

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**FINAL STATEMENT OF REASONS****CALIFORNIA CODE OF REGULATIONS**

Title 8, Division 1, Chapter 4, Subchapter 7, Article 3, Section 3248 of the
General Industry Safety Orders

Mechanical Refrigeration**MODIFICATIONS AND RESPONSES TO COMMENTS RESULTING FROM
THE 45-DAY PUBLIC COMMENT PERIOD**

There are no modifications to the information contained in the Initial Statement of Reasons except for the following non-substantive, substantive, and sufficiently-related modifications that are the result of public comments and/or Board staff evaluation.

Section 3248. Mechanical Refrigeration.
Subsection (a).

Modifications are proposed to restore the existing subsection (a) and add an explanatory NOTE. The complete re-wording of subsection (a) was based on the understanding that a national consensus standard, the 1982 Uniform Mechanical Code (UMC), was not reasonably obtainable by the regulated public. Comments were received from the Division of Occupational Safety and Health (Division) to the effect that changing the standards to which older installation would be held would be disruptive of the Division's enforcement efforts. In addition, investigation by Board staff revealed a number of places where members of the public could access the 1982 UMC. As a result, it was determined that the 1982 UMC reference should remain, augmented by the NOTE that discloses various places where its relevant provisions may be obtained for review.

Thus, the addition of the NOTE is necessary because it is the most practicable means of allowing the 1982 UMC reference to remain in the standard and at the same time, facilitating access to those 1982 UMC provisions.

Subsection (b).

The proposal initially sought to revise subsection (b) completely in order to eliminate reference to the 1997 UMC on the theory that as time passes, that reference will become obsolete. Based on the same considerations that lead to the retention of the existing subsection (a), subsection (b) is retained in its existing form as well, for the most part. A minor editorial change is made (the

substitution of “are” for “is,” since the subject of this verb is plural). In addition, to limit the applicability of the 1997 UMC as time passes, a cut-off date is added so that the referenced provisions of the 1997 UMC apply only to mechanical refrigeration systems placed in service on or after March 13, 1999, but before January 1, 2008, the effective date of the 2007 California Mechanical Code (CMC) referenced in the new subsection (c).

This modification of subsection (b) is necessary in order to limit the applicability of the now-outdated 1997 UMC while allowing that version of the UMC to remain applicable to installations placed in service while the 1997 UMC was the current standard.

Subsection (c).

The proposal is further modified by the addition of a new subsection (c) that provides that mechanical refrigeration systems placed in service on or after January 1, 2008 must comply with specified portions of the 2007 CMC, thereby ensuring that new installations are governed by the most recent widely available, widely applicable standards. These 2007 CMC standards are derived from the most recently adopted version of the UMC, which in turn was built on the prior versions of the UMC referenced in subsections (a) and (b), thus continuing the progression of these regulations in accordance with past practice.

This new subsection (c) is necessary in order to ensure that new installations are held to the current CMC provisions.

SUMMARY AND RESPONSES TO ORAL AND WRITTEN COMMENTS

I. Written Comments

Lawrence P. Halprin, Keller and Heckman LLP, Washington, DC, by letter dated July 17, 2008.

Comment No. 1:

Mr. Halprin states that an “automatic updating” provision of the original proposal is an improper delegation of authority by the Occupational Safety and Health Standards Board (Board).

Response to Mr. Halprin’s Comment No. 1:

The Board disagrees with Mr. Halprin. Mr. Halprin has not provided legal authority to support his comment. Nonetheless, this matter is moot, since the portion of the proposal in question has been deleted.

Comment No. 2:

Mr. Halprin states that the wording of the EXCEPTION statement in the original proposal is unclear.

Response to Mr. Haplrin's Comment No. 2:

This matter is moot, since the EXCEPTION statement in question has been deleted.

Ken Nishiyama Atha, Regional Administrator, U.S. Department of Labor, Occupational Safety and Health Administration, Region 9, by letter dated July 9, 2008.

The Occupational Safety and Health Administration concurs that the original proposal is at least as effective as the federal counterpart standard, 29 CFR §1910.111(a)(1) and (b)(1).

Response to Mr. Nishiyama Atha:

The Board thanks Mr. Nishiyama Atha of the Occupational Safety and Health Administration for his interest and participation in this proposal.

Clyde Trombettas, Division of Occupational Safety and Health (Division), by electronic mail sent July 9, 2008.

Comment No. 1:

Mr. Trombettas states words to the effect that employee health and safety are not improved by the original proposal which would require the Division, in order to conduct its enforcement efforts, to locate many old and outdated versions of the UMC.

Response to Mr. Trombettas's Comment No. 1:

The Board agrees that the original proposal would impose undue enforcement burdens on the Division. The Board also believes that the original proposal could add ambiguities regarding compliance for the regulated public. Consequently, the Board has modified the proposal so that the safety order retains its existing provisions regarding the applicability of the 1982 and 1997 versions of the UMC, except for mechanical refrigeration systems placed in service during or after 2008, which are subject to the newly-adopted 2007 CMC in accordance with the newly-proposed Section 3248(c).

Comment No. 2:

Mr. Trombettas urges the Board to retain the 1982 UMC reference and to print the relevant 1982 UMC provisions in the California Code of Regulations (CCR).

