

April 4, 2017

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California Attractions and Parks Association
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California Farm Bureau Federation
California Framing Contractors Association
California Hotel & Lodging Association
California League of Food Processors
California Manufacturers & Technology Association
California Restaurant Association
California Retailers Association
California Professional Association of Specialty Contractors
California Solar Energy Industries Association
El Centro Chamber of Commerce
Family Business Association Of California
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Western Growers Association
Western Steel Council
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Subject: Heat Illness Prevention in Indoor Places of Employment
Discussion Draft Dated February 22, 2017

The above-signed organizations (the Coalition) submit these comments regarding the subject discussion draft and in response to the discussion during the Advisory Committee meeting on February 28, 2017. The Coalition represents employers large and small across many diverse industries.

We take the safety and health of our employees very seriously. Many members of the Coalition were involved with the development and implementation of the outdoor heat illness regulation, section 3395, and have significant experience with how to effectively prevent heat illness. Respectfully, we disagree with the proposed approach in the discussion draft to address heat illness prevention for indoor employees.

While this rulemaking is mandated by legislation and therefore the necessity of a resulting regulation need not be demonstrated, the Coalition recommends that data be provided so the regulation can reflect where and in what manner the exposure exists.

In summary, this discussion draft creates a program to prevent heat illness for indoor employees that is unnecessarily burdensome, expensive and overly complex and confusing. Very few small and medium businesses will be able to comply with this complex proposal without being forced to seek the assistance of an expert consultant, which will be a substantial burden for businesses. It is also unnecessarily prescriptive, going much further than the outdoor heat illness prevention regulation, section 3395. The following discussion outlines our primary concerns.

Statutory Timing Requirement. This rulemaking process is mandated by legislation SB 1167 (Mendoza) from the 2016 legislative session. In the legislation, the language specifies the timeline for the rulemaking as follows:

By January 1, 2019, the division shall ***propose*** [emphasis added] to the standards board for the board's review and adoption a standard that minimizes heat-related illness and injury among employees working in indoor places of employment.

The language plainly imposes a deadline on the division, not the board: "[T]he division shall propose" a standard "to the standards board" by January 1, 2019. The phrase "for the board's review and adoption" gives the division purpose for its action, but it does not transfer from the division to the board the burden of meeting the compliance deadline of January 1, 2019.

It is unreasonable to interpret legislative language to direct the board to adopt the rule on the same day it is proposed; therefore, we assert that the legislature intended for the division to complete its work by January 1, 2019. If the legislature had intended to mandate the adoption date, it would have simply stated its intent as the date mandated for board adoption. To interpret SB 1167 as imposing on the division which is imposed only on the board is irrational.

Furthermore, we interpret this language to consider that the board may remand the proposal back to the division for revision during the rulemaking process. Finally, it is impractical and potentially impossible for a rule of such complexity to be drafted and ready for adoption within one year, particularly when three months have already passed.

Given the complexity and impractical nature of this first draft, the Coalition has significant concerns whether the development of a workable and enforceable regulation is realistic in such a short timeframe.

Therefore, the Coalition concludes that the legislative intent is that the division submit a regulatory proposal to the board for its review no later than January 1, 2019. After the board's receipt of the proposed rule, the process of review and interaction with the division would begin. The final regulation should be a rule with which employers can comply, that protects employees and results from a measured, thoughtful process.

Proposal is too complex. Employers must understand and comply with numerous regulations enforced by various agencies, in addition to Cal/OSHA regulations. The Coalition strongly supports the provision of safe and healthful workplaces for our employees. However, if the rule is too complex for employers to understand, the benefit of the regulation's intended protection may be difficult to achieve. Furthermore, regulations that are ambiguous and difficult to implement create a "gotcha" situation for employers, where complex compliance requirements can result in inadvertent non-compliance (and high monetary penalties) with no safety or health benefit for the employees. There is no reason why this regulation need be so much more complex than the Heat Illness Prevention regulation for outdoor employers. As it is written, employers would need to hire consultants or additional staff and purchase new equipment to comply. This includes those lacking a large pool of money and other resources.

