BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
CHAMPIONS OF AFFORDABLE HOUSING

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May 29, 2020

Governor Jay Inslee
Office of the Governor
PO Box 40002
Olympia, WA 98504

Dear Governor Inslee,

Pursuant to RCW 34.05.350(3), this letter is a petition on behalf of the Building Industry Association of Washington (BIAW) to repeal WAC 296-800-14035. This WAC was promulgated by the Department of Labor & Industries (L&I) May 26, 2020. BIAW, as the champion of affordable housing, represents 8,000 companies involved in all aspects of home construction and this emergency rule has a direct and negative impact on their businesses. This emergency rule grants the agency the ability to issue fines for violations of your March 23, 2020 Stay at Home Order (SAHO) and subsequent amendments. This fining authority is not granted either in statute or the language of the order and amendments.

The emergency rule lacks legal justification, is unconstitutionally vague, and is devoid of statutory authority. It is therefore illegal and should be repealed.

Emergency rules are governed by RCW 34.05.350, which outlines the limited circumstances in which an agency may bypass the rulemaking process. An agency may use emergency rulemaking where "immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." In other words, pursuant to this petition you are empowered to answer two questions:

1. Was the rule creating fine authority necessary for public health?
2. Would following the typical rulemaking process be contrary to the public interest?

In this case, the answer to both questions must be no.

First, there is no justification for an emergency rule allowing L&I to impose fines on people who are already subject to arrest and criminal prosecution. BIAW does not contend that COVID-19 is not an emergency. As you are aware, our industry has been diligent in working with your office to address the COVID-19 crisis. BIAW's Executive Vice President Greg Lane, participated in a work group facilitated by your office to make recommendations on Phase I and II conditions to ensure that our industry could be conducted safely, and supported safety standards for our industry that were higher than those in the vast majority of states and federal government. Ultimately, these were incorporated in amendments and conditions to the SAHO. BIAW has spent considerable time and resources training BIAW's membership on these new requirements and encouraging them to comply.

Despite BIAW's cooperation, L&I is now asserting additional authority to fine potential violations of the SAHO and amendments. However, the language you previously authorized provides a limited role for L&I to enforce the requirements for each phase. In fact, the only penalty specifically mentioned in either the Phase I or Phase II orders is shutting down a construction jobsite until compliance can be achieved.

As an additional tool to ensure compliance, L&I could also provide information to law enforcement who would have the authority to enforce the gross misdemeanor referenced in RCW 46.03.220(5) and in the SAHO for willful violations of the order. This is routinely done in other circumstances in which L&I inspectors discover potential criminal violations on a jobsite. Given that L&I already has sufficient tools to enforce the SAHO, there is no need for an emergency rule that provides the authority to levy thousands of dollars of fines as well.

"When an agency must announce its reasons for declaring an emergency that requires protection of the public health or welfare, and attempts to justify dispensing with public notice and comment, the reasons should be truly emergent and persuasive to the reviewing court. It is self-evident that considerations of administrative and fiscal convenience alone cannot satisfy that standard. Therefore, the finding of facts that constitute an "emergency" must be more than mere statements of the motivation for the enactment and must provide an adequate basis for judicial review." *Mauzy v. Gibbs*, 44 Wn. App. 625, 723 P.2d 458(1986). Here L&I can provide no support for its position that a contractor, already subject to arrest and criminal prosecution, would be less likely to violate the order if also threatened with an administrative fine. Other than its administrative and fiscal convenience (which are expressly not permitted as reasons for emergency rulemaking) there is simply no justification for the rule.

Second, the emergency rule is unconstitutionally vague and violates due process, showing that it is not responsive to a specific emergency. The WAC itself is 11 lines long. It states essentially that employers must comply with emergency proclamations issued under RCW 43.06.220 (and all amendments and conditions). In other words, rather than provide in written detail what conduct is allowed or prohibited, notice for violation, the penalty, and the process for challenging fines issued for violations (as is common with other rules), the emergency rule simply contains a general reference to any order issued under the authority of a particular statute.[1]

In emergency rule making, courts consider whether the legislative delegation contains "adequate procedural safeguards must be provided, in regard to the procedure for promulgation of the rules and for testing the constitutionality of the rules after promulgation . . . Such safeguards can ensure that administratively promulgated rules and standards are as subject to public scrutiny and judicial

[1] Two other constitutionally problematic issues arise from ambiguity in the language. First, it appears that the intent of the rule is to include all future amendments to the SAHO that are issued after the effective date of the emergency rule. Needless to say, it is impossible to incorporate by reference hypothetical future amendments to the SAHO in any manner that comports with due process. Second, it is unclear whether the rule would even allow for the enforcement of the SAHO order by L&I since it does not solely rely upon RCW 43.06.220. See SAHO at paragraph 10 citing "Chapters 38.08 [and] 38.52" as authority. Under the doctrine of *inclusio unius exclusio alterius*, because the emergency rule references only RCW 43.06.220, any order that cites other authority (including SAHO) would not be subject to enforcement by L&I under this provision. This would seem to undermine the intent of the emergency rule.

review as are standards established and statutes passed by the Legislature." *In re: Powell*, 92 Wn.2d 882, 602 P.2d 711 (1983) (Striking down emergency rule that increased penalty for probationer by making conduct illegal without providing adequate procedural safeguards.) *See also Brown v. Vail,* 169 Wn.2d 318, 237 P.3d 263 (2010). L&I's emergency rule is a bare reference to orders issued under RCW 43.06.220 and certainly outlines no procedural safeguards. This cannot be consistent with constitutional rulemaking and shows that this is not a COVID-19 response. It is not responsive to an emergency, but pre-emptive for the agency's fears of non-compliance. This is not adequate to avoid rulemaking.

Third, there is no statutory authority for the emergency rule. None of the statutes cited provide any explicit authority for the agency to enforce emergency orders issued under RCW 43.06.220. *See e.g.* RCW 49.17.010, RCW 49.17.040, RCW 49.17.050, and RCW 49.17.060. In fact, the only penalty that is authorized by the Legislature in RCW 43.06.220(5) for willful violation of a governor's order is a gross misdemeanor. If you did not feel this penalty is adequate to enforce orders issued under this provision, your recourse is to ask the Legislature to change it.

In other words, an agency must have statutory authority from the Legislature to enact a rule. Your executive order cannot constitute authority alone. *See e.g.* RCWs 34.050375 and 34.05.570 (providing valid basis for challenging rules include that they are *ultra vires,* contain constitutional violations, and are arbitrary and capricious.) *See also Washington Indep. Tel. Ass'n v. Washington Utilities and Transp. Comm*'n, 148 Wash.2d 887, 64 P.3d 606 (2003).

In short, L&I's claim that violations of the SAHO and amendments issued by your office are so likely that they constitute an emergency is not borne out by facts or sufficient to overcome the presumption that rulemaking should be done with notice and an opportunity to be heard. BIAW is also troubled by the circular reasoning and threat to separation of powers inherent in this circumstance-- that your emergency order creates authority for emergency rule-making by an agency that conflicts with the statute that grants you authority to issue orders. This is not a good precedent.

For the reasons outlined above, BIAW respectfully requests that you immediately repeal the emergency rule. Please be advised you have seven days from submission of this petition to respond. BIAW looks forward to hearing from you soon.

Respectfully submitted,

Jackson Maynard
General Counsel