Outlook

Comments – Draft Standard for Comment – Assembly Bill 2243 Wildfire Smoke

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Date Mon 7/7/2025 1:09 PM

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Good afternoon,

Our organizations (California Association of Winegrape Growers, California Farm Bureau, California Farm Labor Contractor Association, and Wine Institute) appreciate the opportunity to submit the following comments via e-mail on the agency's draft standard for Wildfire Smoke proposed pursuant to AB 2243 (E. Garcia), 2022. We appreciate that when AB 2243 was signed into law in 2022, it put Cal/OSHA in the difficult place of dealing with competing policies:

- How to comply with an incredibly flawed state law that is riddled with unintended consequences; and
- Make workplace safety the top priority.

This conflict is why our organizations asked for a veto of AB 2243. Nonetheless, here we are.

Primarily, we have three basic concerns:

- This regulatory change proposes workplace safety standards based on the NAICS Code of the employer instead of potential wildfire smoke risks created by conditions in the workplace.
- The regulation would likely result in agricultural employees missing the opportunity to work and experience lost income because of the impracticality of implementation of the proposal's requirements.
- While tensions are running high relative to immigration policies, implementation of this regulation would ask employees to provide physically identifying information to an unknown third party through the medical evaluation of the employee's suitability to use a respirator. As this information is required only of employees of agricultural employers, this would no doubt be perceived by many farm workers as creating a risk of discriminatory profiling and deportation.

As we understand it, the proposed draft standard would provide for the following:

- Require the agency to update the Air Quality Index (AQI) tables to reflect changes to methods used by the U.S. EPA to report air quality.
- Revise the current regulatory requirement in Title 8 § 5141.1 that an outdoor employer to provide an N-95 respirator whenever the AQI is greater than 500 from wildfire smoke, to requiring mandatory respirator provision and medical evaluation if the AQI is greater than 300 from wildfire smoke for agricultural employees only; the requirement to mandate respirator use and medical evaluation for employers of non-agricultural employers would continue to be triggered by an AQI greater than 500.
- When the AQI exceeds 300 for agricultural employers or 500 for non-agricultural employers, the employer would not need to implement a written respiratory protection program or require employees to undergo fit-testing.

Treating Agricultural Employers and Employees Differently

AB 2243 took the misguided approach of establishing different levels of respiratory protection for employees working in the same conditions but for different types of employers. This approach to occupational safety and health is contrary to

long-standing state and federal OSHA practices, principles, and standards whereby workplace conditions experiences by the employee (not the industry classification of the employer) is the primary consideration in determining workplace safety requirements.

There are countless examples of situations where an employee may be doing work that would expose that employee to identical occupational safety and health conditions as those experienced by agricultural employees (perhaps working only a few feet away) while in the employ of a non-agricultural employer. Below are a few examples:

- A large animal veterinarian employed by a university testing cows at a dairy.
- A county agricultural commissioner monitoring pest issues in a vineyard to monitor a quarantine.
- A nonprofit organization doing plant research in an orchard, field or vineyard.
- A nonprofit community organization doing outreach and education to farmworkers in the field.
- A manufacturer servicing new ag equipment on ag land.
- A state regulatory agency testing soil, water, etc on ag land.

In each of these cases, the employer would be required to provide an N-95 respirator and implement medical evaluation when the AQI exceeds 500, but not between 300-499. In every one of the above examples, if similar work is done at the same location but by an employee working for an agricultural employer, the employer would be required to furnish an N-95 respirator and implement medical evaluation if the AQI exceeds 300. Even though the conditions are the same, the employees of an agricultural employer would be held to a separate standard with different requirements solely because of the NAICS Code classification of their employer.

This is demonstrated by the following:

- Many larger dairies employ a large animal veterinarian to test cows at the dairy on an ongoing basis.
- Most grape growers continually monitor potential pest problems in a vineyard.
- Many growers open their property to academic plant research with assistance from the grower and employees of the grower.
- Many growers invite community organizations on site to share resources with their employees.
- Most agricultural equipment is tested on farms or ranches in cooperative agreements with the grower and employees of the grower who may assist the manufacturer in maintenance of the machinery.
- To demonstrate regulatory compliance, growers continually test soil, water, and other environmental parameters on farms or ranches with this work being performed by employees of the farm or ranch operator or assisted by those employees.

