March 23, 2022

TO: Members, Assembly Labor and Employment Committee

SUBJECT: AB 2243 (E. GARCIA) OCCUPATIONAL SAFETY AND HEALTH STANDARDS: HEAT ILLNESS: WILDFIRE SMOKE
OPPOSE- AS AMENDED MARCH 21, 2022
SCHEDULED FOR HEARING MARCH 30, 2022

The California Chamber of Commerce and the listed organization are **OPPOSED** to **AB 2243 (E. Garcia)** as amended on March 21, 2022, because it ignores the months of research and discussion by redrafting two important regulations without expert involvement or analysis – and will push Cal/OSHA to consider three new regulations in areas that are *already covered by existing regulations*.

Background: California's Expert-Driven Rulemaking Process

Workplace safety regulations in California are drafted, approved, and enforced by the California Occupational Safety and Health Agency, also known as "Cal/OSHA". In drafting regulations (also known as the "rulemaking process"), Cal/OSHA's occupational safety and health experts will spend months drafting an initial draft standard,[1] then engage in months or years of discussions with stakeholders. Through this lengthy process, multiple iterations of drafts will be prepared by Cal/OSHA staff and exhaustive public comments will be provided by stakeholders to fine-tune the regulation.

[1] "Standard" is used by agencies in the rulemaking process, but, for all intents and purposes, is synonymous with "regulation."

Then, if the proposed regulation has significant cost implications for the regulated community, the regulation must be separately analyzed for its economic implications in a process known as the "Standardized Regulatory Impact Assessment" or "SRIA". The SRIA analysis is then reviewed by the Department of Finance for its accuracy. Only then – after months or years of expert analysis and stakeholder engagement and thorough analysis – is a regulation voted upon by Cal/OSHA to go into effect as a regulation.

AB 2243 is an End-run Around the Expertise of Cal/OSHA on Two Recent Regulations and Also Includes Three New Proposed Regulations

AB 2243 ignores this thorough regulatory process, and instead compels Cal/OSHA to adopt specific provisions for two regulations[2] where Cal/OSHA's experts had considered and *specifically declined to adopt these provisions when the regulations were being prepared.*

1) **AB 2243's Re-write of the Wildfire Smoke Regulation Will Not Improve Safety but Will Shut Down Businesses**

To understand the changes that **AB 2243** is forcing, some context is necessary. The Wildfire Smoke Standard presently operates on a three-tier system, based on the air quality in the area (or "AQI" [3]), and applies to any workers who are outside for more than an hour of their shift.

Generally speaking, the Wildfire Smoke Standard uses the following tiers of precautions:

- **At all times**, the employer must monitor the air quality at worksites, offer training to workers, and have a stockpile of N95 respirators on hand for workers in case the air becomes smokey.
- **If the AQI rises to 151,**[4] then employers must make N95 respirators available to all employees. The employee is not compelled to wear the mask, however, if they do not want to. (8 CCR 5141.1(f)(3)(A)).
- **If the AQI rises to 500 or above,** and smoke causes the AQI to rise above 500, then employers must force employees to wear N95s; must provide individual medical assessment for safe respirator usage; and must compel employees to shave their faces[5] and fit test for a tight respirator seal. (8 CCR 5141.1(f)(3)(B)).

In other words – when drafting the Wildfire Smoke Standard, Cal/OSHA intentionally set the Tier 2 threshold relatively low (at an AQI of 150) to ensure workers had access to N95's if they wanted them – but left the threshold for *mandatory N95 usage* high (at 500). This balance ensured that workers have access to N95's, but avoids infeasible and disruptive requirements such as compelled N95 usage, mandatory shaving, and mandatory fit-testing/medical evaluation for each employee.

