April 20, 2023

Sarah Money
Occupational Safety and Health Standards Board
2520 Venture Oaks Way
Suite 350
Sacramento, CA 95833

By email: oshsb@dir.ca.gov

Subject: **Notice of Proposed Rulemaking – Title 8, Division 1, Chapter 4: Construction Safety Orders (Section 1532.1) and General Industry Safety Orders (Sections 5155 and 5198).**

Dear Ms. Money:

The undersigned organizations appreciate the opportunity to comment on Cal-OSHA's proposed amendments to the above noted construction and general industry safety orders intended to further reduce occupational exposures to lead. In anticipation of the public notice for this rulemaking, our organizations submitted comments to Cal-OSHA Standards Board Executive Officer Christina Shupe dated November 14, 2022, identifying concerns with then proposed revisions to the existing orders contained in draft language posted by the Division of Occupational Safety and Health in November 2016.[1] The purpose of this comment letter is to file our November 14, 2022, comments in the record for this rulemaking, and to identify additional issues with the proposed amendments to both orders that would create additional compliance impediments for our industries and members.

Many of the undersigned organizations have also separately filed comments specific to their unique concerns. The comments included herein represent areas of common concern, and the undersigned also refer to any separate comments for the more detailed discussions therein.

Cal-OSHA Should Include a Phase-In Period for More Stringent Standards

Our overriding concern then and now is the lack of a phase-in period for many of the substantive changes to the existing orders.[2] While we appreciate the addition of a phase-in period for the second step down of the medical removal protection level,[3] the balance of the proposed changes would take effect immediately upon filing of the final orders with the Secretary of State. As we stated in our November 14, 2022, letter, this approach does not account for the practical realities of meeting the much more stringent standards in the proposed orders, including but not limited to the availability of laboratory capacity capable of accommodating an exponential increase in blood lead testing, the availability of qualified medical professionals to manage a surge in employee medical monitoring programs and elevated blood lead level response plans, local permitting requirements, access to contractors and materials and the lead time necessary to implement major facility modifications.

We see nothing in the rulemaking record indicating that Cal-OSHA has consulted the third parties responsible for these aspects of compliance or has otherwise accommodated real-world impediments to compliance. We are aware that individual employers could be eligible for temporary or permanent variances depending on their particular circumstances. However, Cal-OSHA's finding that the proposed orders are likely to apply to more than 227,000 employees[4] – a more than 20-fold increase in the number of employees subject to the existing orders – indicates that the agency is likely to be inundated

[1] Draft Section 1532.1, Lead in Construction, revised November 10, 2016: https://www.dir.ca.gov/dosh/doshreg/5198-meetings/draft-section-1532.1-revised-11-10-16.pdf; Draft Section 5198, Lead in General Industry, revised November 11, 2016: https://www.dir.ca.gov/dosh/doshreg/5198-meetings/draft-section-5198-revised-11-11-16.pdf.

[2] One notable exception in the proposed language for the General Industry Safety Orders is the Secondary Engineering Control Airborne Limits (SECALs) for certain operations at lead battery manufacturing facilities.

[3] As of the effective date of the revised orders, the blood lead level trigger for temporary employee removal would be at or above 30 µg/dl, dropping to an average of 20 µg/dl within one year of the effective date.

[4] Berkeley Economic Advising and Research, LLC, Standardized Regulatory Impact Assessment: Revisions to Occupational Lead Standards, February 2019, revised August 2020, Table 11: Number of Employees by Estimated Blood Lead Level, page 34.

with variance requests from thousands of employers and will be unable to process them in time to avoid enforcement actions for circumstances employers cannot control. Consequently, Cal-OSHA's failure to incorporate compliance schedule provisions is likely to result in immediate and widespread non-compliance with the revised orders.

We recommend that Cal-OSHA amend the proposed orders to incorporate the compliance schedule recommendations in our November 14, 2022, letter.

Cal-OSHA Has Not Demonstrated Adequate Laboratory Capacity for Blood Lead Testing

The proposed changes would subject more than 200,000 employees to blood lead testing "prior to assignment" to any tasks that trigger medical surveillance, or as soon as possible after the effective date of the revised orders, and at least once every two months for the first six months of their employment in those tasks.[5] These pre-work testing provisions equate to 4 blood lead tests for every employee in a newly regulated job within the first six months of implementation, meaning the proposed changes would create a surge of more than 800,000 blood lead tests within this six month timeframe. It is unclear whether Cal-OSHA has evaluated the impact of this expected surge on blood sample collection and laboratory processing capacity. However, absent evidence that suppliers and service providers are taking immediate steps to expand existing capacity, and that those steps will be sufficient to meet the expected surge in demand, a more gradual phase-in will be necessary for regulated industries to comply with the new blood lead testing requirements.

The Term "Presumed Hazardous Lead Work" Should be Removed

The 2016 draft language for the General Industry Safety Orders included a narrative action level tied to various work tasks that in the agency's judgment warrant medical monitoring. The phrase used in the 2016 drafts, "trigger amount of lead work," was extensively discussed with Cal-OSHA's Occupational Lead Exposure Advisory Committee. While many industries still have specific concerns with the identified tasks and required measures, as discussed in separate comments, our general concern is that Cal-OSHA is now proposing to change the title of the section to "Presumed Hazardous Lead Work" (PHLW). This new narrative standard also triggers pre-emptive exposure mitigation requirements, including the use of respirators, ahead of any actual assessment of whether such action is warranted. We see nothing in the rulemaking record establishing that the work tasks described in this section are actually hazardous to the health of employees performing those tasks. To the contrary, the General Industry Safety Order provides mechanisms for employers to demonstrate that any PHLW in question is sufficiently non-hazardous that medical monitoring and related requirements are unnecessary.[6] The proposed PHLW terminology undermines the clarity of the proposed orders and would leave employers at the mercy of inspectors as to whether they are in compliance with the regulation. It also potentially exposes employers to litigation by third parties seeking to exploit the subjectivity of the PHLW language.