Furthermore, this proposal for protection from heat illness in indoor workplaces is more complex than the regulating of outdoor workplaces. In our evaluation, indoor workplaces do not typically pose a greater risk of heat illness than outdoor workplaces. Therefore, a more complex program is unwarranted.

The Coalition recommends a performance-based approach to the regulation such as that of the Illness and Injury Prevention Program and the outdoor heat illness prevention program. The first step that employers should take is to assess their indoor workplaces for employee exposure to the risk of heat illness. If the employer identifies the risk is present, then the employer must develop a program. If the risk was evaluated and determined not to be present, then the employer would not be subject to the requirements of heat illness prevention program for indoor employees.

A simpler approach is likely to result in more, not less, employee protection. An approach that is too complex is likely to result in lower compliance, which in turn is less protective of employees. Greater simplicity will lead to greater protection because greater simplicity will improve employer understanding and compliance. We urge the division to simplify the rule.

Proposal too costly. As written, the implementation costs would be significant for most if not all employers subject to the rule. Many employers will not have the expertise to interpret the complex requirements and would have to hire costly staff or consultants. Compliance would require many employers to purchase equipment. There could be consequences to the economy as some employers may not have the requisite resources and could be forced out of business or to cut back.

Major Regulation in question. The Coalition asserts that the economic impact of this rule would exceed the \$50 million economic impact threshold and would therefore be determined a major regulation thus requiring an economic impact analysis.

Scope and application of the regulation. The proposed scope of the discussion draft is too complex and overly broad. Indoor workplaces where no hazard is present should not be required to implement policies, procedures, and controls to prevent heat illness. For employers to be able to interpret and comply with the new standard, as well as to provide employee protection, the Coalition recommends that its scope and application be clear and easily understandable. We suggest that the scope be rational and simple so that employers can identify when they are subject to the regulation.

The Coalition suggests the following scope language:

- (a) Scope and application. This standard applies to indoor places of employment. Employees who work during a day over 50 percent of their time indoors and no more than one hour consecutively outdoors shall be subject to this standard and not the outdoor heat illness prevention standard section 3395.

EXCEPTION 1: Temperature and environment-controlled office spaces must have a written contingency plan in the event of a loss of air conditioning that would result in a temperature that exceeds 90 degrees Fahrenheit. These work places are otherwise not subject to this standard.

EXCEPTION 2: Indoor workplaces that during a day maintain an 85-degree Fahrenheit average temperature or lower.

EXCEPTION 3: Outdoor workplaces in compliance with section 3395 may apply those provisions to indoor workplaces without maintaining a separate program for indoor heat illness prevention.

EXCEPTION 4: Structures built by employers for providing shade to work operations to protect employees from outdoor heat and for compliance with 3395 are not subject to this standard.

Definitions

Personal risk factors. Personal risk factors that may increase an employee’s risk of heat illness should be defined and included in the regulation. Employees and supervisors should be trained on these risk factors and their potential impact on an employee’s susceptibility to heat illness. Inserting the definition in 3395 would suffice.

Heat illness. This is not defined in the draft. Using the definition of “heat illness” in 3395 is recommended.

Acclimatization. This definition should also be the same as that in 3395. This draft has added language that is unnecessary and confusing and the term is not defined the same as in 3395.

Heavy work/Light work/Moderate work/Very heavy work. The use of these terms should be eliminated from the regulation. There is too much subjectivity to be determined, leaving open the risk of the employer and the division interpreting the work load differently. The employer should assess the risk of heat illness in workplace while considering the workload. The use of industrial hygiene terms for this regulation adds to its complexity and will not increase employee protection.

Clothing Adjustment Factors. This provision should be deleted. It adds a degree of complexity that is unnecessary. An employer should assess the clothing worn by employees as part of the employer’s initial assessment of the workplace.