Response to Mr. Trombettas's Comment No. 2:

The Board has retained the 1982 UMC reference, but declines to include the 1982 UMC provisions in the CCR. Not only might there be copyright objection to reprinting parts of the UMC in the CCR, but such an undertaking would add a very large amount of text to the CCR, and the addition of that text would have limited value. The number of mechanical refrigeration systems subject to the 1982 UMC will decrease over time, and significantly expanding the CCR for a shrinking number of systems would not be useful. Instead, in light of information about the availability of the 1982 UMC, an explanatory NOTE has been added identifying resources for obtaining and reviewing that edition of the UMC.

II. Oral Comments

Larry McCune, Division's Principal Safety Engineer

Mr. McCune requested that the portions of the 1982 UMC relevant to the regulation of mechanical refrigeration systems be added to CCR, Title 8, as an appendix.

Response to Mr. McCune:

Whether included as an appendix or otherwise, the Board believes that the text of the 1982 UMC should not be added to the CCR. Please see the Board's responses to Mr. Trombetta's written comments.

Board Member William Jackson:

Mr. Jackson stated words to the effect that if the referenced national consensus standards are out of print or otherwise unavailable, the relevant wording of those standards should be incorporated into the proposal.

Response to Mr. Jackson:

Please see the Board's responses to Mr. Trombetta's written comments.

Board Chair John MacLeod:

Mr. MacLeod asked whether ANSI standards are copyrighted and proprietary, thereby precluding the Board from using the wording of the ANSI standards in the Board's proposals.

Response to Mr. MacLeod:

Board staff contact with the International Association of Plumbing and Mechanical Officials indicates that the 1982 UMC is still subject to copyright. Please see the Board's responses to Mr. Trombetta's written comments.

Board Member Jonathan Frisch:

Comment No. 1:

Dr. Frisch stated that if the 1982 UMC is still copyrighted, Board staff should seek the copyright holder's permission to reprint the relevant portions of the 1982 UMC in CCR, Title 8.

Response to Dr. Frisch's Comment No. 1:

Please see the Board's responses to Mr. MacLeod's oral comment and Mr. Trombetta's written comments.

Comment No. 2:

Dr. Frisch asked whether the proposal would result in the decommissioning of non-compliant equipment.

Response to Dr. Frisch's Comment No. 2:

At the public hearing regarding this matter, Board staff indicated that the original proposal might create regulatory problems for very old equipment (an example was given of equipment dating back to 1908). Since the modified proposal does not change the standards applicable to such old systems, this proposal is not expected to have the sort of impact that is the subject of Dr. Frisch's comment.

Comment No. 3:

Dr. Frisch asked that the Final Statement of Reasons speak directly to the way the proposal improves health and safety.

Response to Dr. Frisch's Comment No. 3:

By adding an explanatory note that guides employers to the 1982 UMC, the modified proposal promotes safety by making it easier for employers, whose systems fall under subsection (a), to know the standards with which they must comply. By making new systems subject to the widely available most recent version of the CMC, this proposal similarly promotes compliance, and thereby employee safety, for the systems subject to new subsection (c).

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

- Chapters 2 and 11 of the 2007 California Mechanical Code.

These documents are too cumbersome or impractical to publish in Title 8. Therefore, it is proposed to incorporate these documents by reference. Copies of 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.

MODIFICATIONS AND RESPONSES TO COMMENTS RESULTING FROM THE 15-DAY NOTICE OF PROPOSED MODIFICATIONS

No further modifications to the information contained in the Initial Statement of Reasons are proposed as a result of the 15-Day Notice of Proposed Modifications mailed on November 17, 2008.

SUMMARY AND RESPONSE TO WRITTEN COMMENT

Lawrence P. Halprin, Keller and Heckman LLP, Washington, DC, by letter dated December 5, 2008.

Comment No. 1:

Mr. Halprin reiterates his comment made during the initial 45-day notice period to the effect that a government agency is precluded “from adopting a rule that incorporates by reference the latest addition of a standard developed by a consensus standards body...” He cites such authority as a portion of the “Federal OSH Act,” to use his terminology, in support of that contention.

Response to Mr. Halprin’s Comment No. 1:

The Board incorporates by reference the response to Mr. Halprin’s Written Comment No. 1 made during the 45-day comment period. Mr. Halprin’s citation of a fragment of federal statute or other attenuated authority does not add significantly to the persuasiveness of his contention. In addition, as stated in the Board’s response to his earlier written comment, this matter is moot, because the portion of the original proposal in question has been deleted.

Comment No. 2:

Mr. Halprin states that that the Board may not incorporate into a standard by reference “a copyrighted uniform code as an alternative to publishing...the full text of the code for public review and comment.”

Response to Mr. Halprin's Comment No. 2:

In support of his contention, Mr. Halprin cites a 1919 court case from Ohio, a 1979 court case from New York and a 1957 California Court of Appeal opinion that concerns, among several issues, the propriety of incorporating by reference certain matters into the Culver City municipal code. Overlooked in Mr. Halprin's discussion is such authority as Government Code Section 11344.6, which is worded in such a way as to acknowledge that matters may be incorporated by reference into the California Code of Regulations; California Code of Regulations, Title 1, Section 20, which sets forth detailed provisions regarding incorporation by reference into the California Code of Regulations; and Kings Rehabilitation Center, Inc. v. Premo (1999), 69 Cal. App. 4th 215, where the Court of Appeal held that the practice of incorporation by reference into the California Code of Regulations is lawful. Based on such persuasive authority, the Board believes that the present proposal is appropriate even if it incorporates matters by reference, and Mr. Halprin's comment does not warrant further modification of the proposal.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

This standard does not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed standard. No alternatives considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the adopted action.