July 7, 2017

TO: Amalia Neidhardt
Steve Smith
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Subject: Heat Illness Prevention in Indoor Places of Employment
Comments on Discussion Draft #2 Dated May 25, 2017

FROM: California Chamber of Commerce
Agricultural Council of California
American Pistachio Growers
Associated Builders and Contractors - San Diego Chapter
Associated General Contractors of California
California Agricultural Aircraft Association
California Citrus Mutual
California Cotton Ginners and Growers Association
California Attractions and Parks Association
California Building Industry Association
California Construction and Industrial Materials Associations
California Farm Bureau Federation
California Fresh Fruit Association
California Framing Contractors Association
California Hotel & Lodging Association
California League of Food Processors
California Manufacturers & Technology Association
California Metals Coalition
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Solar Energy Industries Association
California Tomato Growers Association
Cerritos Chamber of Commerce
Chemical Industry Council of California
El Centro Chamber of Commerce
Family Business Association of California
Far West Equipment Dealers Association
Food and Beverage Association of San Diego
Lodi Chamber of Commerce
National Elevator Industry, Inc.
National Federation of Independent Business
Nisei Farmers League
Nor Cal Beverage Co., Inc.
Plumbing-Heating-Cooling Contractors Association of California
Residential Contractors Association

Robert Fried, Senior Partner, Atkinson, Andelson, Loya, Rudd & Romo
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Western Agricultural Processors Association
Western Electrical Contractors Association
Western Growers Association
Western Plant Health Association
Western Steel Council
Wine Institute

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 May 25, 2017. The Coalition represents employers large and small across many diverse industries. While we appreciate the revisions incorporated into this new draft, the proposal continues to be too complex and ambiguous, and therefore will lead to a lack of compliance and the inability to enforce.

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 continue to disagree with the proposed approach in this 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 urges the agency to review its own enforcement data and any available information concerning instances of heat illness among indoor workers. While the legislative mandate requires the agency to move forward with this regulation, actual data reflecting how, why and in what kinds of indoor workplaces workers suffer heat illness will provide meaningful context to the agency's proposed regulation, and this data should be shared with the regulated community so employers' experience and expertise can be meaningfully applied to crafting an indoor heat illness regulation that can protect workers without imposing unnecessary and ineffective mandates on covered employers.

In summary, this discussion draft, which despite extensive comments from the employer community is incrementally better from the first draft of February 22, 2017 and still creates a program to prevent heat illness for indoor employees that is unnecessarily burdensome, expensive, overly complex and confusing. Very few small and medium employers 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 these employers. It is also unnecessarily prescriptive, much more so than the outdoor heat illness prevention regulation, section 3395. The following discussion outlines our primary concerns.

<u>Statutory Timing Requirement</u>. We continue to assert that the rulemaking timeline consistent with legislative intent requires the agency to submit a proposed regulation to the California Occupational Safety and Health Standards Board by January 1, 2019. This is readily apparent from the legislative language directing the agency to propose the regulation, Labor Code §6720:

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

A plain-English reading of this language clearly mandates that the agency "propose" a standard to the Standards Board, and does not require adoption of a standard by the Board by January 1, 2019. After the board's receipt of the proposed rule, the process of review and stakeholder interaction with the division should begin. The final regulation should be a rule with which employers can comply, that protects employees and results from a measured, thoughtful process that is not needlessly rushed by a misinterpretation of the agency's statutory mandate.

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 and implement, the benefit of the regulation's intended protection will be difficult to achieve.

Furthermore, regulations that are ambiguous and difficult to implement create a "gotcha" situation for employers, where complex regulatory 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 needs to be so much more complex than the heat illness prevention regulation for outdoor employers.

This proposal for protection from heat illness in indoor workplaces is more complex than that regulating outdoor workplaces. The fact that indoor workplaces can under many circumstances be partially or wholly temperature controlled does not typically pose a greater risk of heat illness than working outdoors. Therefore, a more complex program is unwarranted because indoor many spaces are more easily controlled than outdoor workplaces.

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 that a risk is present, then the employer must develop a program. If the risk was evaluated and determined not to be present, then the employer should not be subject to the requirements of heat illness prevention program for indoor employees, other than a contingency plan in the event of the failure of climate controls.

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 with the current draft would require many employers to purchase expensive monitoring and engineering control equipment and to unnecessarily conduct temperature assessments at needlessly frequent intervals. 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.

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. An alternative approach that is the most cost effective manner to achieve protection for workers is advised and achievable. The complexity of this proposed draft is unnecessary; worker protection can be achieved with less complexity and less cost. A more cost effective approach would also relieve the obligation to conduct the required analysis as a major regulation.