Heat index. Using the heat index should not be mandatory. Employers should not be required to make or keep precise measurements of heat and humidity. Section 3395 considers humidity only as an environmental risk factor; therefore, this approach should be consistent with that under 3395. A general assessment of the heat and the risk should be conducted as part of the initial risk assessment; then the appendix can be consulted. Temperature and humidity vary throughout the course of the day. A general assessment of whether the rule is triggered should be sufficient.

High radiant heat area and Radiant heat. These definitions should be simplified so that the employer can easily determine if the area is one of radiant or high radiant heat, or neither.

Wet bulb globe temperature. Requiring the use of this equipment is unnecessary. Outdoor heat assessment requires dry bulb temperature determination which should also be sufficient for indoor heat determination.

c) Heat Illness Prevention Plan

The Coalition concurs with the Phylmar Regulatory Roundtable-OSH Forum recommendations for this section, which is consistent with requirements for an outdoor heat illness prevention program:

The employer shall assess the workplace for the risk of heat illness to indoor employees, if an indoor workplace is not exempted in the scope and application. If the employer assessment determines there is a risk of heat illness to indoor employees typically, the employer shall (continue with draft language in the opening paragraph).....

- (1) Effective procedures to obtain the active involvement of employees and their representatives in developing and implementing the Plan.
- (2) Effective procedures to identify and assess heat stress hazards.
- (3) Effective procedures to control hazards.
- (4) Rest and hydration procedures.
- (5) First-aid and emergency response procedures.
- (6) Training programs.

Subsections. Subsections (d) through (g) should be included as non-mandatory appendices to assist and guide the employer in developing its procedures.

h) Short term exposure levels

This provision is inconsistent with and more onerous than the outdoor heat illness requirements. It is not reasonable public policy for indoor heat exposure requirements to be more onerous than those for outdoor heat exposure, as they are not proportionate with the risk posed. Section 3395 does not include a STEL, and has been successful in significantly reducing the number and severity of workplace heat stress incidents. Inclusion of a STEL also adds a degree of complexity that will complicate employer compliance without improving employee protection. We recommend that DOSH take a similar approach with indoor work environments.

i) Control measures

Over-reaching and overly complex. The enabling legislation states:

The division shall take into consideration heat stress and heat strain guidelines in the 2016 Threshold Limit Values and Biological Exposure Indices developed by the American Conference of Governmental Hygienists.

The American Conference of Governmental Hygienists (ACGIH) material is very complex and meant as a reference only. As it is complex and meant for specialists, it is not appropriate to insert. The division has taken ACGIH's highly complex guidance document meant for professional industrial hygienists and turned it into regulatory requirements applicable to all businesses, without due consideration of the differences. In fact, the drafted rule requires engineering controls where the guidance document merely recommends them for consideration.

The ACGIH's Policy Statement (<http://www.acgih.org/tlv-bei-guidelines/policies-procedures-presentations/tlv-bei-policy-statement>) is very specific in addressing this issue, as included below.

TLV®/BEI® Policy Statement

Policy Statement on the Uses of TLVs® and BEIs®

The Threshold Limit Values (TLVs®) and Biological Exposure Indices (BEIs®) are developed as guidelines to assist in the control of health hazards. These recommendations or guidelines are intended for use in the practice of industrial hygiene, to be interpreted and applied only by a person trained in this discipline. They are not developed for use as legal standards and ACGIH® does not advocate their use as such. However, it is recognized that in certain circumstances individuals or organizations may wish to make use of these recommendations or guidelines as a supplement to their occupational safety and health program. ACGIH® will not oppose their use in this manner, if the use of TLVs® and BEIs® in these instances will contribute to the overall improvement in worker protection. However, the user must recognize the constraints and limitations subject to their proper use and bear the responsibility for such use.

The Introductions to the [TLV®/BEI® Book](#) and the TLV®/BEI® [Documentation](#) provide the philosophical and practical bases for the uses and limitations of the TLVs® and BEIs®. To extend those uses of the TLVs® and BEIs® to include other applications, such as use without the judgment of an industrial hygienist, application to a different population, development of new exposure/recovery time models, or new effect endpoints, stretches the reliability and even viability of the database for the TLV® or BEI® as evidenced by the individual [Documentation](#).

