

September 30, 2019

SENT VIA EMAIL to:

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RE: Permanent Regulation regarding Wildfire Smoke Protections

The undersigned organizations (“Coalition”) appreciate the opportunity to provide input and recommendations regarding the Proposed Revisions to Emergency Regulation Section 5141.1 developed by the Division of Occupational Safety and Health (Cal/OSHA), dated August 13, 2019, regarding “Protection from Wildfire Smoke.”

The Coalition herein represents the many segments of the tourism industry which is consistently considered one of the top five industries in California’s vibrant economy. The diversity of attractions throughout the state – from state parks to theme parks, bustling cities to lush vineyards, professional sports teams to world-class concert events, ocean surf to snowy caps – draws millions of visitors each year. In 2018 alone, traveler spending in California reached \$140 billion, travel-related tax revenue hit \$11.8 billion, and direct travel-generated employment was nearly 1.2 million employees. Tourism is a top contributor to California’s place as fifth-largest economy in the world and we must appreciate our reliance on our visitors and the dollars they spend here, which are heavily reliant on maintaining a welcoming and pleasant visual appearance to our visitors. More broadly, industries such as parks and attractions, retail, restaurants, hotels, and live entertainment represent economic sectors encompassing millions of working Californians with combined labor income into the hundreds of billions. All of these industries stand to be impacted significantly by the proposed rules, whether in indoor or outdoor settings.

Collectively, our Coalition takes the safety and health of our employees seriously. We follow Cal/OSHA’s safety guidelines and have excellent compliance records. However, the August 13, 2019 draft regulations place an undue burden on Coalition constituents, are unclear, and are riddled with uncertainty.

Draft Regulation Scope is Overly Expansive

The scope of the proposed draft far exceeds the intent behind Petition 573¹, the initial request for regulations intended to protect outdoor workers in areas impacted by unhealthy levels of wildfire smoke and even beyond the recently adopted emergency regulations on this issue.

¹ <https://www.dir.ca.gov/oshsb/documents/petition-573.pdf>

One-hour Threshold

As drafted, these regulations essentially identify any worker who spends a cumulative one hour outdoors during a shift as an outdoor worker. This threshold is so low that many workers who spend the majority of the workday indoors would also be included in these requirements. In many of our businesses, we engage in rotating staff. In so doing, if an employee were to spend 10 minutes outdoors 6 times in a shift, for example, that employee would no longer be exempted under (a)(2)(D). Due to the expansive physical nature of the places of employment of Coalition constituents, walking from one part of a coliseum or park to the other side of the park, in itself may take over 10 minutes.

We urge Cal/OSHA to consider alternatives to this one-hour threshold for identifying which employees this regulation applies to.

Version "3.0"

Furthermore, the proposed future draft regulations carry even stricter standards than the emergency regulations. Under the proposed "3.0" draft to be considered at a later, unspecified date, employers would be required to provide optional respirators when the Air Quality Index (AQI) for fine particulate matter (PM2.5) reaches 100 (versus 150 AQI in the emergency regulations) and to require fit-tested respirators at 300 AQI for PM2.5 (versus 500 AQI). These enhanced requirements could essentially shut down entire urban areas. For example, during the 2018 wildfire season, the Sacramento region had an AQI for PM2.5 in excess of 300 for multiple days. Had these regulations been in effect at that time, businesses would have had to either medically evaluate and fit test all employees who might be outdoors for more than an hour and maintain that supply of respirators or simply close their doors.

The proposed draft also includes a note to "discuss what minimum MERV (Minimum Efficiency Reporting Value) filtration should be required for building and vehicles." Having the regulations attempt to address indoor filtration system requirements is a departure from the initial petition on behalf of outdoor workers, bordering on largescale air quality mandates. Numerous buildings and vehicles in California do not have MERV filtration with some buildings having no heating, ventilation, and air conditioning systems whatsoever. Furthermore, any place of business that relies upon the frequent ingress and egress of customers will find it virtually impossible to meet the standard for filtration, effectively requiring that they treat their employees as "outdoor" employees for purposes of these regulations.

We strongly encourage Cal/OSHA staff to abandon the proposed version 3.0 language completely and, instead, work on improving version 2.0.

Confusion and Uncertainty Regarding Rule Application

In addition to the overreach of the regulations, they lack clarity and certainty. Given the ambiguity of the proposal, businesses will have a difficult time knowing exactly when the regulations apply, when they cease to apply, and which employees are affected.

Using AQI Levels as Determinant is Flawed

The regulations are triggered by AQI levels for PM2.5 and an employer's reasonable anticipation that employees will be exposed to wildfire smoke. However, AQI levels fluctuate throughout the day and monitoring stations are not always near the worksite. There is no requirement that the AQI for PM2.5 be above 150 for a sustained period before the regulation is triggered and there is no indicator for when the regulations are no longer applicable. AQI is calculated based on assumptions of 24-hour exposure and it was not designed to measure exposure over one hour; its utility is not comparable to the Permissible Exposure Limit (PEL) calculations that Cal/OSHA typically employs.

The regulations seemingly apply immediately once the AQI hits the thresholds identified even though the AQI admittedly is, again, based on 24-hour exposure assumptions.

In addition, it is not within Cal/OSHA's jurisdiction to control environmental pollution exposures. As expressed above, the AQI is an environmental and not occupational limit with the AQI thresholds including consideration of health effects on the elderly and children, and are not specific to a California employee. Note that the AQI levels for PM2.5 can be exceeded even when there is no wildfire. If there is a wildfire, how does an employer know how much of the wildfire smoke contributed to the exceedance of the AQI versus regular environmental pollution?