AB 2243 would force Cal/OSHA to lower the threshold for maximum precautions from an AQI of 500 to an AQI of 200. This is a massive change. In fact, putting mandatory N95 usage at a threshold of 200 *is a lower threshold than Cal/OSHA ever proposed during the regulatory process.*[6]

In effect, this change would mean that even counties distant from a wildfire would be forced into the highest level of precautions under the Wildfire Smoke Standard – including forcing employees to wear N95's, forcing any outside workers to shave, and quickly hiring medical personnel to fit-test/evaluate their workers should a distant fire occur. For example, downtown Sacramento workplaces would have qualified for maximum precautions under this standard on multiple occasions in 2018 and 2019 – despite being far from

[2] The two regulations at issue are: (1) the Heat Illness Prevention in Outdoor Places of Employment standard (the "Outdoor Heat Standard", 8 CCR §3395) and (2) the Protection from Wildfire Smoke standard ("Wildfire Smoke Standard", 8 CCR §5141.1).

[3] "AQI" refers to the "Air Quality Index", a rating system for air quality, running from 1 to above 500. Fires generate a pollutant called "PM2.5", which is short for Particulate Matter with a diameter of 2.5 micrometers or smaller. In other words – an AQI for PM2.5 is a measure of how much smoke is in the air. For purposes of this letter, all references to "AQI" are references to AQI for PM2.5.

[4] An AQI of 150 is deemed "unhealthy," but not "hazardous."

[5] Notably, employers expressed personal and potential religious-discrimination concerns with forcing employees to shave in discussions with Cal/OSHA staff throughout 2019 and 2020.

[6] The lowest proposal from Cal/OSHA was for a Tier 3 threshold of 300, included in a draft in 2019.

major wildfires. Every worker who was outdoors for more than an hour would need to *either* be sent home, or be forced to shave, be fit-tested, be medically evaluated (for mask fit) and compelled to wear an N-95. To reiterate: this would effectively require shaving and mandatory N95 usage from everyone from school yard duty attendants to delivery drivers to policemen to waiters (with some outdoor tables) to construction workers.

This is simply not a good policy decision. First, the cost and burden of mandatory fit-testing and medical evaluations (as well as the legal issues with compelling employees to shave) would result in most businesses just shutting down if the AQI ever rose above 200 – which is not uncommon even when far from fires. Second, this will increase N95 consumption by those who are not most at risk.

Cal/OSHA set the AQI's under the Wildfire Smoke Standard for a good reason: to ensure N-95 respirators were available at a low threshold if the employee wanted them, but saved the truly heavy precautions (forced shaving, fit-testing, and compelled masking) for the areas where the air quality truly necessitated it. **AB 2243** would not improve upon this safe system but would create considerable new costs for employers (hiring medical professionals for repeated fit-testing and medical evaluation) and doubtless upset many workers who would prefer not to shave their faces because of a distant wildfire.

2) AB 2243's Changes to the Heat Illness Standard Are Duplicative

AB 2243's compelled changes to Cal/OSHA's Heat Illness Standard similarly do not improve safety but will be in conflict with existing requirements.

Cal/OSHA's Heat Illness Standard (8 CCR § 3395) applies to "all outdoor places of employment" and provides specific measures to ensure workers are safe as temperatures rise. These present measures include:

- Fresh, cool drinking water (§3395(c))
- Access to shade when temperatures exceed 80 degrees Fahrenheit (§3395(d))
- Special "high heat" procedures when temperatures exceed 95 degrees Fahrenheit, including: (§3395(e))
    - Ensuring employees have easy contact to a supervisor in case of emergency
    - Pre-shift meetings to review high-heat procedures with workers
    - Increased observation procedures, such as at least one supervisor or observer per 20 employees to observe them for any heat illness
    - Ongoing reminders to employees to drink water throughout the shift
    - Additional specialized requirements for agricultural employers, including a required 10-minute break every two hours
- Specified emergency response procedures (§3395(f))

AB 2243 would compel Cal/OSHA to create another "ultrahigh heat" tier for when places of employment exceed 105 Fahrenheit, with vaguely defined additional measures, including "cool water" (already provided under the present regulation), "increased employer monitoring" (already provided under the present regulation), "additional mandatory work breaks every hour" (already provided at least every 2 hours in agriculture), and "shade structures that include cooling features such as misters" (shade structures already required).

