It's Getting Hot in Here! – Employers React with Concern and Confusion to Cal/OSHA Draft Indoor Heat Illness Standard

Insights
3.20.17

For the past 12 years, California has maintained a Cal/OSHA standard designed to minimize heat illness in outdoor places of employment. However, legislation enacted last year (SB 1167) now requires Cal/OSHA to develop a heat illness standard applicable to *indoor* places of employment.

Cal/OSHA recently convened an advisory committee in Oakland to solicit input from stakeholders and the public on a "discussion draft" standard. Cal/OSHA described this stage as "pre-rulemaking," where they solicit feedback on initial concepts and language before formally releasing a draft proposal. The employer consensus (at least among those in attendance)? The "discussion draft" is much too complicated and would be extremely difficult, if not impossible, for employers to comply with.

Cal/OSHA indicated that (as mandated in SB 1167) in developing this discussion language, they took into consideration specified guidelines developed by the American Conference of Governmental Industrial Hygienists. Cal/OSHA also indicated that they relied upon a heat stress standard recently adopted in Minnesota.

Disagreement Right out of the Gate
Perhaps an indication of things to come, Cal/OSHA and the employer community could not even seem to agree on the timeframe set forth in the legislation mandating a regulatory proposal.

The statutory language provides that, "By January 1, 2019, the division shall propose to the standards board for the board's review and adoption a standard that minimizes heat-related illness and injury among workers working in indoor places of employment."

Cal/OSHA Chief Juliann Sum stated that the agency interprets this to mean that Cal/OSHA must develop a formal rulemaking proposal that can be submitted to the OSHA Standards Board for immediate adoption by January 2019 – a very short timeline, as acknowledged by Sum.

However, employer representatives stated that they read the statutory language to merely mean that Cal/OSHA must "propose" a regulation to the OSHA Standards Board by that date, beginning (rather than ending) the regulatory process wherein public comment is submitted and the proposal is revised after negotiations with interested parties.

Who's Covered?
The "discussion draft" would apply to any indoor place of employment where the temperature exceeds 90 degrees (or where the temperature exceeds 80 degrees but the employees perform moderate, heavy or very heavy work).

However, there are a few exceptions. First, the standard would not apply to work areas with air-conditioning that ensures the temperature does not exceed 85 degrees and employees perform only light or moderate work. Second, where employees work indoors for less than two hours a day, the employer may comply with the outdoor heat standard in lieu of this rule.

So what does "indoor" mean? The draft proposal defines "indoor" to mean a space under a ceiling or overhead covering that is bound on at least half of all sides by walls (including doors, windows, retractable dividers, garage doors, or other physical barriers, whether open or closed). The proposal also specifically provides that this includes vehicles.

Employer representatives raised a number of questions and concerns about this basic scope of coverage. For example, where is the temperature measured to evaluate these coverage standards? In most work settings, the temperature can vary from location to location within the same worksite. In addition, employers raised questions about the "air conditioning" exemption. Does this require an HVAC system or would fans, swamp coolers, and other cooling methods suffice? Does the entire worksite need to be air conditioned? In many industries, there are "flash cool" areas with intense cooling procedures where workers cool down.

Several employer representatives also testified that any discussion of temperature thresholds should be removed from the "scope and application" section of the proposal and instead moved to the portion dealing with heat stress assessments.

Identification and Assessment of Heat Stress Standards
The "discussion draft" requires covered employers to conduct an assessment of heat stress standards to measure and identify certain items.

For employers with "high radiant heat work areas" (areas with significant heat sources such as foundries and boiler rooms), the proposal requires the employer to measure the temperature, estimate the amount of time employees spend in those areas, and identify the employees' work activity levels and clothing (which is used to add degrees to the workplace temperature based on the type of clothing an employee is required to wear). However, the temperature to be measured is the "wet bulb globe temperature" (WBGT), which takes into account temperature, humidity, air velocity, and radiant heat. Cal/OSHA demonstrated a WBGT monitor, which they indicated can cost several hundred dollars.

For employers with non-radiant heat areas, the proposal requires the employer to measure the temperature and other factors, but allows the employer to measure the WBGT or the heat index (which is a simpler measurement that only takes into account temperature and humidity).

