

# Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date : September 30, 2004

From : **Occupational Safety and Health Standards Board**  
Tom Mitchell, Senior Industrial Hygienist

Subject : **Controlled Negative Pressure (CNP) REDON Fit Testing Procedures**

The following information is provided in regard to the proposed revisions to the California Code of Regulations, Title 8, Chapter 4, Subchapter 7, Article 107, Section 5144 of the General Industry Safety Orders.

## INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

The Occupational Safety and Health Standards Board (Board) intends to adopt the proposed rulemaking action pursuant to Labor Code Section 142.3, which mandates the Board to adopt standards at least as effective as federal standards addressing occupational safety and health issues.

The U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) promulgated standards addressing protocols for fit testing respirators on August 4, 2004, as 29 Code of Federal Regulations, Section 1910.134. The Board is relying on the explanation of the provisions of the federal standard in Federal Register, Volume 69, No. 149, pages 46986 to 46994, August 4, 2004, as the justification for the Board's proposed rulemaking action. The Board proposes to adopt a standard that is the same as the federal standard except for editorial and format differences.

The OSHA final rule approves an additional quantitative fit testing protocol, the controlled negative pressure (CNP) REDON fit testing protocol, for inclusion in Appendix A of its Respiratory Protection Standard. The federal amendment affects, in addition to general industry, OSHA respiratory protection standards for shipyard employment and construction. OSHA adopted this fit testing protocol under the provisions contained in the federal Respiratory Protection Standard. The State respirator standard, Section 5144 of the General Industry Safety Orders, is substantially the same as its federal counterpart, and applies to all industries in California.

The proposed standard is substantially the same as the final rule promulgated by federal OSHA. Therefore, Labor Code Section 142.3(a)(3) exempts the Board from the provisions of Article 5 (commencing with Section 11346) and Article 6 (commencing with Section 11349) of Chapter 3.5, Part 1, Division 3 of Title 2 of the Government Code when adopting a standard substantially the same as a federal standard; however, the Board is still providing a comment period and will convene a public hearing. The reasons for the written and oral comments at the public hearing are to: 1) identify any clear and compelling reasons for California to deviate from the federal standard; 2) identify any issues unique to California related to this proposal which should be

addressed in this rulemaking and/or a subsequent rulemaking; and, 3) solicit comments on the proposed effective date. The responses to comments will be available in a rulemaking file on this matter and will be limited to the above areas.

The effective date is proposed to be upon filing with the Secretary of State as provided by Labor Code Section 142.3(a)(3). The standard may be adopted without further notice even though modifications may be made to the original proposal in response to public comments or at the Board's discretion.

#### DOCUMENTS RELIED UPON

69 Federal Register, pages 46986 to 46994 (August 4, 2004). Final Rule amendment of 29 CFR 1910.134 Respiratory Protection, Appendix A: Fit Testing Procedures (Mandatory) regarding Controlled Negative Pressure REDON Fit Testing Protocol.

This document is 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.

#### STRIKEOUT/UNDERLINE DRAFT PROPOSAL

See Attachment No. 1.

#### SIDE-BY-SIDE CODE COMPARISON WITH FEDERAL STANDARD

See Attachment No. 2.

#### COST ESTIMATES OF PROPOSED ACTION

The CNP REDON protocol offers employers an additional option to fit test their employees for respirator use. In the federal preamble, OSHA concludes that the rulemaking action imposes no additional costs on employers.

#### DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed standard 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 the proposed amendment will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore the proposed standard 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.)

This proposed standard does not require local agencies to carry out the governmental function of providing services to the public. Rather, the standard requires local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, the proposed standard 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 standard 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 amendment may affect small businesses. However, no economic impact is anticipated.

#### ASSESSMENT

The adoption of the proposed amendment to the standard 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.

Attachments