



February 10, 2023

**SENT BY U.S. MAIL AND EMAIL**

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**Re:** Formal Request for CDPH to Review Mask Mandate following California Public Records Request :: P017017-101922

**Request**

I represent Physicians for Informed Consent (PIC), a 501(c)(3) not-for-profit educational organization based in California.

This letter is PIC's formal request that your office please immediately review any mask mandate in the State Public Health Officer Order ("Order") of September 13, 2022 by Tomás J. Aragón, MD, Dr.P.H. See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx> (section 3b, "Exempt workers must wear a respirator approved by the National Institute of Occupational Safety and Health (NIOSH), such as an N95 filtering facepiece respirator, or surgical mask, at all times while in the facility.")

Based on public records produced by CDPH, it has become apparent that CDPH does not have an objective reason for continuing any mask mandate in California healthcare facilities, especially private medical clinics.

This request is made prior to PIC submitting any appropriate filings regarding procedural irregularities in the Order, or a Petition to the Office of Administrative Law to determine whether CDPH has issued a regulation without express statutory exemption from APA procedural requirements. See [https://oal.ca.gov/underground\\_regulations/](https://oal.ca.gov/underground_regulations/) ("If you believe a state agency has issued an alleged underground regulation, you can challenge the alleged underground regulation by filing a petition with the Office of Administrative Law (OAL). If your petition is accepted, OAL may issue a determination. This program is informally known as the "Chapter Two Unit," or "CTU," because OAL's regulations regarding underground regulations are found in California Code of Regulations, title 1, chapter 2.")

## **Factual Background**

On October 19, 2022, CDPH received the request for records by my client Physicians for Informed Consent (PIC) under the Public Records Act (PRA) wherein PIC requested the following:

*1. Please provide all documents relied upon by Tomás J. Aragón, MD, Dr.P.H. that verify the accuracy of the following statements he made in the State Public Health Officer Order of September 13, 2022:  
“Covered workers must continue to comply with all required primary series and vaccine booster doses pursuant to Table A below.”*

*“CDPH recommends that all workers stay up to date on COVID-19 and other vaccinations.”  
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx>*

*2. Please provide all the GovQA documents from the HAI program on COVID-19 outbreaks and vaccination status in long-term residential care facilities, used previously on the August 5, 2021, State Public Health Office Order to state that  
“Recent outbreaks in healthcare settings have frequently been traced to unvaccinated staff members.”*

*3. Please provide all communications regarding updated facemask requirements in healthcare settings, since CDC’s updated guidance on September 23, 2022 indicates, “When SARS-CoV-2 Community Transmission levels are not high, healthcare facilities could choose not to require universal source control.” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>*

On January 3, 2023, CDPH produced all responsive records via four pdf files:

1. PRA17017\_Batch1\_Redacted
2. PRA17017\_Batch2\_Redacted
3. PRA17017\_Batch3\_Redacted
4. PRA17017\_Batch4\_Redacted

Attached as Exhibit A are the *only* references in said documents to masks or face coverings.

## **Legal Analysis**

**A. CDPH’s own CPRA documents referenced above show CDPH’s incomplete analysis. CDPH is currently operating inconsistently with federal mask guidance.**

CDPH’s own CPRA documents referenced above show CDPH’s incomplete analysis on the mask mandate issue. Exhibit A hereto reproduces the only three references in said documents to masks or face coverings.

CDPH acknowledges CDC's updated guidelines regarding masks as it pertains to transmission rates. See internal letter from Dan Steckline dated Oct. 10, 2022.<sup>1</sup> Yet CDPH guidance on the CDPH website has not adopted these recommendations thus far, stating that the new recommendations *do not* apply to health care facilities. Therefore, CDPH's position is currently inconsistent with CDC guidelines.<sup>2</sup> CDPH has yet to acknowledge CDC's assessment that health care facilities *indeed are included in the new recommendation*.<sup>3</sup> Nor has CDPH provided PIC with any evidence it has conducted any analysis that would justify this divergence.

