

State of California
Department of Industrial Relations
M e m o r a n d u m

To : ALL STANDARDS BOARD MEMBERS

Date : February 15, 2011

From : **Occupational Safety and Health Standards Board**
Michael J. Manieri Jr., Principal Engineer-Standards

Subject : **Personal Protective Devices- Hazard Assessment and Equipment Selection-HORCHER**

At the January 20, 2011, Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, General Industry Safety Orders, Section 3380, Personal Protective Devices-Hazard Assessment and Equipment Selection. This standard is substantially the same as the equivalent federal standard.

Labor Code Section 142.3(a)(3) exempts the Board from providing a comment period when adopting a standard substantially the same as a federal standard. However, as indicated in the Notice and Informative Digest, the Board still provided a comment period regarding the following three areas: 1) any clear and compelling reasons for California to deviate from the federal standards; 2) any issues unique to California related to this proposal which should be addressed in this rulemaking and/or subsequent rulemaking; and, 3) solicit comments on the proposed effective date.

As a result of public comments and/or Board staff evaluation, the proposal has been modified to exclude workplace operations in the construction and mining industries, consistent with the Federal standard.

SUMMARY OF WRITTEN AND ORAL COMMENTS

I. Written Comments

Mr. Van A. Howell, CSP, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated December 21, 2010.

Comment:

Mr. Howell stated the proposal is commensurate with the federal standards.

Response:

The Board acknowledges Federal OSHA's opinion regarding the proposal.

The CA Chamber of Commerce, Associated General Contractors of California, California Farm Bureau Federation, California Framing Contractors Association, California Professional Association of Specialty Contractors, California Construction and Industrial Materials Association, Residential Contractors Association, Associated Roof Contractors of the Bay Area Counties, Inc., Walter & Prince, LLP, SafeCon Consulting Group, Inc., by letter dated January 20, 2011.

Comment:

The commenters indicated the proposal appears to be oriented to the workplace, rather than the type of work which may be conducted at multiple workplaces and suggested that the proposal be modified to recognize that it would be effective for an employer to outline specific PPE requirements for each job function and apply those requirements to all similar jobsites as an alternative to assessing each jobsite individually. The commenters also noted that there is no mention of construction and mining in the Federal regulation or Federal Register. Consequently, the commenters believe these industries should be excluded from this proposal.

Response:

The proposal is verbatim of the Federal standard in 29 CFR 1910.132(d) (1) which states plainly that “the employer shall assess the workplace to determine if hazards are present...” There is nothing in the non-mandatory appendix which is essentially verbatim of the federal non-mandatory appendix that addresses this issue or provides anything in the way of guidance or clarification that reorients the required assessment away from the workplace to the job function. Consequently, under the terms of the Horcher process, Board staff may not modify the proposal and deviate from Federal language. In response to the commenters point regarding including industries that are not within the scope of the Federal regulation, the Board staff has modified the proposal to specifically exclude the construction and mining industries. This modification does not deviate from the Federal standard.

II. Oral Comments

Oral comments received at the January 20, 2011, Public Hearing in San Diego, California.

Ms. Marti Fisher, representing the California Chamber of Commerce; Mr. Bruce Wick, representing the California Professional Association of Specialty Contractors (CALPASC)

Comment:

Ms. Fisher and Mr. Wick each stated that equipment should be assessed by job function rather than job-site or workplace.

Response:

See the above response to the written comments submitted by the CA Chamber of Commerce, et al.

The Board thanks Ms. Fisher and Mr. Wick for their comments and participation in the Board's rulemaking process.

Mr. Chris Walker, California Professional Association of Sheet Metal and Air Conditioning Contractors.

Comment:

Mr. Walker expressed agreement with Ms. Fisher's and Mr. Wick's comments.

Response:

See the above response to the written comments submitted by the CA Chamber of Commerce, et al.

The Board thanks Mr. Walker for his comments and participation in the Board's rulemaking process.

Mr. Guy Prescott, OSHSB member, Mr. Hank McDermott, OSHSB Member, Mr. Bill Jackson, OSHSB member

Comments:

Mr. Prescott stated his understanding that the proposal applied to general industry, not construction. He indicated that he is aware of assessment requirements already contained in the Construction Safety Orders (CSO). Mr. Prescott also noted that the federal assessment standards do not apply to mining or construction; yet the proposal would be applicable to both, and he stated that the proposal should not overreach the scope and application of the federal standard otherwise the Horcher process would be invalid for this rulemaking.

Mr. McDermott stated that the term "workplace" as used in the Federal standard could be too inclusive and render the proposal difficult to comply with.

Mr. Jackson, having reviewed the cost analysis in the Federal Register entry on which the proposal is based, stated that the Federal standard does not apply to the construction and mining industries. Mr. Jackson also noted existing assessment standards in the CSO which would apply to PPE.

Mr. McDermott stated that the federal assessment standard contains written certification standards and that we should not be imposing such requirements on industries outside of what

was intended by Federal OSHA. He added that we should craft the proposal to be at least as effective and not more effective.

Response:

See the above response to the written comments submitted by the CA Chamber of Commerce, et al.

The proposal has been modified to exclude the construction and mining industries. The Board also notes that the term “workplace” is used throughout Title 8 interchangeably with the term “place of employment”. Further rulemaking regarding the scope and wording of this proposal (matters beyond the scope of the Horcher process) may be considered at a later date.

DETERMINATION OF MANDATE

This regulation does not impose a mandate on local agencies or school districts as indicated in the Staff Development Memorandum.