

Cal/OSHA Rules

As Wildfire Season Heats Up, Protect Workers

CAL/OSHA has issued a reminder to employers that they are required to protect their outdoor workers from unhealthy air due to wildfire smoke.

Cal/OSHA's Protection from Wildfire Smoke emergency regulation, put in place in August 2019, was made permanent in February 2021. For the safety of your workers and to comply with the regulation, it's important that you follow the rules and know when you will need to take action to protect them from outdoor smoke.

The regulation applies when the Air Quality Index (AQI) for airborne particulate matter 2.5 microns (PM2.5) is 151 or greater in an area where employees are working outdoors. Here are the details:

Identification

When wildfire smoke affects a worksite, employers must monitor the AQI for PM2.5.

Employers can monitor the index using the following agency websites:

- U.S. EPA AirNow
- U.S. Forest Service Wildland Air Quality Response Program
- California Air Resources Board
- Local air pollution control district websites or local air quality management district websites.

Communication

Employers must implement a system for communicating wildfire smoke hazards in a form readily understandable by all affected employees, including provisions designed to encourage employees to inform the employer of wildfire smoke hazards without fear of reprisal.

Training and instruction

Employers with outdoor workers need to provide training that covers at least:

- The health effects of wildfire smoke.
- The right to obtain medical treatment without fear of reprisal.
- How employees can obtain the current AQI for PM2.5.
- Possible actions they must take if the AQI exceeds 150 PM2.5

Options for protecting workers

The regulation provides three ways employers can protect their workers:

1. Modifications – If possible, employers should implement modifications to the workplace, in order to reduce exposure. Examples include providing enclosed structures or vehicles for employees to work in, where the air is filtered.

2. Changes to procedures and schedules – Another option is to change work procedures or schedules. Examples include changing the location where employees work or reducing the amount of time they work outdoors or exposed to unfiltered outdoor air

3. Respiratory protection – Employers also have the option to provide proper respiratory protection equipment, such as disposable respirators, for voluntary use without fit-testing AQI PM2.5 levels are below 500.

To filter out fine particles, respirators must be labeled N-95, N-99, N-100, R-95, P-95, P-99 or P-100, and must be labeled as approved by the US National Institute for Occupational Safety and Health.

If the AQI PM2.5 is above 500, respirator use is required, and fit-testing and a medical examination prior to use are mandatory.

See 'Videos' on page 2



New Premium Threshold Set for X-Mod Qualification

THE THRESHOLD for California employers to be eligible for experience rating has been reduced by order of the state insurance commissioner.

Commissioner Ricardo Lara in June approved the recommendation by the Workers' Compensation Insurance Rating Bureau to lower thresholds for determining eligibility for experience rating, which provides an "experience modifier" (X-Mod) to all qualifying employers as a way to gauge their claims history.

Starting Sept. 1, 2022, all employers in California with annual workers' compensation premiums of \$9,200 or more will be eligible for an X-Mod. That's down from the current \$9,500. The change was made to reflect wage inflation and the new expected loss rates.

If your firm will now be subject to experience rating, you should read the following.

Importance of the X-Mod

In order to price policies accurately, one of the most important tools in a workers' compensation carrier's arsenal is the experience modifier.

This is a unique "rating" for employers based on the number and amounts of claims they've had in relation to other companies in their same industry – or other employers that have the same Standard Industrial Class Code (or some derivative of it as in California).

These class codes do not only cover the industry you are in, but also your various employees.

After all, you should not have to pay the same workers' comp premium for a roofer in your company as you would for your accountant.

The most important element of your X-Mod is your claims history – how many claims you've had and how much your insurance company had to pay for (and reserve for these claims if they are still being paid out).

Once that's been determined, your X-Mod can be calculated. The number arrived at is an expression of your claims history in relation to other employers in the same class code.

If your X-Mod is 100, then your claims history is average for what's expected in your class code. If it's more than 100, then you have greater losses than what's expected, and if it's less than 100 you have fewer losses.

If you have an X-Mod of 70, it's expected that the carrier will discount the premium it would charge you by 30%. If it is 130, then you can expect the carrier to tack on another 30% to your premium.

THE PREMIUM EFFECT

Think of the X-Mod as a percentage and 100 is average for your industry. If you start with a \$20,000 base premium...



80 X-Mod
You pay \$16,000



120 X-Mod
You pay \$24,000



X-Mod classifications run a little late to err on the side of caution. Workers' compensation is considered a "long-tail" insurance coverage because claims can remain open for many years – sometimes even a lifetime.

