

**United States Department of Labor  
Occupational Safety and Health Administration**

**National Grain and Feed Association  
North American Millers Association  
Corn Refiners Association  
National Oilseed Processors Association  
Fertilizer Institute**

**Agricultural Retailers Association  
American Feed Industry Association  
Edible Oils Producers Association  
Pet Food Institute  
U.S. Poultry and Egg Association**

**Comments on**

**Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings  
Notice of Proposed Rulemaking**

**Docket No. OSHA-2021-0009; RIN 1218-AD39  
89 Fed. Reg. 70698 (August 30, 2024)**

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Via: <https://www.regulations.gov>

Douglas L. Parker,  
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200 Constitution Avenue NW  
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**Re: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings,  
89 Fed. Reg. 70698 (August 30, 2024); RIN 1218–AD39; Docket No. OSHA–  
2021–0009.**

Assistant Secretary Parker,

The National Grain and Feed Association, the Agricultural Retailers Association, the North American Millers Association, the American Feed Industry Association, the Corn Refiners Association, the Edible Oils Producers Association, the National Oilseed Processors Association, the Pet Food Institute, the Fertilizer Institute, and the U.S. Poultry and Egg Association (together “the Coalition”) respectfully submit the following comments in response to the Occupational Safety and Health Administration’s (“OSHA”) Notice of Proposed Rulemaking on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698 (August 30, 2024)(“proposed rule” or “proposed standard” or “proposal”).<sup>1</sup>

The Coalition represents industries and member companies dedicated to promoting worker safety. As such, the Coalition supports strongly OSHA’s goal of protecting workers from heat-related injuries and illnesses. It is with this dedication to promoting worker safety that the Coalition raises concerns with OSHA’s proposal, namely that the proposed rule exceeds OSHA’s legal authority, is overly broad, and potentially undermines the effectiveness Coalition members’ heat illness prevention programs already in place. Accordingly, OSHA should withdraw the rule, or alternatively, it should incorporate the suggested clarifications set forth in these comments.

## **I. About the Coalition**

### *a. National Grain and Feed Association*

The National Grain and Feed Association (NGFA), established in 1896, consists of grain, feed, processing, exporting and other grain handling companies that operate more than 8,000 facilities that handle grains and oilseeds. NGFA’s membership encompasses all sectors of the industry, including country, terminal and export grain elevators; commercial feed and feed ingredient manufacturers; biofuels producers; cash grain and feed merchants; end-users of grain and grain products, including processors, flour millers, and livestock and poultry integrators;

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<sup>1</sup> OSHA refers to the proposal throughout as the “proposed rule” or “proposed standard.”

commodity futures brokers and commission merchants; and allied industries. The NGFA also has a strategic alliance with the North American Export Grain Association and the Pet Food Institute. In addition, affiliated with the NGFA are twenty-seven state and regional grain and feed trade associations. Canadian firms also are NGFA members.

The NGFA, as the principal representative of the grain handling, feed manufacturing and processing industry, has been in the forefront of research, education and training designed to enhance safety in the grain handling, processing, and feed sectors. The industry is dedicated to pursuing and promoting technological innovations, new practices and safety training and education programs that contribute to safe and efficient grain handling operations. These programs are vital, first and foremost, to safeguard human lives. NGFA is committed to fostering safety, prior to and after the promulgation of OSHA's grain handling standard.

*b. Agricultural Retailers Association*

The Agricultural Retailers Association (ARA) represents agricultural retailers who supply farmers and ranchers with products and services. These products include seed, nutrients, crop protection products, feed, equipment, and technology. ARA members also provide consultative services such as crop scouting, soil testing, field mapping, custom planting and application and development of nutrient management and conservation plans.

Agricultural retailers' range in size from small, family-held businesses to large companies and farmer-owned cooperatives with many outlet stores. Large and small retail facilities are scattered throughout all 50 states and provide critical goods and services, as well as jobs and economic opportunities in rural and suburban communities.

*c. North American Millers Association*

The North American Millers Association (NAMA) represents millers of wheat, corn, oats, and rye across the continental United States, Puerto Rico, and Canada. Our members take raw grain and, through grinding and crushing, create flour and other products that are used to make favorite foods, such as bread, cereals, pasta, cookies, cakes, and snack foods.

