

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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**FINDING OF EMERGENCY  
GOVERNMENT CODE SECTION 11346.1  
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD  
PROPOSED EMERGENCY AMENDMENTS TO TITLE 8  
CALIFORNIA CODE OF REGULATIONS SECTION 5144**

The Occupational Safety and Health Standards Board (Board) hereby finds that the above-referenced proposed emergency amendments to Title 8 California Code of Regulations, as described in the Informative Digest below, constitute an emergency standard pursuant to Government Code Section 11346.1. Labor Code Section 142.3 authorizes the proposed amendments, which for the reasons stated here are necessary for the continued and immediate preservation of public health and safety and general welfare. This finding is based on:

1. A Federal Register Notice published on December 31, 2003, withdrew 29CFR 1910.139, Respiratory Protection for M. Tuberculosis, and made compliance with Section 29CFR 1910.134 effective immediately. This change required employers to ensure that employees who used respirators for respiratory protection for M. Tuberculosis were provided with a medical evaluation consistent with the questionnaire in 29CFR 1910.134 Appendix C, and provide annual fit-testing and training. The Board was required to adopt an equivalent standard within six months of that date, which it did at the June 17, 2004, Board meeting. Affected employers spoke at that meeting to describe the financial hardship and logistical impediments associated with coming into compliance by the effective date, 90 days from filing and later determined to specifically be October 18, 2004. There were concerns that employees who should be issued respirators under this standard could not be medically re-evaluated and provided an annual fit-test by the effective date without incurring large costs associated with the hiring of additional personnel or outside consultants. The short phase-in period for annual fit-testing also threatened to further increase personnel costs, because nurses taken away from floor assignments must be replaced in order to comply with California's staffing ratios. By extending the compliance date for annual fit-testing of lower risk employees until January 18, 2005, and by accepting existing equivalent medical evaluations, as prescribed, this proposal would reduce the perceived concerns over financial burdens of compliance without significantly reducing health and safety protections, and would allow employers to focus their economic resources on high risk employees. In the federal sector, similar concerns were addressed by a six-month delay in enforcement of 29CFR 1910.134 for protection against M. Tuberculosis (Doc 1).

2. The provision of filtering facepiece respirators for protection against tuberculosis in health care and other work places is necessary to prevent the spread of infection to employees. Employees in high risk settings, such as respiratory therapy, are particularly endangered. The effective use of filtering facepiece respirators is dependent upon an employee being successfully fit-tested to the specific model being used. Some high risk employees have not been fit-tested for the respirator models they are currently using, and other high risk employees have not been fit-

tested within the past year. Statements made at the June 17, 2004, Board meeting indicate that many organizations do not have the resources to ensure, by October 18, 2004, that all potential respirator wearers have been fit-tested within the previous 12 month period. It is therefore necessary for the protection of the health of high risk workers that a priority be placed on fit-testing these employees. It is also necessary to clarify to employers that they can use risk classification procedures to ensure that their resources are utilized effectively during this transition period, and that they must come into compliance with the requirements of Section 5144 for high risk employees by October 18, 2004, and for all other employees by January 18, 2005.

3. Section 5144 requires that a medical evaluation be completed for an employee before that employee can be fit-tested. As Sections 5144 and 5147 currently state, employees may not use a respirator after October 18, 2004, until the questionnaire included in Section 5144 Appendix C, has been completed and evaluated by a physician or other licensed health care professional (PLHCP). Any recommended follow-up examination must also have been completed prior to fit-testing and use of respirators. This applies to employees who have already been medically evaluated with other generally accepted questionnaires or examinations, and have been found to be medically qualified to use filtering facepiece respirators for tuberculosis control. The requirement to re-do all of these medical evaluations will unnecessarily delay the fit-testing of employees and the provision of respirators to potentially exposed employees, thereby exposing them to the risk of infection. It is necessary, therefore, to accept existing medical evaluations, as prescribed, in order to permit employees to be fit-tested and to continue to use filtering facepiece respirators to protect against M. Tuberculosis.

Since there are approximately 3,000 tuberculosis cases reported in California each year, and since the use of filtering facepiece respirators is necessary to protect health care workers and other exposed employees against this serious infection, the immediate adoption of these amendments is necessary to protect the health of these employees.

#### INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

On October 18, 2004, employers who provide respirators for protection against M. Tuberculosis will be required to comply with Section 5144. Until that time, employers are required to comply with Section 5147. Section 5144 differs from Section 5147 in that it has more specific requirements for the written program, program administration, respirator selection, medical evaluation, fit-testing, use, training and record-keeping. Specifically, in regards to this proposal, Section 5144 requires that employees be medically evaluated using the questionnaire in Appendix C, or equivalent, and that employees be fit-tested annually using an approved protocol.

