

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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Attachment No. 2

**INITIAL STATEMENT OF REASONS**

## CALIFORNIA CODE OF REGULATIONS

TITLE 8: Chapter 4, Subchapter 7, Article 107, Section 5148  
of the General Industry Safety Orders

**Prohibition of Smoking in the Workplace****SUMMARY**

Labor Code Section 6404.5 prohibits smoking in most enclosed workplaces and specifies that the prohibition is enforceable at the local level and at the state level by the Division of Occupational Safety and Health (the Division). The proposed regulation is intended to address the Decision After Reconsideration of the Occupational Safety and Health Appeals Board (Appeals Board) in the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)*. In that decision, the Appeals Board determined that the Division does not have authority to take action to enforce the provisions of Section 6404.5 in the absence of a regulation promulgated by the Occupational Safety and Health Standards Board (Standards Board) or a special order issued by the Division.

**SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED ACTION**

The proposed regulation reproduces verbatim all of the language found in subsections (b) and (c) of Labor Code Section 6404.5 as new Section 5148 (a) and (b). Pursuant to the conclusions of the Appeals Board decision, the proposed subsections (a) and (b) of new Section 5148 are necessary to enable the Division to continue to enforce the provisions of subsections (b) and (c) of Labor Code Section 6404.5.

The proposed regulation references subsection (d) of Labor Code Section 6404.5 that specifies the workplaces that are not subject to the prohibition on smoking. Specifically, subsection (c) of proposed Section 5148 refers to subsections (d)(1) through (d)(6) and (d)(9) through (d)(14) of Labor Code Section 6404.5 as encompassing the "places of employment" that would not be covered by the other provisions of Section 5148. Subsections (d)(7) and (d)(8) of Labor Code Section 6404.5 refer, respectively, to gaming clubs, bars, and taverns as being among those establishments not considered to

be “places of employment” for the purposes of coverage by the other provisions of Labor Code Section 6404.5. However, subsection (f) of Labor Code Section 6404.5 provides that this exclusion was to end on January 1, 1998, or the date of adoption of a regulation by the Occupational Safety and Health Standards Board (Standards Board) for a permissible exposure level for environmental tobacco smoke. The Standards Board has not adopted such a regulation, and the proposed Section 5148 does not address a permissible exposure level for environmental tobacco smoke. As a result, the exclusion from coverage of gaming clubs, bars, and taverns ended on January 1, 1998. Proposed subsection (c) is necessary to preserve the scope and application of subsection (d) of Labor Code Section 6404.5.

Labor Code Section 6404.5 was enacted in 1994 established by Assembly Bill 131, Friedman, and fully in effect by 1998. Subsection 6404.5(k) specifies that the Division is not required to respond to complaints regarding the smoking of tobacco products in enclosed spaces at places of employment, unless the employer has been found guilty at the local level of three violations within the previous year. Pursuant to subsection (k), the Division has cited employers statewide from 1998 to 2003 for alleged violations of Labor Code Section 6404.5. In the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)* issued May 29, 2003, the Appeals Board decided that the Division does not have authority to take action to enforce the provisions of Section 6404.5 in the absence of a regulation promulgated by the Standards Board. The proposed addition of new Title 8, Section 5148 will rectify that Appeals Board decision and allow the Division to continue to enforce the smoking prohibition of Labor Code Section 6404.5.

#### DOCUMENTS RELIED UPON

Decision After Reconsideration of the Occupational Safety and Health Appeals Board in the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)*.

This document is available for review Monday through Friday from 8:00 am to 4:30 pm at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California.

#### REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

#### SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

### COST ESTIMATES OF PROPOSED ACTION

#### Costs or Savings to State Agencies

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

#### Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

#### Impact on Businesses

Since Labor Code Section 6404.5 is already state law, the Board has made an initial determination that this proposal is not anticipated to result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

#### Cost Impact on Private Persons or Businesses

Since Labor Code Section 6404.5 is already state law, the Board is not aware of any cost impact that a representative private person or business would necessarily incur in reasonable compliance with 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

This proposal is not anticipated to impose nondiscretionary costs or savings on local agencies.

### DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed regulation 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 this regulation

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.)

The proposed regulation does not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulation requires local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, the proposed regulation 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 regulation does not impose unique requirements on local governments. All state, local and private employers will be required to comply with the prescribed standard.

#### EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments may affect small businesses.

#### ASSESSMENT

The adoption of the proposed regulation will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

#### ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.