

May 21, 2020

SENT VIA EMAIL to:

Chair David Thomas and Members
State of California
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RE: Proposed Permanent Regulations on Protection from Wildfire Smoke

The undersigned organizations (“Coalition”) appreciate the opportunity to provide input and recommendations regarding the adoption of the Proposed Permanent Regulation Section 5141.1 regarding Protection from Wildfire Smoke (“proposed regulation”; “proposed rule”) as being heard on May 21, 2020. Our concerns highlighted herein are consistent with our previous comment letters; however, in light of the current COVID-19 crisis, these issues have been greatly exacerbated, making the feasibility of the requirements of the Proposed Regulation are even more dubious.

The Coalition herein represents the many segments of the tourism industry which is consistently considered one of the top five industries in California’s vibrant economy. The diversity of attractions throughout the state – from state parks to theme parks, bustling cities to lush vineyards, professional sports teams to world-class concert events, ocean surf to snowy caps – draws millions of visitors each year. In 2018 alone, traveler spending in California reached \$140 billion, travel-related tax revenue hit \$11.8 billion, and direct travel-generated employment was nearly 1.2 million employees. Tourism is a top contributor to California’s place as fifth-largest economy in the world and we must appreciate our reliance on our visitors and the dollars they spend here, which are heavily reliant on maintaining a welcoming and pleasant visual appearance to our visitors. More broadly, industries such as parks and attractions, retail, restaurants, hotels, and live entertainment represent economic sectors encompassing millions of working Californians with combined labor income into the hundreds of billions. All of these industries stand to be impacted significantly by the proposed rules, whether in indoor or outdoor settings. Furthermore, given the current impact of COVID-19 on our industries, the proposed rules serve as yet another challenge to reopening and recovering.

Collectively, our Coalition takes the safety and health of our employees seriously. We follow Cal/OSHA’s safety guidelines and have excellent compliance records. However, the regulations place an undue burden on Coalition constituents (particularly related to N95 supplies), are unclear, and riddled with uncertainty.

Grave and Immediate Concern Regarding Supply of Respirators

The shortage of N95 respirators due to the current pandemic is well documented and pervasive. The supply of these respirators has created a “Wild Wild West” situation for businesses, the healthcare system, state and local governments, the education system, etc. With every entity competing for limited supplies, we are gravely concerned that we will be able to obtain the level of respirators that would be required to have on hand as pursuant to the proposed rule. Additionally, in response to the Governor’s call, many of our businesses donated respirators to front-line workers throughout the state. We applaud this contribution while at the same time acknowledging that it has created even more challenges for businesses to comply with the proposed regulations.

One-hour Threshold

As drafted, these regulations essentially identify any worker who spends a cumulative one hour outdoors during a shift as an outdoor worker. This threshold is so low that many workers who spend the majority of the workday indoors would also be included in these requirements. In many of our businesses, we engage in rotating staff. In so doing, if an employee were to spend 10 minutes outdoors 6 times in a shift, for example, that employee would no longer be exempted under (a)(2)(D). Due to the expansive physical nature of the places of employment of Coalition constituents, walking from one part of a property to the other, in itself may take over 10 minutes.

We have urged Cal/OSHA to consider alternatives to this one-hour threshold for identifying which employees this regulation applies to and we still encourage the staff to take these concerns into consideration.

Confusion and Uncertainty Regarding Rule Application

In addition to the overreach of the regulations, they lack clarity and certainty. Given the ambiguity of the proposal, businesses have a difficult time knowing exactly when the regulations apply, when they cease to apply, and which employees are affected.

Using AQI Levels as Determinant is Flawed

The regulations are triggered by AQI levels for PM2.5 and an employer's reasonable anticipation that employees will be exposed to wildfire smoke. However, AQI levels fluctuate throughout the day and monitoring stations are not always near the worksite. There is no requirement that the AQI for PM2.5 be above 150 for a sustained period before the regulation is triggered and there is no indicator for when the regulations are no longer applicable. AQI is calculated based on assumptions of 24-hour exposure and it was not designed to measure exposure over one hour; its utility is not comparable to the Permissible Exposure Limit (PEL) calculations that Cal/OSHA typically employs. The regulations seemingly apply immediately once the AQI hits the thresholds identified even though the AQI admittedly is, again, based on 24-hour exposure assumptions.