##### 1. Existing Medical Evaluations

Currently, Sections 5147 and 5144 require that employers provide an evaluation that conforms to the content of Appendix C by October 18, 2004, before they can fit-test employees for the use of N95 or other filtering facepiece respirators. The effect of the proposal would be to add an exception to subsection 5144(e)(2) to permit employers to rely on medical evaluations that were performed prior to October 18, 2004, using other evaluating questionnaires or examinations.

Section 5144, and the comparable federal standard, 29CFR 1910.134, require that the medical evaluation include the content of the questionnaire in Appendix C.

Medical professionals in health care and other settings currently use alternative questionnaires and examinations (Doc 2). Generally, such questionnaires provide equivalent or more extensive health assessment to that intended by Appendix C. Medical professionals have advised the Division (Doc 3) that the standard operating procedures used by health care professionals in evaluating employees for their ability to use filtering facepiece respirators for protection against M. Tuberculosis will provide equivalent protection to that afforded by using the Appendix C questionnaire in this context. Furthermore, if an employee who may potentially be exposed to M. Tuberculosis is medically cleared using an appropriate assessment tool to perform their usual job duties, no additional health risk is anticipated by the use of a filtering facepiece respirator. Further, the risk of any potential negative consequences to an employee from failure to be evaluated specifically using the questionnaire in Appendix C, is significantly outweighed by the risk of infection from M. Tuberculosis if appropriate respiratory protection is not used.

## 2. Extension of Annual Fit-Test Requirements

Under the current standards (Sections 5147 and 5144), on October 18, 2004, the employer is required to have provided a fit-test within the previous 12 month period to any employee using a respirator for protection against M. Tuberculosis. The effect of the proposal would be to add an exception to subsection 5144(f)(2) to permit employers to rely on fit-tests performed prior to that period for employees not at high risk of infection, who use filtering facepiece respirators to protect against M. Tuberculosis, until January 18, 2005. The extension of the compliance deadline does not apply to high-risk employees, and does not apply to employers who do not classify employees by risk. The exception defines those employees considered to be high risk and allows employers to rely on risk classification that they performed in order to determine the frequency of testing for latent tuberculosis infection.

### DOCUMENTS RELIED UPON

1. Tuberculosis and Respiratory Protection, MEMORANDUM FOR REGIONAL ADMINISTRATORS, dated July 30, 2004, from R. Davis Layne, Deputy Assistant Secretary, U.S. Department of Labor.
2. Medical evaluation questionnaires used by various institutions in evaluating employees for the use of filtering facepiece respirators to protect against M. Tuberculosis.
3. Letter to Mr. Len Welsh, Acting Chief, Division of Occupational Safety and Health, dated August 18, 2004, from Dr. Janice Prudhomme, Public Health Medical Officer II, California Department of Health Services.
4. Letter to Mr. Steven L. Rank, Chairman, Occupational Safety and Health Standards Board, dated May 27, 2004, from Mr. Frank Myers III, M.A., CIC, CPHQ, President California Association for Professionals in Infection Control and Epidemiology Coordinating Council and Sandra Prickitt RN, FNP, COHN-S, Executive Vice President, Association of Occupational Health Professionals.

5. Occupational Safety and Health Standards Board Public Meeting Summary dated June 17, 2004.

6. Respiratory Protection for M. Tuberculosis, Final rule; revocation, 68 Fed. Reg. 75776-80 (December 31, 2003).

These documents are available for review Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California.

#### DOCUMENTS INCORPORATED BY REFERENCE

None.

#### STRIKEOUT/UNDERLINE DRAFT PROPOSAL

See Attachment No. 1.

#### SIDE-BY-SIDE CODE COMPARISON WITH FEDERAL STANDARDS

See Attachment No. 2.

#### COST ESTIMATES OF PROPOSED ACTION

##### Costs or Savings to State Agencies

No costs or savings to state agencies will result as a consequence of the proposed action.

##### Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

##### Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under "Determination of Mandate."

##### Other Nondiscretionary Costs or Savings Imposed on Local Agencies

The proposal does not impose nondiscretionary costs or savings on local agencies.

### DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed standard does not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed amendments will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, this standard does not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

This proposed standard does not require local agencies to carry out the governmental function of providing services to the public. Rather, the standard requires local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, this proposed standard does not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed standard does not impose unique requirements on local governments. All state, local and private employers will be required to comply with the prescribed standard.

Attachments