



Comments to the California Occupational Safety & Health Standards Board

Proposed Changes to State Standard Title 8, Division 1, Chapter 4  
Subchapter 7. General Industry Safety Orders  
Article 10. Personal Safety Devices and Safeguards  
Section 3395 – Heat Illness Prevention in Outdoor Places of Employment

Presented by the  
California Association of Sheet Metal and Air Conditioning Contractors' National  
Association

September 25, 2014

---

The members of the California Association of Sheet Metal and Air Conditioning Contractors, National Association (CAL SMACNA) have reviewed the proposed changes to the existing heat illness standard and are pleased to have the opportunity to provide comments to the Occupational Safety and Health Standards Board (OSHSB).

Please note that CAL SMACNA associates itself and is signatory to the Heat Illness Prevention Coalition letter submitted along with the California Chamber of Commerce on Friday, September 19, 2014. The comments and questions below are submitted separately to address additional concerns of CAL SMACNA membership with the proposed revisions.

#### **INTRODUCTION**

CAL SMACNA is a non-profit statewide trade association representing over 600 sheet metal and air conditioning contractors who employ more than 25,000 union employees and administrative personnel throughout the state of California. These contractors and their employees perform commercial and residential heating, ventilating, and air conditioning; architectural and industrial sheet metal; as well as stainless steel kitchen equipment, manufacturing, testing and balancing, and installation of siding and decking. Their range of work is from public works to private commercial and residential projects.

Importantly, CAL SMACNA contractors are signatory to collectively bargained agreements (CBAs) with local chapters of the Sheet Metal, Air, Rail and Transportation (SMART) union and thus operate within a multi-employer setting where skilled and fully trained workers are hired from the union hall. In general, these binding CBAs between employers and employees set specified terms for employee wage scales, working hours, skills training, health and safety protection standards and training, and grievance mechanisms.

The majority of CAL SMACNA members employ individuals who perform their duties in both indoor and outdoor environments. As such, CAL SMACNA has been actively involved with the Division of Occupational Safety and Health (DOSH) as a member of the various Heat Illness Advisory Committees since 2004-05 in the successful development and implementation of the current heat illness prevention standard; and again in the adoption of the 2010 amendments.

The current heat illness prevention regulation is the first state adopted standard in the nation and has been very successful due in large part to the collaboration and consensus amongst stakeholders with a data driven and common sense regulatory approach that is easy to understand, practical to implement and assures confident compliance by employers.

In contrast, DOSH's recently proposed revisions to this standard adhere to none of these qualities. And, if adopted, will lead to confusion, higher costs and difficulties in implementation with impossible standards of confident compliance. Furthermore, CAL SMACNA members strongly believe that these revisions will not provide our workers any significant increased level of protection over the existing rule.

To these points, CAL SMACNA has been frustrated with DOSH's inability during the Heat Illness Advisory Committee process in 2013-14 to identify objective data to support alleged problems or deficiencies with the current standard. In fact, DOSH has failed to respond to multiple requests for data and studies to establish specific deficiencies with the standard and the necessity for additional changes. Instead, it appears that DOSH has taken the concerns by some stakeholders in the agricultural labor sector and simply translated these into a proposal for new and overly prescriptive standards to be swept into the broader regulation affecting other industries including construction.

## COMMENTS

CAL SMACNA offers the following specific comments to DOSH's proposed changes to the Heat Illness Prevention regulation at Title 8, California Code Regulations, Section 3395 in order as proposed:

1. **Section 3395 (b) Definition of "Shade" – Does not discourage access** -- DOSH proposes to include the following new language – "Shade may be provided by any natural or artificial means that does not expose employees to unsafe or unhealthy conditions and that does not discourage access."
  - a. **"Not discourage access" is too subjective** -- CAL SMACNA believes this new qualifier for shade is too subjective and open to interpretation for consistent enforcement and compliance. For example, could a DOSH inspector or employee file a citation or complaint, respectively, against an employer because the shaded area had a bad smell, was too dirty, was too loud, or too close to ongoing work to discourage an employee to access the shade?