[5] §1532.1(2)(A)(1); §5198(j)(2)(A)(1) and (2)
[6] §5198 (d)

We recommend that Cal-OSHA replace the PHLW terminology with the "trigger amount of lead work" terminology from the 2016 draft language.

Medical Removal Benefits Should Be Limited to Occupational Exposures

According to the US Centers for Disease Control and Prevention, elevated blood lead levels can result from a wide range of exposures, including both occupational and non-occupational sources. Non-occupational sources may include living in or renovating older housing (lead paint), ingestion or inhalation of contaminated soil or dust, drinking water from lead service lines, and recreational hobbies such as range shooting, casting, soldering or glazing.[7] These and other exposures can lead to blood lead levels that exceed Cal-OSHA's proposed medical removal levels, yet there are no provisions in the proposed orders that differentiate the employer's obligation to provide medical removal benefits based on the source of exposure. Rather, a strict interpretation would require employers to provide up to 18 months of medical removal benefits – including full wages and preservation of employee job status - to any employee whose blood lead level exceeds the proposed medical removal levels ***regardless*** of whether the elevated blood lead level is due to workplace or non-occupational exposures. This interpretation would place an unjustified and untenable burden on both the employer and the employees who would be assigned to cover additional shifts and job responsibilities. Such outcomes are also more likely to occur at the lower medical removal levels in the proposed regulations.

We recommend that Cal-OSHA include additional language clarifying that medical removal benefits are required when: 1) workplace exposures are determined to exceed relevant action levels and 2) a medical examination by a qualified physician concludes that those exposures are the primary cause of the employees' elevated blood lead level.

The Proposed Orders Conflict with Cal-OSHA's Heat Illness Prevention Regulations

The drastically lower airborne lead exposure limits in the proposed amendments would unintentionally create more hazardous conditions for employees working in enclosed and confined spaces. Where the proposed limits are not possible to achieve, employees would need to wear Tyvek suits and respirators and would be at much greater risk of heat illness, especially during hot summer months. This type of work has been performed for years under the previous regulation, with very little evidence of worker blood lead levels exceeding Cal-OSHA's stated goal of 5 ug/dL or below. Historically, this success has been achieved through hygiene measures, not through lower airborne exposure levels. The minimal gains in employee health protection that can be expected from the proposed five-fold reduction in the airborne lead permissible exposure level are not justified when weighed against the greater potential for employee harm from increased heat exposure.

The 2016 draft also included an important exception to the prohibition on consumption of beverages in lead exposed work areas - allowing employers to supply drinking water provided it is "consumed in a manner which does not allow exposure to lead." This exception is especially critical for employees working in unavoidably high heat environments such as confined or unconditioned spaces, or near high

[7] Sources of Lead Exposure: https://www.cdc.gov/nceh/lead/prevention/sources.htm.

temperature equipment and industrial processes. In these cases, quick access to drinking water is the single most important factor in preventing heat illness-related injuries. Cal-OSHA's own regulations for outdoor heat illness prevention require access to drinking water "located as close as practicable to the areas where employees are working" and in sufficient quantities to provide one quart per employee per hour.[8]

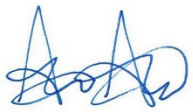
Cal-OSHA's decision to remove this critical exception in the proposed orders places employees at greater risk of heat illness-related injuries. It also conflicts with requirements for employer provision of drinking water in Cal-OSHA's existing outdoor heat illness prevention order, as well as the newly proposed indoor heat illness prevention order.[9]

Hydration stations can be designed in a manner that prevents exposure to lead that might otherwise result from incidental hand to mouth contact or use of a contaminated container. For example, hydration stations can be located in a sheltered or specially ventilated area and use hands-free fountains or single-use cups. In addition, employees should be trained on proper use of hydration stations.

We recommend that Cal-OSHA reinstate the language from the 2016 draft allowing properly designed hydration stations in high-heat work environments.

Thank you for considering our comments. We look forward to reviewing amendments in a proposed 15-day notice and public comment period addressing these important issues.

Sincerely,



Andrea Abergel, Manager of Water Policy
California Municipal Utilities Association

Kerry Stackpole, FASAE CAE, CEO & Executive Director
Plumbing Manufacturers International

[8] Health and Safety Code §3395(c).
[9] General Industry Safety Orders, New Section 3396, Heat Illness Prevention In Indoor Places Of Employment, noticed on March 31, 2023.

Doug Kurkul, CEO
American Foundry Society

Mark DeLaquil
Association of Battery Recyclers

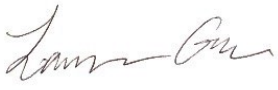
Bryan Leiker, Executive Director
Metal Finishing Association of California

Jack Monger, CEO
Industrial Environmental Association

James Simonelli, Executive Director
California Metals Coalition

Christopher E. Ochoa, Esq., Senior Counsel – Codes, Regulatory and Legislative Affairs
California Building Industry Association

Roger Miksad, Executive Vice President and General Counsel
Battery Council International



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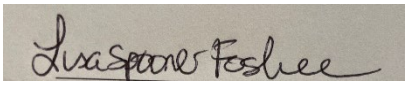

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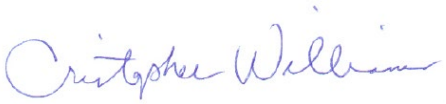

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Enclosure

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Christina Shupe, Executive Officer, Cal-OSHA Standards Board
Steve Smith, Cal-OSHA Standards Board
Susan Eckhardt, Division of Occupational Safety and Health