In all these cases, an employee of an agricultural employer performing all the tasks illustrated above would be required to use an N95 respirator and be medically evaluated if the AQI exceeds 300, while a non-agricultural employee working only a few feet away would not be required to use an N95 respirator and be medically evaluated unless the AQI exceeds 500.

Keep in mind that agricultural employes commonly employ employees performing non-agricultural work. This includes but is not limited to driving, bookkeeping, accounting, administrative, maintenance, handyman, mechanical, plumbing, and construction. People working in those occupations can be employed by a variety of employers, including agricultural employers. But this proposal treats those employees differently based on the industrial classification of their employer, not their occupation or the occupational safety and health hazards of their occupation.

Here is an illustration of the contradictions created by this flawed approach:

- If a university is conducting field research in a commercial vineyard, those university employees would need an N-95 mask with medical evaluation whenever the AQI is over 500. This is because the university is not an agricultural employer.
- However, other vineyard workers employed by the grower (working in the same vineyard at the same time) would need an N-95 mask with medical evaluation whenever the AQI is over 300. This is because their employer is an agricultural employer.
- Additionally, if directly adjacent to the vineyard, a CalTrans worker is mowing the grass, that CalTrans worker would need an N-95 mask with medical evaluation whenever the AQI is over 500. This is because the State of California is not an agricultural employer.
- Furthermore, if the grower has contracted out with a company to fix the road base leading into the vineyard, that crew working directly adjacent to the vineyard would need an N-95 mask with medical evaluation whenever the AQI is over 500. This is because the company employing the crew is not an agricultural employer.
- However, if the grower directly hires the crew to repair the road, those employees would need an N-95 mask with medical evaluation whenever the AQI is over 300. This is because their employer is an agricultural employer.

There is no basis in science, data, or occupational health and safety practice or protocols for this kind of situation to be placed into a California regulation. In the above scenario, all the workers are working in the same vineyard or adjacent to the vineyard and are exposed to the same air quality conditions. They are breathing in the air with the same AQI due to wildfire smoke. Yet, there would be different standards for each employee, dependent only on the NAICS Code of the industry of the employer.

We believe the requirement for an N-95 mask with medical evaluation should not be based on the NAICS Code classification of the employer. There is no scientific or logical basis for making this distinction which will create obvious problems for employers managing the occupational safety and health of their employees.

NOTE: There is also some potential ambiguity in the proposed regulation as "agricultural employer" is not defined.

Potential for Work Stoppage

As the regulation requires an agricultural employer to have a medical evaluation for each employee required to use an N-95 respirator when the AQI exceeds 300, one of the following would occur whenever the AQI is over 300:

1. Work would cease when the AQI exceeds 300. Employees would not be allowed to work until a medical evaluation is completed; or
2. Every employee would need to have a medical evaluation completed in advance, when hired or before working in conditions where poor air quality could occur.

NOTE: Currently, in an agricultural workplace, only pesticide applicators are routinely required to use respirators at the direction of their employer, and as a result are subject to training, fit-testing, and medical evaluation. This is because pesticide applicators, are required to use respirators to mix, load, and apply certain types of pesticides.

In many cases, work would most likely cease when the AQI is above 300 because conducting a medical evaluation in advance is not realistic. This is in part because of the cost of compliance (especially for a small grower) and the unworkability of the proposal.

Cost

- Using the Stanford University "N-95 Respirator User Initial Questionnaire" as a model, it seems the cost for a medical evaluation can vary for the following reasons:
    - An employee has a right to speak with a health care professional. The cost of this is paid by the employer.
    - Most medical evaluations are based on the premise that the respirator will be worn according to manufacturer instructions, which include a fit test. Therefore, some who provide a medical evaluation may by extension also require a fit test.
    - An employee may be approved with restrictions. This could require an additional medical evaluation later depending on the nature of the restrictions. Again, this additional medical evaluation would be at an additional cost.
- In general terms, a medical evaluation would cost between $22 and $40 per employee. A medical evaluation may also require a fit test which costs between $45 and $110 per employee. This would be a total cost of between $67 and $150 per employee. There are more than 400,000 agricultural employees in California creating a statewide cost of between $37.2 million and almost $90 million annually. See Table A (attached) for calculations based on a few different assumptions.
- A medical evaluation would need to be redone whenever there is a change in the health circumstances of the employee. It is not realistic for the employer to ask each employee every day about any potential changes in their health as most employees will be reluctant to share that information.
- Employees with facial hair will not pass a fit test therefore they may not pass a medical evaluation. Additionally, an employee may pass the medical evaluation and the fit test and then later grow facial hair, causing that employee to be unable to pass either the fit test or the medical evaluation.
- The bottom line is that the statewide cost of compliance with this proposal will range somewhere between $12.4 million and almost $90 million annually. This is in addition to the existing compliance costs associated with the existing wildfire smoke regulation.