NAMA members and the U.S. grain milling industry are committed to the safety and health of their employees. This commitment is demonstrated by the lack of heat related injuries and illnesses within the grain milling industry.

*d. American Feed Industry Association*

The American Feed Industry Association (AFIA) is the world's largest organization devoted exclusively to representing the business, legislative and regulatory interests of the U.S. animal food industry and its suppliers. Founded in 1909 as the American Feed Manufacturers Association, the name changed to the American Feed Industry Association in 1985 to recognize the importance of all types of companies involved in the feed manufacturing industry—from manufacturers of commercial and integrated feed and pet food to ingredient suppliers to equipment manufacturers. The AFIA is also recognized as the leader on international industry developments,

representing the industry at global forums, including within the International Feed Industry Federation.

AFIA's members include over 650 domestic and international companies, such as livestock feed and pet food manufacturers, integrators, pharmaceutical companies, ingredient suppliers, equipment manufacturers and supply companies that provide other products or services to feed manufacturers. Several state, national and regional associations are also AFIA members. The feed industry plays a critical role in the production of healthy, wholesome meat, milk, fish, and eggs and supports policies that uphold U.S. food and feed safety, ensure the proper nutrition of animals and protect the environment. More than 75% of the feed in the United States is manufactured by AFIA members. AFIA's members also manufacture approximately 70% of the country's non-whole grain ingredients, including soybean meal, distillers' co-products, vitamins, minerals, amino acids, yeast products and other miscellaneous and specialty ingredients.

*e. Corn Refiners Association*

The Corn Refiners Association (CRA) is the national trade association representing a full 100% of the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, advanced bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber. CRA is the proactive, nimble, highly effective, member-driven trade association representing corn wet millers. It advocates for science-based public policy and economically-sound decisions at the state, federal, and global levels. CRA approaches every new challenge with its members and their customers in mind, working to foster technological innovation, expand commercial opportunities, advance free trade, build the bioeconomy, and feed a hungry world.

*f. Edible Oils Producers Association*

Edible Oil Producers Association (EOPA) is the national trade association representing the refiners of edible fats and oils who produce in the United States, Canada, and Mexico. EOPA member companies refine both domestic and imported edible oils and fats, including, but not limited to canola, coconut, cottonseed, lard, olive, palm, palm kernel, peanut, safflower, sunflower, soybean, corn, tallow, and wheat germ. Formerly the Institute of Shortening and Edible Oils (ISEO), the organization has a long history of advocating uniquely for the food side of edible fats and oils, dating back to 1926.

EOPA represents refiners who produce 95% of the domestic edible fats and oils used in baking and frying, cooking and salad oils, margarines, spreads, confections, toppings, and are listed as ingredients in a wide variety of foods and beverages sold and served in the retail and food service industries. As such, EOPA is the voice of edible fat and oil refiners with government agencies, such as OSHA, and on Capitol Hill.

*g. National Oilseed Processors Association*

Organized in 1930, the National Oilseed Processors Association (NOPA) represents the U.S. soybean, canola, flaxseed, safflower seed, and sunflower seed-crushing industries. NOPA's membership includes 18 members that are engaged in the processing of oilseeds for meal and oil that are utilized in the manufacturing of food, feed, renewable fuels, and industrial products. NOPA member companies operate over 70 softseed and soybean solvent extraction plants across 21 states. NOPA members crush over 97% of all soybeans processed in the U.S. which equates to over 2 billion bushels annually.

For NOPA members, protecting their employees is at the core of everything they do. NOPA members remain committed to continuously improving their operations to provide the highest level of safety for their workforce. NOPA tracks OSHA regulations and industry standards to ensure its members have the tools they need to protect their number one asset – their employees.

*h. Pet Food Institute*

Established in 1958, Pet Food Institute (PFI) is the trade association and the voice of U.S. cat and dog food manufacturers. Our members account for the vast majority of the pet food and treats made in the United States, with more than \$64 billion in domestic annual dog and cat food and treats sales and annual exports of more than \$2.4 billion. PFI's members collectively contribute to rural communities' vibrancy by employing over 35,000 people in 34 states. Our membership also includes companies that supply ingredients, equipment, and services to dog and cat food makers. We are proud to be providing food for dogs and cats in over 82 million U.S. households.

