.

3. Impacts on workers in California: The updated rule by Cal-OSHA affects a significant portion of workers in California who are not covered by the Aerosol Transmissible Diseases standard. These regulations are expected to be implemented for a period of at least two to three years beginning February 3, 2023. The updated regulations by Cal/OSHA, which therefore has been "adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" and thus qualifies as a "Regulation" under the definition in CA Gov't Code Section 11342.600. This demonstrates the public importance of the Cal-OSHA guidance, as it has far-reaching impacts on workers' health and safety.

4. Adoption of guidance in school districts: The CDPH and Cal-OSHA guidance has been adopted by school districts, as evidenced by the case of [Oakland Schools allowing COVID-positive students to attend class](#) (Attachment H). The CDPH and Cal-OSHA guidance, which bases isolation solely on symptoms, fails to consider asymptomatic transmission, contrary to the CDC guidelines. Furthermore, the CDPH and Cal-OSHA guidance violates federal law ([Section 504](#) (Attachment I) of the Rehabilitation Act of 1973) and California State Code ([California's Educational Equity Code](#) (Attachment J)) by allowing COVID-positive teachers, staff and students to attend school while requiring them to avoid contact with higher-risk

individuals. This violation jeopardizes the right to a [Free and Appropriate Public Education \(FAPE\)](#) (Attachment K) for higher-risk students and may lead to [truancy](#) (Attachment L) charges against parents due to medically justified but [unexcused absences](#) (Attachment M).

5. Lack of support from current recommendations, research, and reports: The updated Cal-OSHA COVID-19 Isolation Guidance is not supported by current recommendations, research, and reports. The use of symptoms alone to determine isolation poses considerable risks to the public in terms of COVID-19 infection and the associated short and long-term risks, such as Long COVID and COVID-induced organ damage. The guidance's attendance and sick policies are inadequate compared to the CDC's isolation standards, which mandate a minimum 5-day isolation followed by 5 days of masking, irrespective of symptoms or COVID-19 hospitalization levels.

6. Compromised principle of public impact without public feedback: The release process of the Cal-OSHA guidance undermines the principle of allowing public impact with public feedback. This violates the fundamental purpose of California regulations on agency actions, which aim to ensure fair and transparent decision-making processes by government agencies, emphasizing public participation, protection of rights, procedural due process, and accountability. The Cal-OSHA guidance release process fails to uphold these essential principles.

7. Significance of COVID-19's impact: [The global impact of the COVID-19 pandemic continues to cause significant harm](#) (Attachment N), with reports indicating the [high number](#) (Attachment O) of children testing positive for COVID-19 and experiencing [persistent symptoms](#) (Attachment P). Additionally, [the transmission of COVID-19 from children to households](#) (Attachment Q) has been a major contributing factor in the spread of the disease. The risks associated with COVID-19 infection and the potential for long-term health consequences highlight the urgency for sound, comprehensive and effective public health measures.

8. Public interest: Cal-OSHA has not provided any opportunity for public comment. The members of the public recognize the importance of this guidance and have attempted to provide comments at the California Conference of Local Health Officers (CCLHO) Board of Directors Meeting, which is an unrelated meeting. See call to action on Action Network [https://actionnetwork.org/events/action-public-comment-at-ca-public-health-meeting-with-director-dr-tomas-aragon?clear\\_id=true](https://actionnetwork.org/events/action-public-comment-at-ca-public-health-meeting-with-director-dr-tomas-aragon?clear_id=true) (Attachment R)

Considering the aforementioned reasons, the issue raised by the Cal-OSHA COVID-19 Isolation Guidance is of considerable public importance and requires careful examination and rectification.

We ask that the Office of Administrative Law make a determination of an underground regulation and adopt it as a regulation pursuant the requirements and procedures of the APA.

In summary: Cal/OSHA’s COVID-19 Prevention Non-Emergency Standards is an “[underground regulation](#)” as it is a “guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA (Administrative Procedure Act) and is not subject to an express statutory exemption from adoption pursuant to the APA”. It is of considerable public importance as it poses serious health risks to workers, including school staff and teachers, as well as children, households, and the community. It is required that this underground regulation be subjected to the process of regulation to facilitate a period of public comment.

Optional: Please attach any additional relevant information that will assist OAL in evaluating your petition.

**See Attachment S**

Confirmation Pursuant to Title 1, Section 260(b)(7):

A copy of this petition and all attachments were submitted to the challenged agency.

Challenged Agency:

**State of California Department of Public Relations, Division of Occupational Safety and Health (DOSH), known as “Cal/OSHA”**

Name of individual at Challenged Agency to whom petition was sent:

**Chief Counsel Danielle Lucido  
DOSH, Legal Unit**

If submitted by mail, commercial or hand delivery:

Address:

If submitted by email:

Email Address: **[dlucido@dir.ca.gov](mailto:dlucido@dir.ca.gov)**

Please Note: When a petition is submitted to OAL and the challenged agency concurrently in the same e-mail, and the e-mail address of the recipient at the challenged agency is visible to OAL, the e-mail satisfies the written confirmation requirement. (Title 1, Section 260(b)(7)(B).)

If the state agency whose rule you are challenging is the California Department of Corrections and Rehabilitation (CDCR) or any prison or facility within the CDCR, you may want to send a copy of the petition to:

Regulations and Policy Management Branch  
CDCR  
P.O. Box 942883  
Sacramento, CA 94283-0001

Additional information, including status of petitions under review, may be found on the OAL web site at [www.oal.ca.gov](http://www.oal.ca.gov).

If you have additional questions, contact the OAL Reference Attorney by calling (916) 323-6815, or by sending an e-mail message to [staff@oal.ca.gov](mailto:staff@oal.ca.gov).

Deliver this petition and all supporting documentation to:

Attention: CTU  
Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

Or by email to [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

Petitions and accompanying documentation may be submitted to OAL in hard copy, either through the mail, or by hand delivery in person or by a commercial delivery service (FedEx, UPS, etc.), or by e-mail.