Unworkability:

In addition to its high implementation cost, this proposal is not workable on a practical basis. This is primarily because of the record keeping involved, quick turnaround needed for medical evaluations and potential fit testing and the reality

that agricultural employees would just decline to be medically evaluated seek other employment. This becomes a bit of a circular conversation, but please consider the following.

Let's initially start with why employees would just refuse and seek other employment: On Cal/OSHA's medical evaluation form, it states, "The following information **must** be provided by every employee who has been selected to use any type of respirator (please print)
Name,
Date,
Job Title,
Age (to nearest year),
Gender,
Height,
Weight,
Phone number (include the Area Code), and the best time to phone at this number."

The reasons for asking for this information are obvious – to positively identify the employee and ensure information about that employee's medical evaluation is preserved and correctly applied. However, this information is not being collected for other employees working for non-agricultural employers who are being exposed to the same wildfire smoke health risks. If collection of this information is essential to safeguard the health of agricultural employees, why is it not also essential for all employees exposed to the same wildfire smoke, regardless of the NAICS Code of the employer. The proposed regulation does not uniformly protect all employees but preferentially provides a higher level of protection to certain employees in a misguided attempt to comply with the nonsensical requirements of AB 2243.

Further, agricultural employees, particularly in the current political context, are likely to perceive a newly-required collection of any personal information as being profiled and illegally discriminated against, and increasing their exposure to deportation.

Many employees who work for agricultural employers also perform work for non-agricultural employers. Employees will be wary of providing this information for third-party evaluation if they are not confident of the confidentiality of the information. Under the operation of this proposed regulation, employees who decline to provide this information will be unable to complete medical evaluations and will be unavailable to work for an agricultural employer if the AQI exceeds 300.

This problem is exponentially compounded by aggressive ICE enforcement actions which are likely to continue through 2028 at least. Cal/OSHA's medical evaluation form requires the employee to provide physically identifying information to an unknown third party. Many employees would naturally assume could be made available to ICE, (as recently occurred when the Federal Government shared Medicaid enrollment data with DHS), thereby making it easy for ICE to come after that employee and their family.

These fears are not limited to unauthorized workers. Many California agricultural employees are U.S. citizens, permanent resident aliens or are other legally present and working in the U.S. Because of current immigration enforcement news, many are being cautious and choosing to stay out of sight and avoiding work, schools, places of worship, hospitals, and other public situations. This proposed regulation asks those employees to needlessly take risks and provide sensitive, private, physically identifying information to implement a regulation the defies sound regulatory and occupational safety and health practice.

Relative to the record keeping: To demonstrate compliance with this proposed regulation, an employer would want to conduct a medical evaluation for every employee immediately upon hiring. If a wildfire smoke incident arises, the employer would want to know in real time which employees are available to work. But employers will face practical barriers in getting and maintaining this information in advance for all employees.

First, if a significant amount of time has passed since the employee was hired, the employer would want to be sure there has been no change in the employee's health condition which could include (for example) new blood pressure or cholesterol medications, weight gain or loss, or whether that employee has grown a beard. This would necessitate a new medical evaluation or the employee providing sufficient new information to document that the employee's health situation has not changed.

Second, if the employee states that they have already completed a medical evaluation through another employer that allows them to work without restriction, this proposed regulation would necessitate the need for a second medical evaluation. In which case, what happens when the employee says that they were approved under the first medical evaluation, but under the second medical evaluation, there are restrictions?

Based on documentation in this situation, if the employer tells the employee that they cannot work due to the second medical evaluation, that employee could sue the employer under several provisions of existing law.

Conversely, the employer would turn to Cal/OSHA for guidance. Would Cal/OSHA instruct the employer to rely on the first medical evaluation and allow unrestricted work? In which case, would Cal/OSHA be estopped from any enforcement action against the employer who relied on Cal/OSHA's advice? These are questions that lawyers would debate for unknown billable hours adding additional burdens to the California taxpayer.

