APRIL 27, 2020 | LEGISLATIVE & STANDARDS BOARD UPDATES

Cal/OSHA's Proposed Permanent Wildfire Smoke Rule – Coalition to Comment

By Andrew J. Sommer and Eric J. Conn

Last summer, at the urging of various interest groups, the Cal/OSH Standards Board adopted an emergency regulation regarding hazards associated with wildfire smoke. The regulation took effect on a temporary emergency basis on July 29, 2019.



Recently, the Board published a request for written comments and notice of a public hearing on its proposal to revise the emergency standard and make it permanent. The Board explained:

Current regulations are not sufficiently specific as to what employers are required to do during wildfire events. This results in confusion on behalf of both employers and employees, leaving many employees unprotected.... As wildfire seasons worsen, the proposed regulation will avoid a potential increase in debilitating and sometimes life-threatening illnesses faced by workers exposed to wildfire smoke.

The deadline for written comments is May 21, 2020, and the public hearing will be held in Rancho Cordova, CA that same day.

The Emergency Standard

The emergency standard (which is still in effect) requires California employers to take steps to protect employees who may be exposed to wildfire smoke. Importantly, the regulation covers "workplaces" rather than employers of a particular size or scope of service. It applies in workplaces where:

- The current Air Quality Index (AQI) for PM2.5 is 151 or greater, regardless of the AQI for other pollutants, and
- The employer should reasonably anticipate that employees may be exposed to wildfire smoke.

The regulation specifically exempts the following workplaces and operations:

- Enclosed and mechanically ventilated buildings and structures, as long as any windows, doors, bays and other openings are kept closed;
- Enclosed vehicles, when the air is filtered by a cabin air filter and windows, doors, and other openings are kept closed;
- Where the employer demonstrates that the concentration of PM2.5 in the air at the workplace does not correspond to an AQI of 151 or greater;
- Employees exposed to a current AQI for PM2.5 of 151 or greater for a total of one hour or less during a shift; and
- Firefighters engaged in wildland firefighting.

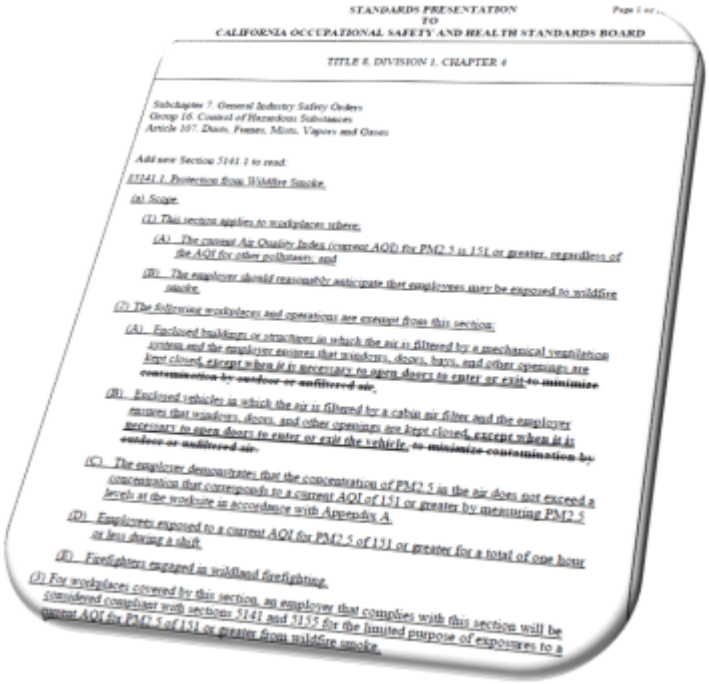
Under the emergency regulation, employers must determine employee exposure to PM2.5 for covered worksites before each shift and periodically thereafter, as needed to protect the health of employees. This is done by obtaining the current AQI for PM2.5 by checking with specified government agencies or websites, or by measuring the PM2.5 levels at the worksite.

Finally, employers with a covered workplace are required to take the following steps to protect employees who may be exposed to wildfire smoke:

- Establish a system for communicating with employees about wildlife smoke hazards and provide employees with effective training and instruction on the regulation, the health effects of wildfire smoke, and the safe use and maintenance of respirators;
- Reduce harmful exposures to wildfire smoke if feasible, for example, by providing enclosed buildings, structures or vehicles with filtered air, or by relocating work to a location where the AQI for PM2.5 is less than 151; and
- Employers that cannot reduce workers' harmful exposure to wildfire smoke so that the AQI for PM2.5 is less than 151 must provide respirators such as N95 masks to all employees for voluntary use.

Proposed Amended Permanent Standard

Even at the emergency stage last summer and fall, many employers raised issues and objections to the emergency rule, including the cost of training and of the PPE, including N95 masks. This has become even more of an issue due to the ongoing COVID-19 pandemic, which has caused significant shortages of supply of many types of PPE – N95 masks in particular.



STANDARDS PRESENTATION
TO
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

TITLE 8, DIVISION 1, CHAPTER 4

Subchapter 7. General Industry Safety Orders
Group 16. Control of Hazardous Substances
Article 107. Dusts, Fumes, Mists, Vapors and Gases

Add new Section 5141.1 to read:

§5141.1. Protection from Wildfire Smoke.

(a) Scope.

(1) This section applies to workplaces where:

(A) The criteria Air Quality Index (current AQI) for PM2.5 is 151 or greater, regardless of the AQI for other pollutants; and

(B) The employer should reasonably anticipate that employees may be exposed to wildfire smoke.