2. **Section 3395 (c) Provision of Water– *Pure, fresh and suitably cool***– DOSH proposes to include the following new language -- The water provided shall be fresh, pure and suitably cool, and shall be provided to employees free of charge.
- a. **“Fresh, pure and suitably cool” is too subjective** -- CAL SMACNA believes this new qualifier for the provision of water is too subjective and open to interpretation for proper and consistent enforcement and compliance. Further we believe it will lead to significant new costs for construction employers. For example, could a DOSH inspector or employee file a citation or complaint, respectively, against an employer because the potable municipal tap water provided had a bad smell, had a relative lack of clarity, had an off-color, or was even tepid or room temperature?
  - b. **Municipal water supplies no longer compliant?**– Per the vagaries of potable water provided by municipal water suppliers, CAL SMACNA believes the only way to safely and reliably comply with this proposed requirement is to no longer rely upon municipal water supplies and instead install jobsite filtration and refrigeration systems; or provide commercially available bottled water that is refrigerated. The costs for labor and equipment to install and maintain filtration and refrigeration systems and/or procure sufficient quantities of bottled water, as well as, maintain ice supplies and ensure proper recycling of plastic bottles is significant. Both methods of compliance are extremely costly and would increase energy and resource consumption on the worksite. Cost estimate for bottled water is between \$3.25 and \$6.50 per worker per day (*\$.19 to \$.48/ bottle + coolers + ice + labor to maintain and recycle empties*). Mechanical filtration and refrigeration systems are equally if not more expensive to electrify, assemble, maintain, and re-locate to ensure consistent availability at changing and dynamic worksites.
3. **Section 3395 (c) Provision of Water –*Prescribed distance of 400 feet***–DOSH proposes to include the following new language: The water shall be located as close as practicable to the areas where employees are working, and shall be at a distance of not greater than 400 feet walking distance from any employee at any time other than when the employee is using a restroom or travelling between the restroom and an area where employees are working unless the employer can demonstrate that conditions prohibit locating the drinking water within the prescribed distance.
- a. **Subcontractors don’t always control the worksite to ensure placement of water within 400 feet** -- Construction jobsites, boundaries and work areas are often defined by the property owner and/or the general contractor (GC). These jobsites are also subject to constant and dynamic change and are frequently dangerous. These elements taken together make confident compliance with an arbitrary distance requirement extremely difficult for CAL SMACNA members. For example:
    - i. Owners of industrial food processing facilities absolutely prohibit food and drink anywhere near their facilities. This owner site prohibition could apply to other jobsites as well, i.e. computer clean rooms, etc.

- ii. The GC controls the jobsite and must manage the work area and flow of multiple subcontractors. As subcontractors, CAL SMACNA members need the GC's permission for the space to place caches of refrigerated water near their workers. What if the GC refuses permission because they deem there is not enough space at 10 am for safety reasons but when a DOSH inspector arrives an hour later there appears to be enough space for a cache of water due to the progression of work and movement of equipment and materials during the past 60 minutes? Who is liable for the citation?
  - b. **Multiple Caches of refrigerated water is difficult and expensive** -- The reality is construction work is dynamic and often shifts to various worksites within a larger jobsite throughout the day. Locating multiple caches of filtered, bottled and refrigerated water in sufficient quantities for all workers at all times within 400 feet of every worker is subject to many variables (site jurisdiction, safety, workflow, etc.) and comes at a high cost. It is extremely difficult to monitor compliance and easy to be deemed in violation.
  - c. **DOSH has not provided compliance guidance for employers** -- DOSH has not provided any guidance or determined how an employer is to reliably demonstrate to them (consistently for all inspectors and field office representatives) that various "*conditions prohibit locating the drinking water within the prescribed distance.*" How is DOSH to do this and a CAL SMACNA contractor to confidently comply with the distance requirement given the dynamic conditions described in the examples above?
4. **Section 3395 (d) Access to shade –Sufficiency and proximity** -- DOSH proposes to require employers provide access to shade be provided to all employees on meal, recovery or rest periods and it shall be within 700 feet walking distance from every working employee unless the employer can demonstrate that terrain or other conditions prohibit the shaded area within the prescribed distance.
- a. **Subcontractors don't always control the jobsite to ensure enough physical shade for 100% of workers at one time; nor within 700 feet of all workers at all times.**  
The GC controls the jobsite and must manage the work area and flow of multiple subcontractors. A typical worksite can have hundreds of employees from dozens of subcontractors present at any given time. They do not arrive and depart at the same time nor do they take breaks or meal periods at the same time necessarily. The ability to reliably predict the actual number of workers to be taking concurrent breaks on a site at any given time; or the workers individual physical locations on the site on any given hour on any given day is next to impossible. Thus, to ensure compliance a redundant number of tents or temporary structures will need to be purchased, erected and placed throughout the jobsite for the maximum number of workers and possible worksites at all times. This is extremely costly and in fact may not even be possible or advisable due to construction site restrictions and safety reasons.
  - b. **Who is liable for citation in a multi-employer setting?** Assuming they are allowed to erect shade, how does a subcontractor predict or know how many people will be taking recovery or rest periods in order to have enough shade erected on the site? Similarly, how does a

subcontractor employer predict these numbers and comply in a multi-employer setting? Who is liable? Is it the GC or subcontractor?