That's why claims costs are not evaluated until 18 months after your policy incept.

In other words, if your policy incepted Jan. 1, 2022 and you had a claim in June, the X-Mod wouldn't be calculated to include 2022 until July 1, 2023.

Claims costs include already-incurred outlays as well as expected future costs for which the insurance company has set aside reserves for medical care and indemnity payments.

X-Mods are calculated using three years of claims history. The essentials for calculating premium are:

- Class codes of your various employees.
- Claims history for three years.
- X-Mod. ❖

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Cal/OSHA Has Created Training Videos to Protect Workers

Resources

The [Western Center for Agricultural Health and Safety](#) website has checklists for employers, training handouts (poster for discussion), and images explaining the health effects and monitoring the AQI.

Cal/OSHA has [created training videos](#) on wildfire smoke

protection and the use of N-95 respirators.

Guidance for employers and workers on wildfire smoke is [available on Cal/OSHA's web page](#) along with [frequently asked questions about N-95 masks](#). Cal/OSHA's [Training Academy](#) offers free resources in English and Spanish. ❖

Commissioner Rejects Proposed Hike

FOR THE third year in a row, California Insurance Commissioner Ricardo Lara has rejected the Workers' Compensation Insurance Rating Bureau's proposal for a workers' compensation rate increase, and has ordered instead that benchmark rates remain the same.

Lara rejected the WCIRB's proposal that benchmark rates increase 7.6% for policies incepting on or after Sept. 1, saying that there was not enough data to support such a large increase.

That means the average benchmark rate will remain unchanged at \$1.45 per \$100 of payroll over the next year, compared to the \$1.56 per \$100 of payroll the Rating Bureau had recommended.

The commissioner also rejected a proposal to include a 0.008 cent add-on to account for costs of COVID-19 claims.

The benchmark rate – also known as the pure premium rate – is an average across all of California's 500-plus class codes. The pure premium rate is a base rate that carriers can use as a guidepost to price their policies.

Pure Premium Rate Explained

The benchmark rate – or pure premium rate – is the amount needed to pay for adjusting and settling workers' compensation claims for each of the class codes. The insurance company then applies a loss cost multiplier to cover their expenses and profits.

Insurers are not required to follow the benchmark rate and they can choose to use it or not when pricing their policies.

That said, most carriers follow the rate closely, as evidenced by the continuing low pricing for workers' comp policies in California.

COVID-19 claims

Lara also rejected the Rating Bureau's proposal to start including COVID-19 claims in the computation of employers' experience modifications (X-Mods) for claims, starting Sept. 1.

In 2020, at the start of the pandemic, Gov. Gavin Newsom ordered that illness claims for COVID-19 infections contracted in the workplace be covered by workers' compensation and that those claims not be included when calculating an employer's X-Mod.

At the time, the reasoning was that employers had no experience in limiting transmission in the workplace and that COVID-19 infections among workers did not reflect a company's safety efforts.

The Rating Bureau recommended that COVID-19 claims be included in X-Mod calculations for all claims incurred on or after Sept. 1. It argued that "like many other workers' comp hazards, COVID-19 is now part of the ecosystem, and employers can take steps to mitigate the risk and protect their workers."

In rejecting the proposal, the Department of Insurance said that employers should not be penalized with higher premiums for failing to keep employees from contracting a disease that is spreading throughout society.