We are also concerned about the location and availability of approved monitoring sites. If the AQI data is collected at the nearest monitoring site, the exposure threat could vary widely between the monitoring site and the worksite depending on distance, topography, and microclimate in the region. Furthermore, the regulations do not allow the use of other non-governmental monitoring sites which may produce AQI readings more consistent with those at the worksite.

Employer Uncertainty

The regulations are also based on an employer's ability to reasonably anticipate that employees will be exposed to wildfire smoke. This basis is extremely subjective as employers have no guidance as to what is reasonable and what is not, and how an employer is to anticipate the future presence of wildfire smoke. There is no correlation to the present exposure to wildfire smoke nor an objective wildfire advisory. Additionally, the regulations contain no provisions regarding when the requirements cease to apply. For example, if the conditions were met for the rule to apply but then the AQI dips below the 151 threshold, is the employer then allowed to stop utilizing the controls put in place?

The confusing provisions in the draft regulations will make it impossible for an employer to confidently comply. We urge Cal/OSHA to keep this in mind and work on revisions to tie the trigger to more objective standards instead of "reasonable anticipation", and make it immensely clear precisely when the regulations are triggered and similarly when the regulations cease to apply. We also ask Cal/OSHA to require that the AQI levels for PM2.5 be at a heightened level for a sustained period before these regulations apply instead of instantaneously as the current draft regulations suggest.

Alternative Compliance Measures

As mentioned, the tourism industry is replete with businesses who place utmost value on the health and safety of their employees. Many of these businesses have environmental health and safety officers and frequently Emergency Medical Technicians (EMTs) on hand who can evaluate employees during a wildfire. In addition to the above recommendations, we request that Cal/OSHA staff work with the Coalition to develop alternative compliance measures that would factor in the unique nature of those businesses involved in the tourism industry including all sectors of the hospitality and entertainment industries – food and drink service, event planning, theme parks, zoos, aquariums, sports and music events, retail, lodging, resorts, hotels, and traveling – with a special focus on those employees who interact directly with guests. The hospitality and entertainment industry is highly dependent on the outward visual appearance of their places of business and employees, to create a warm and inviting environment for tourists that would be severely undermined by the employee use of a respirator. Even more disconcerting is the impact respirators would have on our employees' ability to communicate with our guests and visitors, in particular with regard to safety instructions. For these reasons, we ask Cal/OSHA staff to consider alternative compliance measures for the hospitality and entertainment industries that may include

adjustments to the one-hour outdoor threshold for certain employees, limiting physical activity while outdoors, and encouraging preventative rest breaks.

We greatly appreciate your attention to these concerns and look forward to working with you on solutions that would be included in the next draft of permanent regulations.

Sincerely,



Erin Guerrero

California Attractions and Parks Association

California Association of Boutique & Breakfast Inns

California Authority of Racing Fairs

California Hotel & Lodging Association

California Lodging Industry Association

California Retailers Association

California Travel Association

Enterprise Rent-A-Car

Hotel Association of Los Angeles

Long Beach Hospitality Alliance

Ski California

Western Fairs Association

§5141.1. Protection from Wildfire Smoke.

Definitions:

(b) "Hospitality and Entertainment Industry" means places of employment that include food and drink service, event planning, theme parks, zoos, aquariums, sports and music events, lodging, resorts, hotels, and traveling.

"Guest facing employee" means an employee who interacts face to face and in person with guests

(f)(4) Control Respiratory Protective Equipment.

(A) Where the current AQI for PM_{2.5} is equal to or greater than 151 for three consecutive hourly measurements during working hours, but does not exceed 500, the employer shall provide respirators to all employees for voluntary use within one hour from the time the third consecutive hourly measurement was greater than the AQI of 151, in accordance with section 5144 and encourage employees to use respirators. Respirators shall be NIOSH-approved devices that effectively protect the wearers from inhalation of PM_{2.5}, such as N95 filtering facepiece respirators. Respirators shall be cleaned, stored, maintained, and replaced so that they do not present a health hazard to users. Employers shall use Appendix B to this section in lieu of Appendix D to section 5144 for training regarding voluntary use of respirators.

NOTE: For voluntary use of filtering facepieces, such as N95 respirators, some of the requirements of section 5144 do not apply, such as fit testing and medical evaluations.

Exception to (f)(4)(A): Providing an N95 respirator for voluntary use is not required if an employer of a guest facing employee who works within the hospitality and entertainment industry meets the following conditions:

1. Limits the physical activity of the guest facing employee;
2. Allows and encourages employees to take a preventative rest break when they feel the need to do so to protect themselves from the health effects of smoke inhalation, in an enclosed building or structure and the employer ensures that windows, doors, bays, and other openings are kept closed to minimize contamination by outdoor or unfiltered air, or enclosed vehicles in which the air is filtered by a cabin air filter and the employer ensures that windows doors and other openings are kept closed to minimize contamination by outdoor or unfiltered air; and
3. If requested by the employee, provide a portable air cleaning device certified by the California Air Resources Board (CARB).

Negative Determination. If the current AQI for PM_{2.5} are below an AQI of 151, then the employer may discontinue providing respirators to all employees for voluntary use.

(B) Where the current AQI for PM_{2.5} exceeds 500, respirator use is required in accordance with section 5144. The employer shall provide respirators with an assigned protection factor, as listed in section 5144, such that the PM_{2.5} levels inside the respirator correspond to an AQI less than 151.

Negative Determination. If the current AQI for PM_{2.5} are below an AQI of 500, then the employer may discontinue requiring the use of a respirator.