Employer Requirements Under California’s Emergency Wildfire Smoke Regulation

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After several months of development, the California Occupational Safety and Health Standards Board’s emergency regulation to protect outdoor workers from the harmful effects of wildfire smoke went into effect on July 29, 2019.

The process began in response to a petition the California Division of Occupational Safety and Health (Cal/OSHA) received on December 13, 2018, filed jointly by the California Labor Federation, Worksafe and the California Rural Legal Assistance Foundation. Prompted by the devastating wildfires in recent years, the petition asked for emergency regulatory protection for outdoor workers from the harmful effects of wildfire smoke.

Broadly speaking, the regulation addresses the issue by requiring employers to monitor levels of smoke at worksites, and then take some protective action when the smoke reaches a certain level in the air, including, for example, moving workers indoors or providing air respirators.

The wildfire smoke regulation applies to workplaces where the Air Quality Index reaches a certain level.

Now that those regulations are in effect, there’s a lot for employers to know. Read on for more details about employer requirements under this new emergency regulation, which is effective through January 28, 2020, with two possible 90-day extensions. A permanent rule is anticipated in 2020.

Affected Workplaces

The regulation’s scope is broad, but it doesn’t apply to everyone. It applies to workplaces where the Air Quality Index (AQI) reaches a certain level (see Monitoring Air Quality Index on page 3), but it creates exemptions for certain workplaces and operations, including:

- Enclosed buildings and vehicles with air filtered by a mechanical ventilation system with the windows, doors, and other openings kept closed to minimize exposure;

- Firefighters engaged in wildland firefighting; and

- Employees with only short-term exposure to the smoke (less than one hour).
The regulation primarily affects outdoor occupations and industries, including, for example, agriculture, construction, maintenance and landscaping. Beyond these obvious industries, however, the regulation will likely have a very broad reach. The exemption for short-term exposure is phrased in such a way that if an employee is outdoors for more than one hour in a shift, the regulation applies. That means a cumulative hour or more outside over the course of a shift, not a solid hour, will trigger the compliance requirements.

The regulation could also include employers whose employees are intermittently exposed to outside air. For example, delivery jobs or certain warehouse jobs where employees might move in and out of doors could fall under the emergency regulation.

Even an employer with no outdoor employees should be cautious, as the regulation could also apply to high traffic indoor worksites such as restaurants or banks where doors are consistently opened and allow in outside air.

Employers should consult with legal counsel to determine if they fall into an exemption.

Employers must integrate/supplement their Injury and Illness Prevention Plans with a system to communicate wildfire smoke information.

Communication and Training Requirements

The new regulation requires employers to integrate/supplement their Injury and Illness Prevention Plans (IIPP) with a system of communicating wildfire smoke information, as well as some training and instruction related to wildfire smoke. (The regulation specifically states that this information is required by section 3203, which is the regulation requiring all employers to establish an IIPP to prevent workplace injury and illness. See CCR Title 8 § 3203.)

**Communication:** The emergency regulation's communication requirements are fairly simple. Employers at affected worksites must establish a system for communicating wildfire smoke hazards to employees, including the AQI level for PM 2.5 and protective measures available to them. Employers must also encourage employees to keep them informed about worsening air quality and any adverse symptoms that may result from wildfire smoke exposure. Basically, employers and employees must communicate with each other about smoke in the air, adverse effects, the AQI level, and the protective measures available, for example, moving employees indoors or to a different location, or that air respirators are available for use.

**Training:** The regulation also requires employers to train and instruct employees on specific information found in Appendix B to the regulation, including:

- The health effects of wildfire smoke;
- The right to obtain medical treatment without fear of reprisal;
- How employees can obtain the current AQI information;
- The requirements of the emergency regulation;
- The employer’s communication system;
The employer’s methods to protect employees from wildfire smoke;

The importance, limitations, and benefits of using a respirator when exposed to wildfire smoke; and

How to use the respirators provided by the employer.

The above information is contained in greater detail in Appendix B of the approved regulation. Employers should review the information in Appendix B, supplement their IIPPs, and begin implementing training/instruction as soon as possible.

The wildfire smoke regulation explains how to check the current and forecasted Air Quality Index.

Monitoring Air Quality Index

The new regulation is triggered by the Air Quality Index level for PM 2.5 (particulate matter with an aerodynamic diameter of 2.5 micrometers or smaller; these are essentially tiny particles in the air that reduce visibility and, when levels are elevated, make the air appear hazy). Employers are required to monitor the AQI at worksites covered by the regulation for PM 2.5 before each shift and “periodically thereafter, as needed to protect the health of the employee[s].”