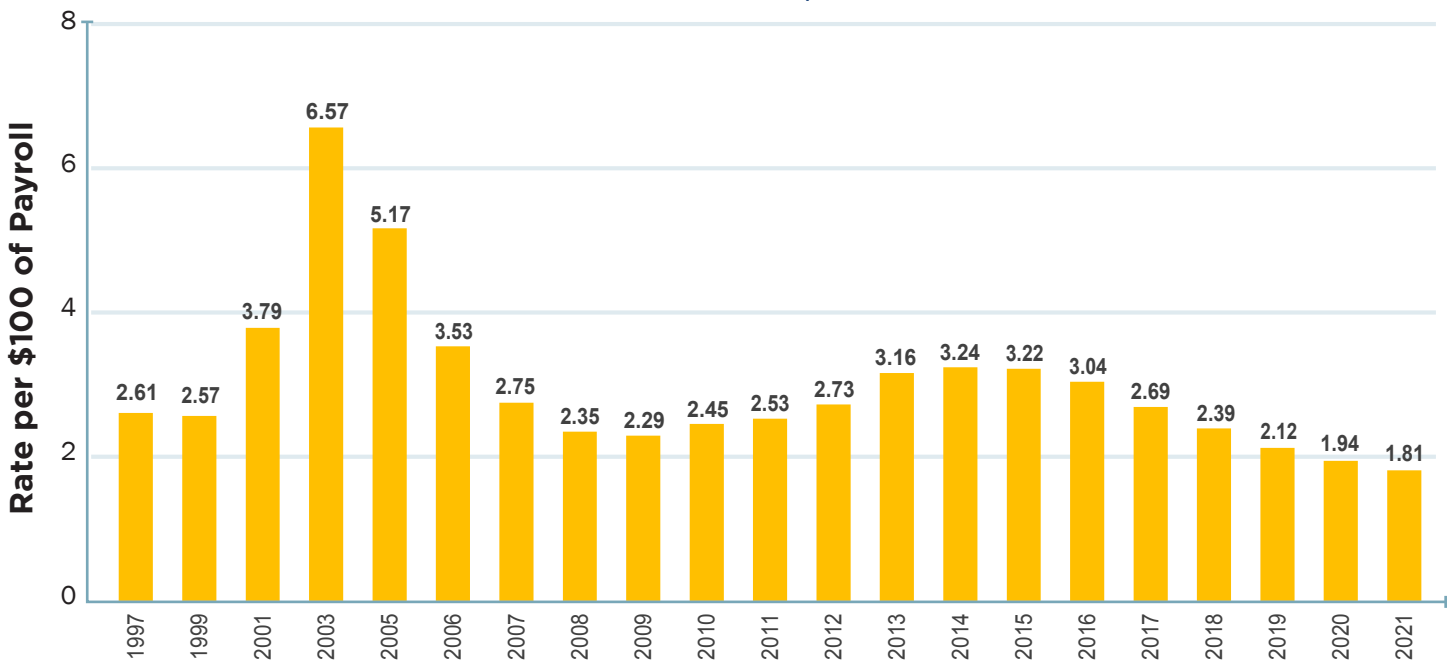
How rate decision affects your policy

Whether an employer's insurance rate stays the same, increases or decreases will depend on its claims history, industry and location. Some employers may still see rate increases if they've had claims, especially ones that require costly medical treatment.

If you are concerned about your workers' comp rates, please give us a call to discuss. ❖

AVERAGE CHARGED RATES ARE AT HISTORICAL LOWS

As of December 31, 2021



Source: Workers' Compensation Insurance Rating Bureau



COVID Guidance

Employee Testing Must Be ‘Business Necessity’

WITH COVID-19 cases spreading fast throughout the country in what experts say is the biggest surge since the pandemic started, employers who regularly test their workers may have to change their policies.

The Equal Employment Opportunity Commission in July issued new guidance for when employers can test their workers in order to comply with the Americans with Disabilities Act and other federal statutes. Employers will now only be able to test employees if they can prove that doing so is a “business necessity.”

This is a major change from the EEOC’s earlier guidance, which basically stated that any on-site employee testing was legal.

What Employers Will Need to Consider

- Community transmission levels,
- Current COVID-19 variants and how easily they are transmitted,
- Employees’ vaccination status,
- Working conditions, and
- The potential effects of positive cases on operations.

The guidance also recommends that employers considering testing take into account current guidance from the Centers for Disease Control and Prevention, the Food and Drug Administration, as well state and local health authorities.

You have leeway

The new guidance does not bar employee testing. Rather, under EEOC guidance:

“Employers can screen staff who come to work with COVID-19 symptoms or have been diagnosed with the coronavirus and are returning to work. And they can exclude from the workplace employees who test positive or exhibit COVID-19 symptoms.”

If a worker has been away from work after testing positive for COVID-19, the employer can require a note from a doctor confirming they can safely return to work.

Employers can screen job applicants who come for on-site interviews for COVID-19. If you go this route, you have to be consistent and screen all applicants coming for interviews and others who enter the workplace. It’s important that employers are consistent to avoid running afoul of discrimination laws.

If a job applicant tests positive, the employer has the right to withdraw the job offer if they need them to start immediately. It’s important that the employer needs the person to start immediately, and that remote work is not an option.

The takeaway

The new guidance is yet another legal hurdle for employers when it comes to dealing with COVID-19 in the workplace.

If you’ve been conducting worksite testing, you’ll need to revisit your policies and make sure they comport with the newly issued guidance. ❖