State of California
Office of Administrative Law

In re: **Occupational Safety and Health Standards Board**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action:	**Government Code Section 11349.3**
Title 08, California Code of Regulations	**OAL Matter Number: 2024-0329-01**
Adopt section: 3396	**OAL Matter Type: Regular (S)**

SUMMARY OF REGULATORY ACTION

This action by the California Occupational Safety and Health Standards Board (Board) proposes to adopt regulations relating to heat illness prevention in indoor places of employment.

On March 29, 2024, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On May 8, 2024, OAL notified the Board that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and for failure to comply with required APA procedures.

DISCUSSION

The Board's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) No exemption applies to the present regulatory action under review.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16 of title 1 of the CCR, which provides:

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) …
> (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
> (4) …
> (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
> (6) …
> (b) Persons shall be presumed to be "directly affected" if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following provisions in the Board's proposed regulatory action do not satisfy the clarity standard.

1.1. <u>Proposed Subsection (b)(9) of Section 3396</u>

Proposed subsection (b)(9) of section 3396 reads:

> "Heat index" means a measure of the heat stress developed by the National Weather Service (NWS) for outdoor environments that takes into account the dry bulb temperature and the relative humidity. For purposes of this section, heat index refers to conditions of indoor areas. Radiant heat is not included in the heat index.

> NOTE: A chart listing NWS heat index values (2019) can be found in Appendix A to section 3396.

Proposed subsection (b)(9) is unclear because it can, on its face, be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(1).) As written, the definition of "heat index" is followed by a note that refers to the NWS heat index values (2019) in Appendix A, but the regulation does not specifically require use of the heat index values in Appendix A. This makes it unclear whether use of the NWS heat index values in Appendix A is required, or whether there are other NWS values not specified in the regulations that may be used by employers.

1.2. Proposed Subsection (e)(1)(C) of Section 3396

Proposed subsection (e)(1)(C) provides:

> Instruments used to measure the temperature or heat index shall be used and maintained according to the manufacturers' recommendations. Instruments used to measure the heat index shall utilize NWS heat index equation or tables.

Proposed subsection (e)(1)(C) is unclear for two reasons. First, proposed subsection (e)(1)(C) presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(5).) As written, it is unclear from the proposed regulation text what the content of the NWS heat index equation is or what specific equation is required. Second, proposed subsection (e)(1)(C) can, on its face, be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(1).) Based on the proposed text, it is unclear whether NWS heat index "tables" is referring to the chart listing NWS heat index values (2019) set forth in Appendix A to section 3396, or whether it is referring to other, unspecified NWS heat index tables.

2. Failure to Comply with APA Procedure

Government Code section 11347.3, subdivision (b)(5), requires that a rulemaking file include the estimate, together with the supporting data and calculations,

required by Government Code section 11346.5, subdivision (a)(6). Government Code section 11346.5, subdivision (a)(6), requires:

> An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

Government Code section 11357 requires that the Department of Finance (Finance) adopt instructions for inclusion in the State Administrative Manual prescribing the methods that an agency shall use in making the estimate required by Government Code section 11346.5, subdivision (a)(6). These instructions are found in State Administrative Manual (SAM), sections 6600 through 6616, and the STD. Form 399 Economic and Fiscal Impact Statement.

SAM, section 6614 provides in relevant part:

> A state agency adopting, amending, or repealing a routine or emergency regulation shall use the STD. 399 to make a determination and develop an estimate of that proposed regulation's fiscal impact on local governments.
> …
> A Finance Program Budget Manager (PBM) or designee signature is required when the Fiscal Impact Statement on the STD. 399 reflects either costs or savings, whether budgeted or not. The estimate in a STD. 399 that is signed by the agency must reflect the actual language of the proposed regulation adopted by the agency.

SAM, section 6615 further provides:

> A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency

costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

A.1 - Reimbursable Local Costs	B.1 - State Costs
A.2 - Non-Reimbursable Local Costs	B.2 - State Savings
A.3 - Local Savings	B.4 - Other
A.6 - Other	

In this rulemaking action, the STD Form 399 submitted by the Board depicts fiscal impacts as follows: A.2 Non-Reimbursable Local Costs; A.3 Local Savings; B.1 State Costs; and B.2 State Savings. Therefore, pursuant to SAM, sections 6614 and 6615, the Board was required to obtain Finance concurrence on the Form 399, but such concurrence was not obtained.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Board on the date indicated below.

The Board must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any comments containing objections or recommendations must be summarized and responded to in the Final Statement of Reasons. Any substantive regulatory text changes and comments received in response to those changes must be presented to the Board for consideration prior to the adoption of the final regulation text. The Board must resolve all other issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action.

Date: May 9, 2024

Kevin D. Hull

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Director

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cc: Department of Finance
(Gov. Code, sec. 11349.1(e))