(2) The following workplaces and operations are exempt from this section:

(A) Enclosed buildings or structures in which the air is filtered by a mechanical ventilation system and the employer ensures that windows, doors, bays, and other openings are kept closed, except when it is necessary to open doors to enter or exit to minimize contamination by outdoor or unfiltered air.

(B) Enclosed vehicles in which the air is filtered by a cabin air filter and the employer ensures that windows, doors, and other openings are kept closed, except when it is necessary to open doors to enter or exit the vehicle, to minimize contamination by outdoor or unfiltered air.

(C) The employer demonstrates that the concentration of PM2.5 in the air does not exceed a concentration that corresponds to a current AQI of 151 or greater by measuring PM2.5 levels at the worksite in accordance with Appendix A.

(D) Employees exposed to a current AQI for PM2.5 of 151 or greater for a total of one hour or less during a shift.

(E) Firefighters engaged in wildland firefighting.

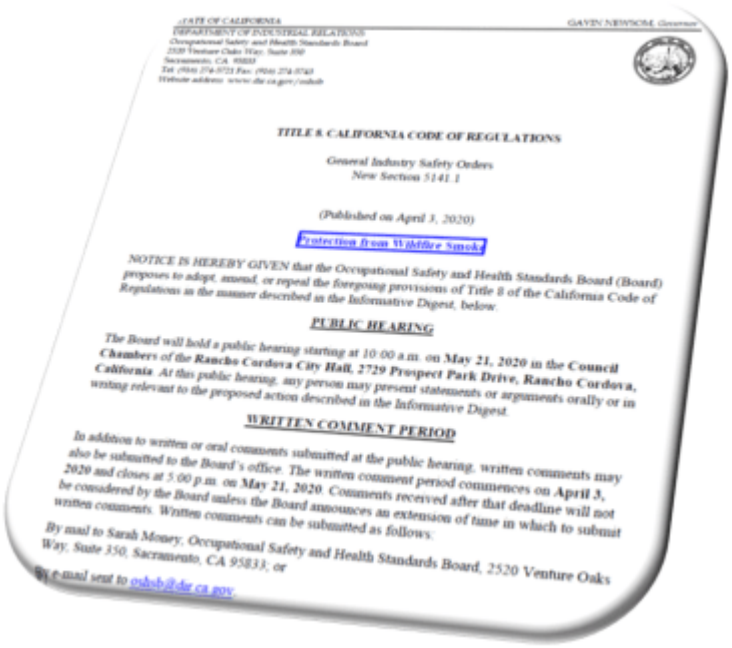
(3) For workplaces covered by this section, an employer that complies with this section will be considered compliant with sections 5141 and 5155 for the limited purpose of exposures to a current AQI for PM2.5 of 151 or greater from wildfire smoke.

The Board has now proposed to make permanent the emergency standard with a few meaningful revisions. The most prominent revision is the addition of an emergency exception from the requirement to identify harmful exposures, for employers who assume an AQI for PM 2.5 of 151 or greater, and who provide a sufficient number of respirators to employees. But despite ongoing worldwide PPE shortages, Cal/OSHA's proposed permanent wildfire smoke standard provides no relief to the requirement for employers to maintain a supply of NIOSH-approved N95 respirator masks to comply with the rule, even as the California wildfire season comes into view during the height of the pandemic.

Wildfire Smoke Rule Employer Coalition

To ensure Industry's concerns are presented and heard, Conn Maciel Carey's national Workplace Safety Practice is coordinating an *ad hoc* coalition of employers to prepare a set of comments to submit to the Standards Board. Several of our national clients with operations in California have urged us to assemble a group of other impacted organizations to support the preparation of comprehensive comments to address the Board's proposed

permanent rule, and to raise to the Board our concerns with the vague and unclear standards and the impact the rule might have on California employers, particularly during the ongoing COVID-19 pandemic.



STATE OF CALIFORNIA — GAVIN NEWSOM, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833
Tel: (916) 274-5721 Fax: (916) 274-5743
Website address: www.dir.ca.gov/oshsb

TITLE 8, CALIFORNIA CODE OF REGULATIONS

General Industry Safety Orders
New Section 5141.1

(Published on April 3, 2020)

Protection from Wildfire Smoke

NOTICE IS HEREBY GIVEN that the Occupational Safety and Health Standards Board (Board) proposes to adopt, amend, or repeal the foregoing provisions of Title 8 of the California Code of Regulations in the manner described in the Informative Digest, below.

PUBLIC HEARING

The Board will hold a public hearing starting at 10:00 a.m. on May 21, 2020 in the Council Chambers of the Rancho Cordova City Hall, 2729 Prospect Park Drive, Rancho Cordova, California. At this public hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest.

WRITTEN COMMENT PERIOD

In addition to written or oral comments submitted at the public hearing, written comments may also be submitted to the Board's office. The written comment period commences on April 3, 2020 and closes at 5:00 p.m. on May 21, 2020. Comments received after that deadline will not be considered by the Board unless the Board announces an extension of time in which to submit written comments. Written comments can be submitted as follows:

By mail to Sarah Money, Occupational Safety and Health Standards Board, 2520 Venture Oaks Way, Suite 350, Sacramento, CA 95833; or

By e-mail sent to oshsb@dir.ca.gov.

In light of the May 21st comment deadline, if you are interested in joining the coalition, please promptly contact Eric J. Conn (the Chair of Conn Maciel Carey's national Workplace Safety Practice) or Andrew J. Sommer (the Head of our Cal/OSHA Practice).