Draft Regulation Proposed by the Coalition. Attached is an effort to draft a regulation that is general enough in nature to be adopted by varied workplaces without being overly burdensome and complex (coalition draft). It is consistent with our oral remarks provided during the two advisory committees, as well as the remarks in our prior comment letter. The remainder of our comments will address the rationale of the provisions that benefit from explanation.

Scope and application of the regulation. The proposed scope of the discussion draft leaves unresolved the question of compliance in an air-conditioned office environment when the air-conditioning is inoperative.

Secondly, many workers regularly go in and out of a building, rotating between indoor and outdoor work. At times, employers may use rotation of indoor and outdoor work as administrative control for prevention of outdoor heat illness. The scope exception does not properly account for the work patterns of real-world workplaces and workers. The proposed language making workers who work more than one hour per day indoors subject to the indoor standard would subject many employers to the outdoor regulation in ways that will frequently be unworkable, for example:

- If the employee works for more than an hour per day indoors but works indoors less than an entire day, then the employee would be subject to both standards.
- Many workplaces have a variety of workers that work indoors and outdoors, and the amount of time indoors and outdoors varies each day. A requirement to track employees' indoor and outdoor work time to determine whether the employer must comply with the indoor or the outdoor standard for each employee will impose yet another severe monitoring and recordkeeping burden on employers.
- Outdoor workers often move indoors to cool off. For the purpose of the outdoor standard, this is considered shade. Would the indoor space where an outdoor worker seeks shade be covered by the indoor standard?

The indoor and outdoor heat illness prevention rules must be harmonized for the many employees that function in both environments. Simple, practical rules of prevention should apply: water, cool down, and training requirements that are compatible and can be complied with for all employees.

Definitions

Cool-down area. In order to harmonize with the outdoor standard, the cool-down area should include any area that allows the body to cool. Otherwise, the confusion between an outdoor cooling area and an indoor cooling area will be unworkable.

Globe Temperature. Limit the complexity of compliance by following the outdoor standard and using one method of measurement – the dry bulb temperature.

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 section 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 at the employer's discretion. Temperature and humidity vary throughout the course of the day. A general assessment of whether the rule is triggered should be sufficient.

Furthermore, the three different levels add unnecessary complexity to not only compliance, but also enforcement. When combined, the requirements of using a dry bulb, a globe temperature and three levels of heat index create an overly burdensome set of measurement and implementation.

High radiant heat work area and Radiant heat. These definitions should be simplified and include clarity so that the employer can easily determine if the area is one of radiant or high radiant heat, or neither. Furthermore, we question the necessity of this term in the standard. A clearer requirement could be established around high heat, whether radiant or not – which is what the coalition recommends.

Indoor. Include examples and clarify grey area environments such as a greenhouse, packing shed or partially constructed building or partially enclosed building.

(c) Heat Illness Prevention Plan

This section of the rule should track more closely with the outdoor heat illness prevention plan. Therefore, subsection (1) should be deleted to harmonize with section 3395. It would be overly complex for employers to develop two plans with two different requirements for development.

(f) First aid and emergency response and Coalition added (g) high heat procedures

The Coalition proposes that this section would be most appropriately broken up into two sections, to be more consistent with the outdoor regulation.

(h) Control Measures

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

Pre-shift meetings. This requirement is most appropriate in the areas or periods of high heat. Daily pre-shift meetings repeating the same message may be of limited value rather than the message being delivered at appropriate intervals, when applicable.

Heat index levels. The use of the various levels for varying requirements is too complex. The levels should be identified at temperature levels– high heat that triggers requirements at 95 degrees with and at 105 and regular heat (85 to 95 degrees) that triggers lower controls. These provisions should be in harmony with the outdoor regulation.

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.

k) Recordkeeping.

(4) Employee use of temperature recording or measuring devices must be approved on a case-by-case basis. The device must not interfere with personal protective equipment and must be accurate and

dependable. It is unadvisable for an employee to rely on a device that delivers inaccurate results or interferes with PPE or work processes.

Conclusion. The Coalition is very concerned that because of its complexity and overly burdensome approach as written, the discussion draft will not result in increased employee protection. Employers need to be able to understand the requirements to comply with the regulation and continue to keep employees safe and healthy. Furthermore, it is unnecessarily burdensome. There is no justification for this regulation to be more stringent than section 3395 for outdoor work environments.

The Coalition has drafted the proposed approach to prevent heat illness in indoor workers. We appreciate the opportunity to provide this input and for your thoughtful and serious consideration. To discuss further, please contact Marti Fisher, California Chamber of Commerce, (916) 444-6670.