

December 18, 2020

Environmental Improvement Board  
1190 Saint Francis Drive  
Suite # South 2102  
Santa Fe, New Mexico 87505

Re: EIB Docket 20-55

We, the undersigned organizations, write in response to the New Mexico Department of Environment, Occupational Health and Safety Bureau's (Bureau) proposed amendment to the "Recording and Reporting Occupational Injuries, Illness and Fatalities" section of the New Mexico Administrative Code (NMAC), i.e., § 11.5.1.16 NMAC. The proposed amendment requires that employers report an employee's positive novel coronavirus (Covid-19) test to the Bureau within 4 hours of being informed of the positive test.<sup>1</sup> The Bureau recommends this change to formalize a process enacted through an emergency amendment.<sup>2</sup>

As advocates representing many workers throughout New Mexico, we strongly support this amendment that will certainly strengthen worker safety. Nonetheless, we are concerned that it does not sufficiently address the needs of all workers, particularly low-wage and immigrant workers, during this challenging time. Below you will find a list of concerns and recommendations that we have identified regarding health and safety protocols in New Mexico.

*Lack of Clarity for Workers Regarding Rapid Response Procedures and Positive Covid-19 Tests at their Workplaces:*

Countless workers continue to work outside of their homes and expose themselves to Covid-19, ensuring that their communities have the services they require. These workers deserve to know about Covid-19 outbreaks in their workplace. Below we identify several areas that create a lack of clarity and confusion among workers and provide recommendations to address these issues.

The main issue is that employers are not required to inform their workers when someone employed by the business tests positive for Covid-19. In fact, we have heard from many workers that employers actively hid the truth about positive Covid-19 tests at the workplace to avoid further disruptions to their businesses. We, therefore, recommend that the Bureau set up a system that (1) informs an employer's entire workforce that someone at the business tested positive for Covid-19 and (2) that protects the privacy of the person who tested positive. We understand that workers have the right to maintain positive Covid-19 results private, but we highly encourage the Bureau to create this system to ensure the proper containment of Covid-19 at workplaces where outbreaks occur. This is particularly important for those workers that came in close contact with

---

<sup>1</sup> New Mexico Environment Improvement Board Notice of Scheduled Public Hearing to Consider Proposed Amendments to 11.5.1.16 NMAC, EIB Docket Num. 20-55, N.M. Reg. vol. 31 issue 19 (Oct. 13, 2020)

<sup>2</sup> Emergency Amendment to 11.5.1.16 (effective Aug. 5, 2020) <https://www.env.nm.gov/wp-content/uploads/2020/03/Emergency-Amendment-to-11.5.1.16-final.pdf>

the worker that tested positive. Importantly, the Bureau should NOT delegate this responsibility to employers.

Furthermore, the Bureau has yet to provide clear and simple information to workers about the rapid response process and exactly what it entails. The Bureau has stated that rapid response protocols may consist of “(1) isolating positive cases, (2) quarantining close contacts for 14 days, (3) ceasing operations to the extent necessary to isolate affected areas, (4) disinfecting these areas, (5) implementing safety procedures, and (6) resuming operations.”<sup>3</sup> Workers, particularly low-wage and immigrant workers, are often left in the dark about these practices and rarely know what their rights and responsibilities are during these moments. Further perpetuating this issue is that employers are often given significant leeway in deciding how to include workers in rapid response practices and procedures - meaning that employers can, and often do, hide behind this lack of accountability to undermine proper health and safety protocols that would prevent the further spread of Covid-19 at the workplace. We, therefore, encourage the Bureau to take the necessary steps to ensure that all workers at the workplace know and understand the rapid response procedures that will occur before the business can reopen, and that employers include all workers in any rapid response practices that aim to strengthen health and safety at the workplace.

Finally, workers are often left in the dark about when and how they should return to work after testing positive for Covid-19 or coming in close contact with someone that tested positive at their workplace. Often, workers are left to rely on assistance from others, such as our organizations. In the absence of sufficient outreach and information from New Mexico’s agencies, many workers do not understand the types of job protections they have when they must quarantine or isolate for a period of time. This creates an unnecessary fear in workers, particularly low-wage and immigrant workers, that they will be fired if they must quarantine or isolate due to Covid-19. Therefore, the Bureau should give all workers at a business that is going through rapid response protocols information that clearly and simply explains a worker’s rights and responsibilities if they contract Covid-19 or if they come in close contact with someone that tested positive.<sup>4</sup>

#### *Lack of Strict Enforcement Practices:*

Employers that do not follow proper health and safety protocols are endangering their employees and possibly the public. Many workers fear that they face more consequences for trying to do the right thing and follow proper health and safety pandemic protocols, such as being disciplined for requesting mandated personal protective equipment, than employers breaking the law and ignoring those same protocols. The Bureau should clearly explain to all employers and workers the consequences of ignoring health and safety pandemic protocols established by rapid response practices or public health orders. More specifically, the Bureau should make it clear to employers that firing an employee for quarantining will result in a fine of

---

<sup>3</sup> N.M. Env’t Dep’t, Rapid Response Covid-19 Watchlist, Frequently Asked Questions (updated Dec. 11, 2020) <https://www.env.nm.gov/wp-content/uploads/2020/11/2020-11-30-Updated-FAQs.pdf>

<sup>4</sup> The New Mexico Center on Law and Poverty drafted a factsheet that clearly and simply identifies a worker’s responsibilities and rights when they test positive or come in close contact with someone that tests positive for Covid-19. We are happy to share this factsheet with the Bureau.

up to \$5,000 for each violation<sup>5</sup>; and that not following health and safety pandemic protocols will result in further fines and their business being closed for up to 14 days.<sup>6</sup> This will help ensure proper adherence to all health and safety practices.

Finally, now, more than ever, there should be clear, effective, and consistent enforcement of New Mexico's vibrant code of health and safety measures that by law employers are obligated to follow and that existed prior to the Covid-19 pandemic. For instance, under NMAC § 11.5.4.11, agricultural employers are obligated to provide all agricultural workers with toilet and handwashing facilities on the fields and dairies where they work.<sup>7</sup> Measures like this one exist in various industries - many of which are considered essential, remain open, and consist of mainly immigrant and low-wage workers – and should be enforced for the benefit of all workers in those professions. Without continued and effective enforcement of these existing measures, New Mexico will be unable to contain the Covid-19 pandemic.

Thank you for your efforts, thus far, and for considering these important comments. Please contact Felipe Guevara with the NM Center on Law and Poverty at [felipe@nmpovertylaw.org](mailto:felipe@nmpovertylaw.org) if you have any questions.

Sincerely,

New Mexico Center on Law and Poverty  
NM OLE  
El Centro De Igualdad y Derechos  
La Semilla Food Center  
Rose Garcia – Executive Director of Tierra Del Sol Housing Corporation  
Susie Johnson, MA. – Agricultural Worker Advocate

---

<sup>5</sup> See N.M. Stat. Ann. § 12-10A-19(A)

<sup>6</sup> Public Health Emergency Order, N.M. Dep't of Health (effective Nov. 30, 2020) <https://cv.nmhealth.org/wp-content/uploads/2020/11/113020-PHO.pdf>

<sup>7</sup> Attached to this comment is a letter we sent the Bureau and other agencies regarding health and safety protections for agricultural workers in New Mexico. We encourage the Bureau to review this letter and consider the points we make to further protect agricultural workers in New Mexico.