Which means that in real time, the employee would likely be excused from work (with full pay) due to the first medical evaluation.

Finally, let's not forget that ag work is directly tied to Mother Nature. Agricultural employment and agricultural production is tied to the weather and **other** conditions that are beyond the control of employers. To our knowledge, no regional database exists with data on the number of days annually (or time of year) where the AQI has been above 300. Nor do we understand the full implications of how climate change will impact this in the future. We don't know how often the new requirements would necessitate a medical evaluation for use of an N-95 respirator. To be prepared for the worst case scenario, many employers will want to do a medical evaluation upon hiring as discussed above, with all the attendant problems described above.

Over the last several years, California has experienced wildfires during harvest time. When crops are ready to be harvested, crews must be quickly dispatched to harvest perishable commodities. In most cases, this would include new employees.

For those new employees, the employer would need to consider whether to perform medical evaluation at the time of hire or wait until the need becomes evident. This may become evident too late to complete a medical evaluation, or could result in lost production time, and could create a situation (as discussed above) where the employee does not want to provide information that the employee perceives may go to ICE.

If the employer waits, when the AQI exceeds 300, this employee may be unable to work because there will not be sufficient time to complete a medical evaluation and possibly a fit test. In such case, employees would seek employment with employers who can offer work without having to meet this requirement. In doing so, employees would lose work and income while searching for a new employer, all with the end result being that those employees will be exposed to wildfire smoke at an AQI greater than 500 working for an employer to whom this proposed regulation will not apply.

Conclusion

This proposed regulation needs to be substantially amended as follows:

- The regulation cannot be based on the NAICS code of the employer. This makes no sense. This regulation needs to be based solely on the workplace risks from wildfire smoke experienced by the employee regardless of the NAICS code of the employer.
- The proposed regulation would result in lost days of work for agricultural employees. This means a loss of income for employees and their families and a substantial economic hardship for the employer and the rural communities where the employees work and live. If that is not the intent, workability concerns must be addressed.
- Employees may not want to provide physically identifying information through the medical evaluation process. If this workplace safety standard is perceived as illegal profiling and discrimination, and increasing deportation risks, employees will decline to participate and will seek work with employers who can offer work when the AQI exceeds 300. In which case, what has the proposed regulation really accomplished?

With all that in mind, we ask you to review how Cal/OSHA can avoid the unintended consequences of AB 2243 as discussed above while also acting to enhance worker safety.

Thank you in advance for considering our concerns.
Table A – Statewide Compliance Annual Costs

Assumption	**Type of Test/Eval**	**Cost per Test/Eval**	**Number of Employee's**	**Annual Cost**

		(Average of High & Low)		
Once Annual Medical Eval	Medical Eval Only	$31	400,000	$12.4 million
2nd Medical Eval for 25% of Employees	Medical Eval 2nd Medical Eval	$31 $31	400,000 100,000	$12.4 million $ 3.1 million $15.5 million
Fit Test for 10% of Employees	Medical Eval Fit Test	$31 $108	400,000 40,000	$12.4 million $ 4.3 million $16.7 million
2nd Medical Eval for 50% of Employees	Medical Eval 2nd Medical Eval	$31 $31	400,000 200,000	$12.4 million $ 6.2 million $18.7 million
2nd Medical Eval for 25% of Employees & Fit Test for 10% of Employees	Medical Eval 2nd Medical Eval Fit Test	$31 $31 $108	400,000 100,000 40,000	$12.4 million $ 3.1 million $ 4.3 million $18.6 million
Fit Test for 25% of Employees	Medical Eval Fit Test	$31 $108	400,000 100,000	$12.4 million $ 10.8 million $23.1 million
Twice Annual Medical Eval Fit Test for 10% of Employees	Medical Eval Fit Test	$62 $108	400,000 40,000	$24.8 million $ 4.3 million $29.1 million

NOTE: The above assumptions include that any given employee works for only one employer. In reality, most agricultural employees work for multiple employers throughout the year. Additionally, the above does not include lost wages. Consequently, the estimates in the right column should be multiplied by two or three. Additionally remember that the medical evaluation and fit testing must be completed while on the clock. ***This all means that the statewide compliance costs are likely somewhere between $37.2 million and almost $90 million annually.***

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