In addition, it is not within Cal/OSHA's jurisdiction to control environmental pollution exposures. As expressed above, the AQI is an environmental and not occupational limit with the AQI thresholds including consideration of health effects on the elderly and children, and are not specific to a California employee. Note that the AQI levels for PM2.5 can be exceeded even when there is no wildfire. If there is a wildfire, how does an employer know how much of the wildfire smoke contributed to the exceedance of the AQI versus regular environmental pollution?

We are also concerned about the location and availability of approved monitoring sites. We have already seen that when the AQI data is collected at the nearest monitoring site, the exposure threat can vary widely between the monitoring site and the worksite depending on distance, topography, and microclimate in the region. Furthermore, the regulations do not allow the use of other non-governmental monitoring sites which may produce AQI readings more consistent with those at the worksite.

Employer Uncertainty

The regulations are also based on an employer's ability to reasonably anticipate that employees will be exposed to wildfire smoke. This basis is extremely subjective as employers have no guidance as to what is reasonable and what is not, and how an employer is to anticipate the future presence of wildfire smoke. There is no correlation to the present exposure to wildfire smoke nor an objective wildfire advisory. Additionally, the regulations contain no provisions regarding when the requirements cease to apply. For example, if the conditions were met for the rule to apply but then the AQI dips below the 151 threshold, is the employer then allowed to stop utilizing the controls put in place?

The confusing provisions in the draft regulations will make it impossible for an employer to confidently comply. We urged Cal/OSHA to keep this in mind and work on revisions to tie the trigger to more objective standards instead of “reasonable anticipation,” and make it immensely clear precisely when the regulations are triggered and similarly when the regulations cease to apply. We also asked Cal/OSHA to require that the AQI levels for PM2.5 be at a heightened level for a sustained period before these regulations apply instead of instantaneously as the current draft regulations suggest. We therefore strongly encourage staff to continue to take these concerns under advisement while considering the permanent adoption of these flawed regulations.

Alternative Compliance Measures

As mentioned, the tourism industry is replete with businesses who place utmost value on the health and safety of their employees. Many of these businesses have environmental health and safety officers and frequently Emergency Medical Technicians (EMTs) on hand who can evaluate employees during a wildfire. In addition to the above recommendations, we request that Cal/OSHA staff work with the Coalition to develop alternative compliance measures that would factor in the unique nature of those businesses involved in the tourism industry including all sectors of the hospitality and entertainment industries – food and drink service, event planning, theme parks, zoos, aquariums, sports and music events, retail, lodging, resorts, hotels, and traveling – with a special focus on those employees who interact directly with guests. The hospitality and entertainment industry is highly dependent on the outward visual appearance of their places of business and employees, to create a warm and inviting environment for tourists that would be severely undermined by the employee use of a respirator. Even more disconcerting is the impact respirators would have on our employees’ ability to communicate with our guests and visitors, in particular with regard to safety instructions. For these reasons, we asked Cal/OSHA staff to consider alternative compliance measures for the hospitality and entertainment industries that may include adjustments to the one-hour outdoor threshold for certain employees, limiting physical activity while outdoors, and encouraging preventative rest breaks. We would still encourage consideration of these alternative compliance mechanisms.

We greatly appreciate your attention to these concerns as you consider these proposed permanent regulations.

Sincerely,



Erin Guerrero
California Attractions and Parks Association

California Association of Boutique & Breakfast Inns
California Authority of Racing Fairs
California Fairs Alliance
California Hotel & Lodging Association
California Lodging Industry Association
California Restaurant Association
California Retailers Association

California Travel Association
Enterprise Rent-A-Car
Hotel Association of Los Angeles
Long Beach Hospitality Alliance
Ski California
Western Fairs Association

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