The proposal goes on to state that employers must conduct these assessments when the heat stress is at or near the annual high, and shall reassess when there is a change in working conditions, such as a change in tasks, procedures and work processes.

Employer representatives expressed concern that most businesses would not have the expertise to make such complicated calculations – some even predicted that this proposal would give rise to a new "cottage industry" of heat illness consultants who (for a fee of course) would assist employers in making these necessary assessments. Moreover, employers expressed confusion over when and how often they would need to assess these factors. For example, many employees change tasks several times a day or even change work locations. Would a reassessment be necessary each time there is such a "change in working conditions?"

Short-Term Exposure Limits

Next, the "discussion draft" sets forth a series of tables that purport to limit employee exposure to certain temperatures. Specifically, they set forth a series of "short-term exposure limits" that prohibit an employee from being exposed over a one-hour period to a time-weighted average temperature. These exposure limits vary by whether the employees work in high radiant heat work areas, whether their work activity is light, moderate, heavy or very heavy, the type of clothing they wear, and whether they have been acclimatized or not.

The draft proposal requires employers (to the extent feasible) to use engineering or administrative controls to reduce employee exposures to at or below these exposure limits. Where not feasible to reduce exposures below the limit, such controls shall be used to reduce heat stress as much as possible. Where these controls are not feasible to reduce employee exposures below the limits, employers are required to implement a whole slew of additional procedures (including monitoring, pre-shift meetings, and ten minute cool-down rest periods every two hours).

The end result is two very-complicated charts that employers must follow to determine what the exposure limit is for a specific employee. It is difficult to imagine how a run-of-the-mill employer would be able to make such a complicated calculation, especially when taking into consideration that temperature can fluctuate and employees can change work activity or work clothing several times within a given period of time.

Rest and Hydration

Like the outdoor heat standard, this proposal requires employers to ensure that employees have access to potable drinking water, provided in sufficient quantity to provide one quart per employee per hour. In addition, the proposal specifies that employees shall be "allowed and encouraged to take a preventative cool-down rest period when they feel the need to do so to protect themselves from overheating."

Other Provisions

In most other respects, the proposal tracks the outdoor heat illness standard in additional obligations imposed on employers. These include provisions related to heat illness prevention

obligations imposed on employers. These include provisions related to heat illness prevention plans, first aid and emergency response, close observation of unacclimatized employees, training and recordkeeping.

Overall Employer Reaction? Cool At Best.
Employer representatives at the advisory committee acknowledged that heat illness can be a factor in some indoor places of employment, and expressed a willingness to work to find practical solutions to this problem. However, they expressed significant concern about the complexity and ambiguity contained in the current proposal. They recommended that the proposal should be simplified so that the average employer (without a full-time industrial hygienist) can understand it and comply.

Several employer representatives urged Cal/OSHA to learn lessons from the experience of adopting the outdoor heat illness standard, which has gone through three complex and thorough revisions based on stakeholder feedback. For example, after similar debate about using dry bulb temperature or more complex measurements (such as heat index or WGBT), that regulation settled on dry bulb temperature in part due to an effort to make compliance practical for employers.

What's Next?
Again, this was the very first meeting on a "pre-rulemaking" draft discussion document. Therefore, there is still a ways to go before a formal standard is proposed or adopted. However, interested employers should start tracking this language closely and weigh in now. Cal/OSHA will likely be paying close attention to employer feedback – in fact, Cal/OSHA Chief Juliann Sum stated that the agency wants to work with stakeholders to get the language as close to final as possible before the formal rulemaking process begins.

Cal/OSHA stated that interested stakeholders could provide feedback on the current "discussion draft" until March 30, 2017. Comments can be submitted by emailing them to Amalia Neidhardt at aneidhardt@dir.ca.gov

Finally, it is important to note that the legislation mandating this process (SB 1167) specifically stated that the bill did not prohibit Cal/OSHA from proposing, or the OSHA Standards Board from adopting, a standard that limits the application of high heat provisions to certain industry sectors. While neither worker nor employer representatives advocated for such an approach at the advisory committee, it is important to keep the possibility in mind for future discussions.

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