- c. **The proposed 700 feet requirement conflicts with DOSH's proposed changes to the definition of shade in Section 3395 (b) Shade** – What happens if a contractor locates a shade structure within the 700 foot requirement for compliance purposes but, a DOSH inspector or employee issues a citation or complaint, respectively, because that area had a bad smell, was too dirty, was too loud, or too close to ongoing work to discourage an employee to access the shade as opposed to another more appropriate area that was outside the 700 foot requirement? Which standard is to be complied with?
  - d. **DOSH has not provided compliance guidance for employers** -- DOSH has not provided any guidance or determined how an employer is to reliably demonstrate to them (consistently for all inspectors and field office representatives) that *“terrain or other conditions prohibit the shaded area within the prescribed distance.”* How is DOSH to do this and a CAL SMACNA contractor to confidently comply with the distance requirement given the dynamic conditions described in the examples above?
5. **Section 3395 (d) Access to shade–Reduced temperature trigger from 85 to 80 degrees Fahrenheit**– DOSH proposes to reduce the threshold trigger for the provision of shade from 85 degrees to 80 degrees Fahrenheit.
- a. **80 degrees Fahrenheit is too low a trigger for provision of shade** -- The new lower threshold is considered to be fairly mild by many contractors and in fact does not take into account jobsite circumstances (*i.e. natural shade*) and actual sun exposure (*i.e. cloud cover, marine layer, etc.*). CAL SMACNA believes that this change will be significant in the increased number of days that shade is required to be provided at significant cost to employers without any corresponding worker benefit.
6. **Section 3395 (d) (3) and (4) Access to shade-- Employee cool-down periods, medical monitoring and requisite provision of first aid and/or emergency medical services**– DOSH proposes to require employers to encourage their employees who take a cool-down rest “to remain in the shade and shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.” And, “If an employee exhibits signs or reports symptoms of heat illness, the employer shall monitor the employee during the cool down rest or recovery period to determine if signs or symptoms are abating or worsening. If signs or symptoms worsen or do not resolve, the employer shall provide appropriate first aid and/or emergency medical services.”
- a. **Non-medically trained personnel now required and liable to make accurate medical determinations** -- CAL SMACNA believes it harmful to the employer and employee for non-medically trained personnel to be required and liable to make a determination that *“any signs or symptoms of heat illness have abated”* before ordering an employee back to work. How does an employer know when it is safe to order their employee back to work? Who is the arbiter of *“all signs or symptoms of illness”* being abated, the employer, the employee,



written. Furthermore, employers cannot know the health condition or lifestyle of each employee to ensure proper and accurate acclimatization. Nor is an employer able to demand this information from the employee.

9. **Section 3395 (g) Written procedures –*Confusing conflation of employer obligations in written procedures but not in other areas of proposed regulation*** – DOSH proposes extensive changes to the written procedure requirements that give rise to a multitude of questions.
  - a. CAL SMACNA associates its comments in this regard with the concerns outlined in the Heat Illness Advisory Committee Letter, as submitted by the California Chamber on September 19, 2014.

CAL SMACNA contractors take employee safety extremely seriously. However, according to the careful review and response from our membership, we conclude that these proposed changes to the Heat Illness Prevention standard are not only unworkable in the construction industry but do not provide any additional increase in protection for our workers.

## **CONCLUSION**

In short, the draft amendments to the current Heat Illness Prevention standard as proposed by the Division of Occupational Safety and Health (DOSH) deviate from the current standard in terms of clarity, necessity and ease of implementation and compliance. For these reasons, CAL SMACNA requests the Occupational Safety and Health Standards Board (OSHSB) to reject the current proposed changes and instead: 1) direct DOSH to demonstrate necessity for any additional changes to the current standard; 2) work with stakeholder to arrive at proposed changes that specifically address deficiencies in the current standard, if any; and 3) ensure clarity in the final regulatory language for regulated employers to fully understand and be able perform reliable compliance.