It is not appropriate for individuals or organizations to impose on the TLVs® or the BEIs® their concepts of what the TLVs® or BEIs® should be or how they should be applied or to transfer regulatory standards requirements to the TLVs® or BEIs®.

Special Note to User

The values listed in this book are intended for use in the practice of industrial hygiene as guidelines or recommendations to assist in the control of potential workplace health hazards and for no other use. These values are not fine lines between safe and dangerous concentrations and should not be used by anyone untrained in the discipline of industrial hygiene. **It is imperative that the user of this book read the Introduction to each section and be familiar with the Documentation of the TLVs® and BEIs® before applying the recommendations contained herein.** ACGIH® disclaims liability with respect to the use of the TLVs® and BEIs®.

It would be unnecessarily burdensome and inappropriate to require employers not trained as industrial hygienists themselves to use these guidelines.

The control measures in the draft proposal are yet another example of needless complexity that will ensure employers will be unable to fully comply with the standard.

Clarity issues. Section (i) should be simplified and referenced as high heat. Radiant or not, high heat should be addressed. Subsections (c)(5) and (i)(1-4) require engineering controls “to the extent feasible” and “as feasible and applicable” where employees perform work in high radiant heat work areas. By the definition in subsection (b), a high radiant heat work area is “a work area with a significant radiant heat source.” Workplaces are full of radiant heat sources such as laser printers, refrigerators, computers, ovens, and human bodies. The line between significant and insignificant is unclear and leaves the rule open to wildly different interpretations. Therefore, this provision should be struck.

Cost impact: Major Regulation. Major Regulations are those that are identified as having an impact on the state’s economy of over \$50 million, and therefore require further economic analysis. The complex requirements and lack of clarity of this proposal hides the potentially most costly and burdensome aspects of it. If just 100,000 businesses had to spend \$500 on engineering controls, that feature alone would push the cost of this rulemaking over the \$50 million mark. Add to that cost those imposed by Subsection (i)(3) which says that the engineering controls shall include, but not be limited to, isolation of hot processes or work areas, shielding of radiant heat sources, insulation hot objects, and local exhaust ventilation. The additional energy consumption required by some engineering controls alone could be a major ongoing cost.

Environmental Impact. The required engineering controls will have adverse environmental impacts, including higher energy consumption, that should be carefully assessed.

High heat. The high heat provisions are like the high heat provisions in the existing outdoor heat rule and should trigger at 95 degrees Fahrenheit as in the Outdoor Heat Illness Prevention rule. The proposed indoor heat rule, however, requires these provisions as temporary measures during the construction of engineering controls. The high heat measures should be used as they are used in the outdoor rule, as the permanent measures to protect against high heat.

Requirements for engineering control should be eliminated from this rule and left to the employer’s assessment of the hazard and determination of their necessity or feasibility, and in the overall approach to employee protection from high heat indoors.

Sections (1) – (4) Control requirements should be moved into a non-mandatory appendix and indicated as recommendations for consideration. Instead of those sections in the rule, we propose the following provision:

(x) Employers with employees performing work in areas where the temperature is above 110 degrees Fahrenheit shall consider the feasibility of engineering and administrative controls to reduce exposure to high heat.

j) Training

This section should be conformed with any revisions to the other provisions. Additionally, the following revision is recommended:

(4) The concept, importance, and employer’s methods of acclimatization.

k) Recordkeeping.

The recordkeeping should be the same as required by the illness and Injury Prevention Program (IIPP). The requirements for recordkeeping in this draft extend unreasonably beyond the IIPP requirements.

Conclusion. The Coalition is very concerned that because of its complexity and overly burdensome approach as written, this draft will not result in increased employee protection. Employers need to be able to understand the requirements to comply. Furthermore, it is unnecessarily burdensome. There is no justification for this regulation to be more stringent than section 3395 for outdoor work environments. To discuss further, please contact Marti Fisher, California Chamber of Commerce, (916) 444-6670.