

August 17, 2018

Juliann Sum, Chief  
California Division of Occupational Safety and Health

Dear Ms. Sum,

We appreciate the work the Division continues to dedicate to crafting an indoor heat exposure standard that meaningfully protects workers. We acknowledge the complexity of crafting a standard that achieves this goal while remaining feasible to implement and enforce. As this process continues, we would like to respond to a point that has arisen repeatedly in stakeholder comments on this standard.

Several industry stakeholders have argued in comments to Cal/OSHA that the indoor standard's control measures should not in most respects be more protective than the requirements in outdoor places of employment under Section 3395, because the Division has not demonstrated that heat hazards are greater in indoor versus outdoor workplaces. We believe that this argument ignores sound policy and Cal/OSHA's legal obligations in regards to at least two critical factors:

**1. Legislative mandate.** Concerns about the indoor standard's requirements in comparison to Section 3395 appear to be motivated by the California APA's requirement that the OAL review regulations for "consistency," however this requires only that the regulation be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." Cal. Gov. Code Sec. 11349. Nothing in the proposed indoor standard legally conflicts with Section 3395. Moreover, these considerations are superseded by the specific statutory mandates for developing the indoor heat rule.<sup>1</sup>

Unlike the Division's development of the outdoor heat standard in Section 3395, the Division is developing the indoor standard under the legislative direction of SB 1167, as enacted in Labor Code Section 6720. Whenever a state agency adopts regulations pursuant to a statute, the regulation must be "consistent and not in conflict with the statute. . . ." Cal. Gov. Code Sec. 11342.2.<sup>2</sup> This follows the well-established principle in administrative law that "if the intent of

---

<sup>1</sup> The consistency requirement of Government Code 11349 does not invalidate standards simply because of ambiguity or overlap with standards that provide greater protections. Rather than invalidating such standards, the Occupational Safety and Health Review Board has found that where such overlap occurs, the more protective standard applies. See *Beutler Heating & Air Conditioning*, OSHAB 98-556, DAR (Nov. 6, 2001) (where two safety orders arguably overlap, DOSH should apply the more protective standard).

<sup>2</sup> Moreover, with respect to the development of an indoor heat standard, Labor Code 6720 is both more specific than Government Code 11349 and more recently enacted. Specificity ("*generalalia specialibus non derogant*") and recency ("*leges posteriores priores contrarias abrogant*") are both well-established rules of statutory construction which further support the Division's statutory obligation to follow specific requirements and guidelines of Labor Code 6720 in developing the indoor heat standard.

[the legislature] is clear . . . the agency [] must give effect to the unambiguously expressed intent of [the legislature].” *Chevron, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

The intent of the State Legislature, as expressed in SB 1167, directs the Division to base the indoor heat standard on work activity levels, among other factors, and to take into consideration the ACGIH TLVs, which account for clothing adjustment factors in addition to work activity and metabolic rates. Notably, Section 3395 was in effect when SB 1167 passed and 3395 includes no control measures based on work activity or clothing adjustment factors. SB 1167 thus explicitly directs the Division to consider specific factors not included in Section 3395, effectively directing the Division to adopt a different and more protective approach than Section 3395. More importantly, the Division must “give effect” to the unambiguously expressed legislative intent of SB 1167, including the requirements to use work activity levels and consider ACGIH TLVs. *Chevron*, 467 U.S. at 842-43.

To propose a standard consistent with SB 1167, the Division should base control measures on work activity level -- as it did in the first discussion draft from February, 2017. Alternatively, the standard could set the control measure implementation trigger temperature low enough to adequately protect workers engaged in heavy or very heavy work. A control measure trigger of 80, or at most 85, degrees Fahrenheit, if based on heat index, could achieve this purpose. The 90-degree dry bulb temperature trigger applicable to most workplaces in the most recent draft is too high to protect workers engaged in heavy or very heavy work, and is therefore not consistent with SB 1167 and Labor Code Section 6720.

**2. Control over the environment.** In addition to the Division’s legislative mandate to use different and stronger criteria for control measures in the indoor heat standard than in Section 3395, California is also under a legislative mandate to ensure that health standards appropriately “prescribe suitable protective equipment and control or technological procedures to be used in connection with these hazards. . . .” Cal. Lab. Code Sec. 142.3(c). As we have noted in previous comments, employers have a significantly greater ability to control the conditions in indoor workplaces. A standard requiring the use of feasible control measures meets the consistency requirements of any applicable APA requirements. OSHA standards generally require a hierarchy of controls that begins with engineering controls. It would be inconsistent with the structure of California’s OSH standards, fundamentals of occupational health and safety, and plain common sense to relax requirements to use appropriate engineering controls indoors simply because they are not available in the outdoor context.

Other stakeholders have argued that the indoor heat standard should be based only on the demonstrated risk, not the feasibility of controls. This approach, however, would ignore the Division’s statutory obligations in developing an OSH standard. Labor Code Section 144.6 requires an adopted standard dealing with harmful physical agents, such as heat, be “that standard which *most adequately assures, to the extent feasible*, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.” (emphasis added). Feasibility is thus a mandatory consideration, alongside maximizing the prevention of harm to employees. Significantly different feasibility limitations in indoor versus outdoor workplaces demand different control measure requirements to ensure the indoor standard “most adequately” protects workers from heat illness, including a hierarchy of controls mandating first

consideration for engineering controls, and a significantly lower application threshold for these measures than for the “high-heat procedures” in Section 3395.

\* \* \*

For the reasons discussed above, we urge the Division to focus on its statutory obligations to develop an indoor heat standard that is based primarily on scientific research and that most adequately assures workers will not suffer heat illness. These are the Division’s most important legal obligations under the APA, Labor Code, and authorizing legislation, irrespective of how closely the indoor standard ultimately matches requirements under Section 3395 for a different environment. We appreciate the Division’s recent revisions to account more for certain risk factors for heat illness, but a standard that adequately protects workers must go further and require feasible engineering controls at 80 or 85 degrees Fahrenheit heat index, reinstitute mandatory cool-down breaks, and avoid loopholes for workplaces where employees also work outdoors, as we have discussed in more detail in previous comments.

We appreciate the Division’s continuing commitment to engage stakeholders in this rulemaking process. Thank you for considering our comments.

Sincerely,

Doug Parker  
Executive Director