Though these changes are vaguely-defined, they appear to be very similar to the existing regulatory text – which means that: (A) They are not necessary and would create confusion; and (B) they would be perfectly appropriate to *raise via the normal regulatory process* with Cal/OSHA. Instead, it appears that the proponents of **AB 2243** would like to skip Cal/OSHA's detailed analysis and expert discussion with an end-run of legislation.

3) AB 2243 Also Improperly Compels Cal/OSHA to Consider Three Additional Regulations – Each of Which is Already Addressed Elsewhere in Law or Regulation.

In addition, **AB 2243** then contains a list of new topics for entirely new regulations which Cal/OSHA must consider – but each of these topics is *already covered by an existing law or regulation.* The topics of new regulations listed in **AB 2243** are:

- *"Additional protections related to acclimatization to higher temperatures"* – Acclimatization to high heat is already included in the present Heat Illness Standard, and employees are already required to receive training on it. (§3395(g) & (§3395(h)(1)(D)).
- *"Training programs …in administering first aid related to extreme heat-related illness"* – Training on first aid for heat illness is also already included in the Heat Illness Standard.[7] (§3395(h)(1)(E)).
- "Additional protections for piece-rate worker" – Piece rate work is already regulated by the Labor Commissioner, making the purpose of a conflicting or duplicative regulation questionable at best.

In other words – in the most likely scenario, considering these new regulatory processes will not improve safety and will certainly waste Cal/OSHA's time. In the worst-case scenario – if Cal/OSHA drafts a duplicative regulation on these already covered topics – they will lead to confusion and conflicting obligations for California's workplaces.

Also, it bears noting that there is already a process to propose new regulations at Cal/OSHA (the "Petition Process") which is relatively easy to do. In the words of Cal/OSHA's website[8]:

> There is no specific form or format required to petition the Board for the adoption, amendment, or repeal of an occupational safety and health standard. Such proposals may be made orally or in writing at the Board's Public Meeting or may be submitted in writing to the Board at any time.

Conclusion

AB 2243 is an end-run around Cal/OSHA's regulatory process that attempts to re-write two of Cal/OSHA's most recent regulations in ways which will not improve safety and Cal/OSHA specifically chose to reject in its drafting of these regulations. In addition, **AB 2243**'s push to consider new standards is similarly wasteful – and, if the proponents wish to push those topics, they should be handled via the normal petition process at Cal/OSHA.

For these reasons, we are **OPPOSED** to **AB 2243 (E. Garcia)**.

Sincerely,

Robert Moutrie
Policy Advocate
California Chamber of Commerce
on behalf of

Agricultural Council of California
American Composites Manufacturers Association
American Pistachio Growers
Associated General Contractors
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors, National Association
California Association of Winegrape Growers
California Builders Alliance
California Building Industry Association

---

[7] Specifically, the Heat Illness Standard already requires training be provided on "(E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life-threatening illness." (§3395(h)(1)(E)).

[8] Full discussion of the Petition Process at: https://www.dir.ca.gov/oshsb/petitions.html#:~:text=There%20is%20no%20specific%20form,the%20Board%20at%20any%20time.

California Chamber of Commerce
California Cotton Ginners and Growers Association
California Framing Contractors Association
California Grocers Association
California League of Food Producers
California Manufacturers & Technology Association
California New Car Dealers Association
California Railroads
California Restaurant Association
California State Association of Counties
California Strawberry Commission
Construction Employers' Association
Hollywood Chamber of Commerce
Housing Contractors of California
National Elevator Industry, Inc.
National Federation of Independent Business
Nisei Farmers League
PCI West – Chapter of the Precast/Prestressed Concrete Institute
Residential Contractors Association
Sacramento Regional Builders Exchange
Western Agricultural Processors Association
Western Growers Association
Western Steel Council
Wine Institute

cc: Legislative Affairs, Office of the Governor
Mark Rossow, Office of Assemblymember E. Garcia
Consultant, Assembly Labor and Employment Committee
Lauren Prichard, Consultant, Assembly Republican Caucus