September 6, 2022

The Honorable Gavin Newsom
Governor, State of California
1021 O Street, Suite 9000
Sacramento, CA 95814

Submitted via e-mail: Leg.Unit@gov.ca.gov

RE: AB 2243 (E. Garcia) – Request for Veto

Dear Governor Newsom,

We write in opposition of AB 2243 by Assembly Member Eduardo Garcia and respectfully request your veto of this legislation.

Our organizations have worked diligently with the author to resolve concerns we have with this bill and repeatedly provided him with potential amendments. Despite the author's commitments in Senate Labor, Public Employment and Retirement Committee to take clarifying amendments, those amendments never materialized. Consequently, the bill, as submitted to you now for consideration, is a sloppily drafted clutter of statutory confusion that has not earned the privilege of becoming law.

Fundamentally, we believe AB 2243 bill is unnecessary. Cal/OSHA and the Occupational Health and Safety Standards Board (Board) have already dealt with the issues targeted in this bill. There are already regulations in place addressing workplace safety relative to exposure to wildfire smoke and exposure to heat in outdoor workplaces. Additionally, the regulatory process is already well underway in creating a workplace safety standard for exposure to heat in indoor workplaces. There is no demonstrated need for this bill.

If the sponsors of AB 2243 believe the existing regulations are insufficient, changes to those regulations can be achieved through the existing process provided in law whereby sponsors of this bill could petition the Board directly for the amendments they seek. Notably, the petition process is very simple, and does not require any special legal expertise to begin. Importantly, that petition process would involve review by health safety experts. To date, no such petition has been filed and there has been no health safety expert examination of the regulations proposed by this bill.

In short, Cal/OSHA and the Board don't need to be micromanaged by the author and sponsors in a manner that side steps the existing regulatory process. Putting aside our policy concerns for the bill, the lazy and sloppy drafting of this bill should not be rewarded with a signature.

Below are three specific significant problems with how poorly this bill is written.

The Acclimation to Higher Temperature Provision is Ambiguous.

We believe the outdoor heat illness regulation *already* covers acclimatization – making subdivision (d) of AB 2243 entirely unnecessary relative to that regulation. Without regard to outdoor heat, AB 2243 is ambiguous as to whether the proposed change in subdivision (d) would also apply to the not-yet-passed indoor heat regulation. To be clear – subdivision (d) similarly makes no sense for the indoor heat regulation.

The author stated it is not his intent to apply subdivision (d) to the indoor heat regulation. So, we suggested this should be clarified. Nonetheless, no such clarification was made and as AB 2243 now sits on your desk, subdivision (d) states the following, "*The division shall consider* ***developing regulations, or revising existing regulations****, related to additional protections related to acclimatization to higher temperatures, especially following an absence of a week or more from working in ultrahigh heat settings, including after an illness*." ***Emphasis Added**

As this provision is not contained within the changes the author is seeking to the outdoor regulation (under subdivision (b)) and because this provision applies to existing and proposed regulations, the intent and scope are confusing at best. The confusion could have been easily resolved by simply moving subdivision (d) to subdivision (b) paragraph (1) and adding a new subparagraph (C) to read as follows:

> (b) The division, before December 1, 2025, shall submit to the standards board a rulemaking proposal to consider revising Section 3395 of Title 8 of the California Code of Regulations and Section 5141.1 of Title 8 of the California Code of Regulations. In preparing the proposed regulations, the division shall consider revising the following:
> (1) The heat illness standard in subdivision (a), to do the following:
> (A) Require employers to distribute a copy of the Heat Illness Prevention Plan to all new employees upon hire and upon training required by Section 3395 of Title 8 of the California Code of Regulations, but no more than twice per year to each employee.
> (B) Require employers to distribute a copy of the Heat Illness Prevention Plan to all employees at least once on an annual basis.
> *(C) The division shall consider additional protections related to acclimatization to higher temperatures, especially following an absence of a week or more from working in ultrahigh heat settings, including after an illness.*

Unfortunately, that clarifying amendment was never made. Instead, the bill has been submitted to you for consideration in the hopes that this defectively drafted bill might be signed into law.

NOTE: If AB 2243 is interpreted to apply to the pending indoor standard, this could delay adoption of that standard by a year or more.

AB 2243 Creates a Different Wildfire Smoke Standard for Farmworkers Only.

There is no evidence that the existing regulation is ineffective or outdated. To the contrary, the regulation was adopted in 2019 as an emergency regulation and became permanent in 2020.

In adopting the regulation, the Board solicited input from labor organizations, employers, and health safety experts. Months of meetings were held and multiple draft regulations were circulated and discussed. For AB 2243 to bypass that thorough and thoughtful process and instead require changes in AQI standards in the regulation would ignore this close analysis by health safety experts, stakeholders, Cal/OSHA and the Board. There is no data or evidence presented by the author or sponsors to support the contention that the change made by AB 2243 would increase worker safety.