If the AQI for PM 2.5 is greater than 150 and the employer “reasonably anticipates” that employees will be exposed to wildfire smoke, then employers must reduce the employees’ exposure to the smoke (see Reducing Exposure below).

The regulation explains how to check current and forecasted AQI using websites such as the U.S. EPA AirNow website, U.S. Forest Service Wildland Air Quality Response Program website or the California Air Resources Board website, to name a few. Employers should go to these sites and become familiar with how to look for and read the relevant information. Generally, the websites will allow you to search by location, e.g., zip code, county, region, etc. Employers should remember to look specifically for PM 2.5 levels as other air pollutants, such as ozone, are measured as well.

Employers may measure PM 2.5 levels themselves using a direct reading instrument at a specific worksite and ultimately determine the AQI, but per Appendix A of the regulation, the employer must be able to demonstrate that the instrument doesn’t underestimate exposure. Appendix A also describes specific standards for direct monitoring equipment and includes a PM 2.5 to AQI conversion chart. Importantly, it also specifies that the person supervising or conducting the direct monitoring must have sufficient training or experience to apply Appendix A subsection (e), and ensure correct use of the monitor and interpretation of the results. Employers wishing to use direct monitoring should consult with counsel to ensure compliance.

Reducing Exposure to Smoke When AQI is Above 150

Once the AQI at a worksite exceeds 150 for PM 2.5, the employer must act immediately to reduce exposure to the wildfire smoke, and the regulation provides some flexibility on how employers may do so.

Depending on the worksite and conditions, employers may relocate employees to enclosed buildings with filtered air; this is called the “engineering control” method. When this method isn’t
feasible, employers may move employees to another outdoor location where the AQI for PM 2.5 is 150 or lower, if practicable; this is called the “administrative control” method.

Additionally, where the AQI for PM 2.5 is between 151 and 500, employers must give employees the option to use air respirators approved by the National Institute for Occupational Safety and Health (NIOSH), such as N95s. N95s are inexpensive respirators that can be obtained online or from local hardware/home improvement stores. Training for the optional use of respirators is required and included in Appendix B of the regulation.

If the AQI exceeds 500, respirator use is mandatory. Employers must also comply with the burdensome respiratory protection requirements contained in section 5144, including fit testing and medical evaluations. The regulation also specifies that if facial hair interferes with the respirator seal and compromises its protection, then workers with facial hair may wear loose-fitting, powered air purifying respirators.

Employers should develop a strategy for reducing smoke exposure at their worksites in the event of a wildfire, considering whether engineering or administrative control methods are feasible based on their specific circumstances. Employers should also consider stocking up on air respirators, enough to cover multiple shifts, especially if they have outdoor employees. After developing a plan, employers should write it down in a policy and train their supervisors to ensure timely compliance when a wildfire occurs.

The process of adopting the permanent regulation has begun; CalChamber will provide updates as the regulation develops.

Working Toward Permanence

As Cal/OSHA works on the permanent rule, a CalChamber-led coalition seeks to include changes that would provide employers with greater certainty — and emphasizes that Cal/OSHA should not use the emergency rule as a means to adopt broader standards than the original intent.

The emergency rule also includes ambiguous or confusing language that needs clarification, including:

- When an indoor environment’s ventilation or other features are enough to exempt the area from the regulation, especially in the context of high traffic sites where doors are opened often;
- How employers should fulfill their obligation to train employees;
- Procedures for testing powered air respirators’ fit and evaluating their effectiveness; and
- Whether facial hair should be shaved or allowed with use of a respirator.

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Key Takeaways for Employers

Employers must work quickly to comply with these regulations. Determine whether the smoke protection requirements apply to your business and, if so, employers should:

- Familiarize themselves with how to monitor AQI information using a reliable website that provides accurate PM 2.5 levels, such as those discussed above;
- Create a policy and train supervisors on how and when to monitor the AQI and the compliance requirements that are triggered when the AWI goes above 150, i.e., engineering controls, administrative controls and providing respirators;
- Establish a system to communicate information to employees about AQI levels, protective measures available, etc.;
- Supplement their Injury and Illness Prevention Plans with the training information required by Appendix B and begin training/instructing as soon as possible;

Consult legal counsel to avoid disrupting your business any more than necessary during wildfires.

- Consider having respirators on hand. Employers with outdoor employees should stock up on respirators, such as the N95s, to prepare for multiple shifts of employees working in poor air quality to facilitate timely compliance with the regulations and minimize potential disruptions in work.

Employers should follow these steps and consult legal counsel to avoid disrupting their business any more than necessary during wildfires.

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