

# Now & Next

OSHA Alert

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## Wildfire smoke protection measures required by Cal/OSHA

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The recent and tragic wildfires in Southern California are a reminder that employers must take steps to protect employees during and after natural disasters.



### What's the impact?

- California employers should prepare for wildfire smoke events.
- California employers with operations impacted by recent wildfires are required to take measures to protect employee health.

Where there is smoke, there is Cal/OSHA! The following non-exhaustive summary is intended to assist employers with fulfilling these workplace safety requirements. obligations.

### Wildfire smoke

Cal/OSHA's permanent wildfire smoke regulation, set forth at California Code of Regulations, title 8, section 5141.1 ("Wildfire Smoke Regulation"), went into effect on February 1, 2021. The

permanent rule was enacted to address the increasing number of wildfires in California, beginning with the 2018 Camp Fire. The rule was specifically targeted at preventing exposure to particulate matter with an aerodynamic diameter of 2.5 micrometers or smaller, known as PM2.5. According to the United States Environmental Protection Agency, PM2.5 poses the greatest risk because they penetrate deep into the lungs and can enter the bloodstream.

The Wildfire Smoke Regulation obligations are triggered when two conditions occur: (1) the current Air Quality Index (“AQI”) for PM2.5 is 151 or greater, regardless of the AQI for other pollutants; and (2) employers should reasonably anticipate that employees may be exposed to wildfire smoke. The requirement that employers “reasonably anticipate” employee exposure qualifies the first requirement, which is necessary because PM2.5 can be generated from a variety of sources other than wildfire smoke including transportation, fuel burning, or dust storms. There are no clear-cut guidelines for employers to determine whether exposure is to be reasonably anticipated. Instead, employers must rely on a mix of factors including proximity to wildfires, smell, visible presence of ash, and public health warnings about current wildfire smoke conditions.

Once threshold conditions are met, the regulation applies to all workplaces with the following exceptions:

- / Enclosed buildings or structures with air filtration through mechanical ventilation, provided the employer ensures that windows, doors, bays, and other openings are kept closed, except as necessary to enter or exit.
- / Enclosed vehicles equipped with cabin air filtration, provided the employer ensures that windows, doors, and other openings are kept closed, except as necessary to enter or exit.
- / Worksites where the employer can demonstrate that PM2.5 levels do not exceed a current AQI of 151 or greater through worksite monitoring.
- / Employees exposed to PM2.5 levels of 151 or greater for less than one hour a shift.
- / Firefighters engaged in wildland firefighting.

Ultimately, the Wildfire Smoke Regulation covers employees working in a variety of industries, including but not limited to construction, agriculture, automobile dealerships, auto rental and leasing, auto shops, nurseries and garden supply, gasoline stations, utilities, courier and messengers, warehousing and storage, motion picture and video industries, radio and television broadcasting, real estate, security services, waste management, ambulance services, amusement parks, spectator sports, manufacturing, and landscaping. Even workplaces where the majority of work is conducted indoors can be subject to the regulation if there is repeated exposure to outdoor air, such as a drive through at a fast service restaurant. All California employers should assess their operations to identify potential exposure.

When applicable, the Wildfire Smoke Regulation generally requires that employers:

- / Measure AQI forecasts and the current AQI for PM2.5 at the start of each shift and periodically thereafter, as necessary.
- / Establish a system to communicate with employees about current wildfire smoke hazards and protections, including provisions to encourage employees to report worsening air quality and adverse symptoms without fear of reprisal.
- / Provide training on the effects of wildfire smoke, the requirements of section 5141.1, including employee rights thereunder, the benefits and limitations of respiratory protection, and the employers' methods for protecting employees.
- / Implement engineering and administrative controls, including the provision of respiratory protection for voluntary use. These controls can include the use of portable air purifiers, achieving negative pressure in a retail establishment so that the air moves out, or rotating employees to minimize exposure throughout a shift.

Requirements may vary depending on whether conditions at the worksite constitute an "emergency situation," or whenever the AQI for PM2.5 equals or exceeds 500.

Given the breadth of the requirements, all California employers should consider having written procedures and training ready to go should the need arise. Attempting to implement a program for the first time during a wildfire smoke event is difficult at best and certainly not the most effective means to comply.