AB 2243 ignores all of that and requires a new regulation just for farmworkers. Subdivision (b)(2) of AB 2243 states, *"**With regard to farmworkers**, the wildfire smoke standards set forth in Section 5141.1 of Title 8 of the California Code of Regulations, to reduce the AQI threshold for PM2.5 at which control by respiratory protective equipment becomes mandatory **for farmworkers** to, at a maximum, an AQI of 301 or more. The proposed threshold may be lower than 301 AQI or more, as determined by the division. For an AQI above 301, the employer need not implement fit testing and medical evaluations or otherwise implement requirements under Section 5144 of Title 8 of the California Code of Regulations." ***Emphasis added***

This means the author is asking for one of two changes:

1. Limit the existing wildfire smoke regulation to just farmworkers; or
2. Create an entirely new wildfire smoke regulation just for farmworkers that would serve in addition to the existing regulation for every other occupation.

We do not believe the author is asking Cal/OSHA and the Board to amend the existing wildfire smoke regulation to restrict it to farmworkers. However, as this farmworker limitation was added to AB 2243 in the last week of session and was never heard in any committee, we really don't know for sure.

To be clear: It makes no sense for Cal/OSHA and the Board to create a whole new standard for farmworkers. If this is indeed the intent of the bill, workers exposed to wildfire smoke of the same AQI and from the same wildfire and working on adjacent worksites would have ***different wildfire smoke safety requirements based on occupation***.

This would be nonsensical as the human health risks associated with inhaling wildfire smoke are without sole regard to the occupation of the human breathing in that smoke. Do we really think that there should be different standards for employees on a farm compared to employees painting a barn on that farm, or doing roadwork in front of that farm? There is no medical basis for such an arbitrary distinction.

AB 2243 Creates a Respiratory Protective Equipment Standard that is Less Stringent than Federal Law.

Existing state and federal law both require that if an employer requires an employee to wear an N-95 mask or other similar respirator, that employee must go through a fit test and medical evaluation to assure proper and safe usage of the respirator. Additionally, the existing wildfire smoke regulation provides that if the **AQI exceeds 150**, the **employer is required** to provide the respirator to employees, but those **employees can voluntarily choose** whether to wear the mask.

This means that employees with a health issue that may place him or her at risk in wearing a mask can refuse to do so. The regulation also provides that if the **AQI exceeds 500**, the employer is required to provide the respirator and the **employee is required** to wear the mask subject to a fit test and medical evaluation.

Subdivision (b)(2) of AB 2243 states, *"With regard to farmworkers, the wildfire smoke standards set forth in Section 5141.1 of Title 8 of the California Code of Regulations, to reduce the AQI threshold for PM2.5 at which control by **respiratory protective equipment becomes mandatory** for farmworkers to, at a maximum, an AQI of 301 or more. The proposed threshold may be lower than 301 AQI or more, as determined by the division. For an AQI above 301, the employer **need not implement fit testing and medical evaluations** or otherwise implement requirements under Section 5144 of Title 8 of the California Code of Regulations." ***Emphasis added***

This means that contrary to state and federal law, AB 2243 provides the employee is required to wear the mask, but is not required to go through a fit test or medical evaluation. This would put some employees at risk.

To help identify whether an employee has a health condition that would put the employee at risk, federal law (*29 CFR 1910.134*) and state law (*Section 5144, Title 8, CCR*) both require use of a medical evaluation using a mandatory medical questionnaire or an equivalent method when an employee is required to wear the mask.

Consequently, signing this kind of requirement into law would be unprecedented. To our knowledge, no governor has ever statutorily directed Cal/OSHA and the Board to adopt a workplace health standard that is less restrictive than federal law.

Again, this is a feebly written bill. We do not believe it is the author's intent to reduce standards. But nonetheless, that is exactly what the bill does.

Summary

AB 2243 is not needed, subverts the existing process in law for adopting and revising a workplace safety regulation, needlessly singles out agricultural employees, and could unintentionally delay adoption of the pending Heat Illness Prevention in Outdoor Places of Employment standard. Additionally, AB 2243 is so poorly drafted it would create significant ambiguity as to how the bill would be interpreted and applied, and on its face it calls for adoption of a health standard that could put employees at risk.

Consequently, we must respectively request a **VETO of AB 2243**. Such poorly drafted legislation should not be rewarded with a governor's signature.

Sincerely,

Agricultural Council of California
American Pistachio Growers
Associated Roofing Contractors
California Association of Winegrape Growers
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Food Processors
California Forestry Association
California Outdoor Hospitality Association
California Railroads
California Restaurant Association
California Strawberry Commission
California Travel Association
National Federation of Independent Business
Nisei Farmers League
PCI West – Chapter of the Precast/Prestressed Concrete Institute
Western Agricultural Processors Association
Western Growers Association

Michael Miiller | California Association of Winegrape Growers | (916) 204-0485 | Michael@CAWG.org