**B. Additionally, it is unclear whether CDPH and CAL OSHA are in compliance with state and federal regulations regarding the use of N95 respirators.**

The CDC acknowledged in September 2021 the limited effectiveness of surgical and cloth masking and currently recommends N95 respirators in the issued Emergency Use Authorization (EUA) guidelines for their use. These guidelines specifically state that the use of N95 respirators must be in compliance with the federal or state OSHA respiratory programs outlined in Title 8 Section 5144 of the California Code of Regulations<sup>4</sup> and 29 CFR 1910.1.<sup>5</sup> It is unclear whether CDPH's current respirator policies are in compliance with state regulations and whether CDPH, CalOSHA or the CA Department of Industrial Relations<sup>6</sup> is monitoring compliance in healthcare and other facilities. State and federal OSHA standards were created to protect the wearer not only from toxic and infectious environmental hazards, but also to protect the wearer from the negative and potentially hazardous effects of the respirator itself. The employer must provide a comprehensive written respiratory program covering medical evaluations, training and fit testing.<sup>7</sup> Employers not in compliance can face fines of over \$13,000 per incidence.<sup>8</sup>

Regards,



Gregory J. Glaser

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<sup>1</sup> PRA17017\_Batch1\_Redacted

<sup>2</sup> CDPH "Guidance for the Use of Facemasks" Sept 22, 2022

<https://www.cdph.ca.gov/programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>

<sup>3</sup> Center for Disease Control Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic Updated Sept. 23, 2022

<https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>

<sup>4</sup> California Code of Regulations Title8 Section 5144 "Respiratory Protection"

<https://www.dir.ca.gov/title8/5144.htm>

<sup>5</sup> Center for Disease Control and Prevention guidance "Strategies for Optimizing the Supply of N95 Respirators" September 16, 2021

<sup>6</sup> State of California Department of Industrial Relations guidance "N95 Masks Commonly Asked Questions" February 2021 [https://www.dir.ca.gov/dosh/dosh\\_publications/N95-mask-questions.html](https://www.dir.ca.gov/dosh/dosh_publications/N95-mask-questions.html)

<sup>7</sup> CAL OSHA Respiratory Protection Standard

<https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/OHB/Pages/RespStd.aspx>

<sup>8</sup> USDOL OSHA violation detail

[https://www.osha.gov/ords/imis/establishment.violation\\_detail?id=1472885.015&citation\\_id=01001A](https://www.osha.gov/ords/imis/establishment.violation_detail?id=1472885.015&citation_id=01001A)

## Exhibit A

### The Three References to Masks or Face Coverings in CDPH Provided CPRA Documents

**Reference 1:** from PRA17017\_Batch1\_Redacted

#### Exposure Risk Assessment for HCP

Hospitals should and SNFs must use the CDC's updated risk assessment framework to determine exposure risk for HCP with potential exposure to patients, residents, visitors, and other HCP with confirmed COVID-19 in a health care setting. CDC's updated definition of higher-risk exposure includes use of a facemask by HCP (instead of a respirator) while caring for an infected patient who is not also wearing a facemask or cloth mask. CDC guidance for assessing travel and community-related exposures should continue to be applied to HCP with potential exposures outside of work (e.g., household,) and among HCP exposed to each other while working in non-patient care areas (e.g., administrative offices). For the purpose of contact tracing to identify exposed HCP, the exposure period for the source case begins from two days before the onset of symptoms or, if asymptomatic, two days before test specimen collection for the individual with confirmed COVID-19.

**Reference 2:** from PRA17017\_Batch3\_Redacted

- Last week, CDC released new guidance on infection control in healthcare settings:
  - [Infection Control: Severe acute respiratory syndrome coronavirus 2 \(SARS-CoV-2\) | CDC](#)
  - [Interim Guidance for Managing Healthcare Personnel with SARS-CoV-2 Infection or Exposure to SARS-CoV-2 | CDC](#)
  - [Strategies to Mitigate Healthcare Personnel Staffing Shortages | CDC](#)
  - One SHO mentioned that in general, providers have been happy with the new guidance, especially that routine testing is no longer required in long term care facilities. However, the guidance refers to fully vaccinated individuals, and not those up-to-date, so the incentive to receive recommended boosters is gone. There is also some frustration from emergency room and urgent care staff. Masking recommendations are linked to transmission rates, and since most areas remain "high," there may not be recommendation changes in some settings and jurisdictions.

**Reference 3:** from PRA17017\_Batch4\_Redacted

During specimen collection, facilities must maintain proper infection control and use recommended personal protective equipment (PPE), which includes a NIOSH-approved N95 or equivalent or higher-level respirator (or facemask if a respirator is not available), eye protection, gloves, and a gown, when collecting specimens.