## **Injury illness prevention program**

Employer obligations to keep employees safe are not limited to the specific provisions of the Wildfire Smoke Regulation. There will be circumstances where the Wildfire Smoke Regulation is not triggered, but hazards to employees remain. This includes not only burn area clean up and reconstruction, but employee proximity to hazardous dusts kicked up by such activity or weather conditions. Exposed employees can include couriers making deliveries to homes in burn areas, home healthcare personnel, utility crews, or even public transportation drivers.

Employers cannot merely rely on the current AQI for PM2.5 and the absence of wildfire smoke when determining whether working conditions are safe for their employees. In the absence of actual wildfire smoke, employers are still required to implement their Injury Illness Prevention Programs ("IIPP") to protect employees from workplace hazards.

Accordingly, employers should consider the following:

### **PUBLIC HEALTH ORDERS/NOTICES**

Although Cal/OSHA cannot enforce a public health order or notice, such orders can form the basis of IIPP violations. Specifically, Cal/OSHA can use the order or notice as evidence that an

employer is aware of a new workplace hazard, which awareness of then triggers inspection, correction, and training requirements. For example, the Los Angeles County Department of Public Health issued a [Windblown Dust and Ash Advisory](#) from January 19 through January 21, advising the public to stay inside, wear eye protection, and wear an N95 when outdoors. Prior to the enactment of the emergency COVID-19 regulation, Cal/OSHA used similar public health declarations as the basis for IIPP violations. Accordingly, employers should move to implement their IPPs whenever such advisories are issued to determine employee exposure.

### **EVACUATION ORDERS**

Employers should be careful not to violate evacuation orders. Cal/OSHA can potentially issue willful citations on the grounds that an employer was aware of a dangerous condition and did nothing to protect employees.

### **EXPOSURE ASSESSMENT AND CORRECTION**

Employers are required to evaluate workplace hazards whenever they become aware of a new hazard in the workplace. As set forth above, public health advisories can trigger this obligation. All employers in or in near proximity to impacted burn areas should conduct the required assessments to determine employee exposure before taking appropriate measures.

### **TRAINING/COMMUNICATION**

Employers should train their employees in or in near proximity to impacted burn areas on the hazards in the area and how to mitigate exposure. Training should include encouraging employees to report worsening conditions or symptoms of respiratory distress.

### **ONGOING OBLIGATION**

Conditions can and will change rapidly. Employers should not rely on prior assessments alone when identifying current exposure conditions. The extent of the obligation will be tied to the nature of the hazard. A single hazard assessment may be sufficient for an office or indoor retail setting, where mechanical ventilation provides suitable protection. However, a single assessment will likely not be the case for employees who must enter burn areas or are otherwise exposed to ash and dust as part of their routine work tasks.

## **Respiratory protection**

Even when an employer is required to provide respiratory protection for voluntary use, employers must remember that providing N95s for voluntary use requires training on how to use and properly wear the respirator. To the extent an employer is providing N95s for voluntary use as a corrective measure under their IIPP, they are required to provide employees with information

contained in what is referred to as "Appendix D." Required respirator use or the voluntary use of respirators other than dust masks (i.e., N95s) imposes additional regulatory requirements that employers should review.

## **Considerations for construction/demolition**

Construction and clean-up crews working in burn areas must prevent employee exposure to a variety of hazards including electrical, flammable gas, unstable structures, tree work, excavations, haulage vehicles, carbon monoxide, ash, asbestos, lead, heat illness, confined spaces, and other hazardous liquids. Most if not all cleanup activities will require personal protective equipment, including respiratory protection. No employers engaged in these activities should send in personnel without first performing a thorough hazard assessment and implementing protective measures. Homeowners and general contractors should be mindful of state licensing requirements for conducting this work.

## **Emergency action plan**

Finally, all California employers with more than 10 employees are required to have a written emergency action plan (EAP) that complies with California Code of Regulations, title 8, section 3220. Employers with fewer than 10 employees must still implement an emergency action plan, but it can be communicated orally. Whether written or oral, employers are required to implement evacuation procedures, establish an employee alarm system, and provide training as necessary to assist in a safe and orderly evacuation of employees in the event of an emergency. California employers without an EAP should take this opportunity to implement one not only for purposes of wildfires but earthquakes and other events.

For more information on the content of this alert, please contact your Nixon Peabody attorney, [Nixon Peabody's OSHA Team](#), or:

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