*i. The Fertilizer Institute*

The Fertilizer Institute (TFI) advances policies to support the fertilizer industry by advocating for data- and science-driven policy solutions, promoting solutions to operate in a highly competitive global market, and championing regulatory certainty to stimulate energy resources and private capital investment. TFI advances the economic and reputational health of the fertilizer industry by advocating for the economic, environmental, and social benefits of fertilizer, promoting continuous improvement through education, research, and training and championing platforms for industry business development opportunities and solutions. TFI seeks to advance sustainable fertilizer production, distribution, and use by advocating for the 4R nutrient stewardship framework to improve farm performance and reduce nutrient loss, promoting pathways for industry innovation that result in positive environmental outcomes, and championing environmental and business performance throughout the industry supply chain

*j. U.S. Poultry and Egg Association*

Founded in 1947, U.S. Poultry & Egg Association (USPOULTRY) is the all-feather organization representing the complete spectrum of today's poultry industry, whose mission is to

progressively serve member companies through research, education, communication, and technical assistance.

Employee safety is a priority of USPOULTRY members. This is why USPOULTRY operates its “HR & Safety Program,” which supports the industry’s workplace safety efforts through technical services and education. As part of this effort, USPOULTRY develops industry-specific education and training programs and identifies and maintains technical resources addressing key industry issues. These resources help member companies improve operations, identify and reduce loss exposures and enhance employee safety and retention. USPOULTRY also oversees an awards program that seek to highlight employers continuously improving their safety performance through the establishment of sound safety and health programs as part of on-going efforts to reduce occupational injury and illness.

At USPOULTRY, employee safety extends beyond the workplace. Supporting a strong, safe, and healthy workforce is vital to maintaining a quality, wholesome food supply.

## **II. Executive Summary**

The shortcomings of OSHA’s proposed rule render the proposal unworkable, impractical, and constructed on dubious legal authority – not to mention counterproductive, in that it undermines existing heat-related safety programs. Accordingly, OSHA’s proposed rule will not actually promote worker safety.

As explained in further detail below, OSHA should withdraw or amend the proposed standard for the following reasons:

- The proposed rule exceeds OSHA’s legal authority. OSHA has not demonstrated that excessive heat presents a significant risk of material harm in the workplace and/or that the standard would substantially reduce or eliminate that workplace risk. Further, the proposal improperly seeks to regulate a non-occupational hazard. The Coalition supports OSHA’s goal of protecting employees from excessive heat in the workplace, but OSHA must operate within the legal parameters of its statutory grant of authority.
- The proposed rule’s “one-size-fits-all” approach is unworkable. The potential dangers posed by excessive heat vary greatly depending on the industry, the geographic location of the work, the time of year, the weather, the unique work being performed, and the underlying distinctive health characteristics of each and every worker. A one-size-fits-all standard applicable to general industry throughout the entire country is overbroad and unworkable. This is particularly true as applied to the unique services provided by the Coalition’s member companies.
- The proposed rule undermines existing heat-related safety programs. The Coalition’s member companies already have heat injury and illness prevention plans or otherwise take proactive steps to protect workers from excessive heat in the workplace. These plans and actions are specifically tailored for each geographic location and distinct worksite. Member companies know from experience the preventative actions that work best to protect their

employees while still ensuring the efficient operation of their businesses and serving local communities. Implementing the proposed rule would complicate and undermine these carefully tailored safety procedures.

- The proposed rule does not account for business needs. The proposed rule is divorced from the reality of the member companies' unique business operations. The myriad requirements elevate form over function and threaten to micromanage employers' work processes. The proposed rule also suffers from a lack of clarity that will create confusion for employers if/when they must take steps to come into compliance.

### **III. Workplace Safety is an Imperative for Coalition Member Companies**

Simply put, the Coalition's member companies do not have a significant number of heat related recordable events. This is because these companies promote worker safety, managing heat like all other conditions and potential hazards in the workplace. The industry has been successful in reducing risk with a proactive performance approach that varies greatly between industry, geographic location, the time of year, weather, and other conditions.

The great majority of member companies have developed heat-related workplace safety protocols that include education (recognizing signs and symptoms of heat illness, for example) and training (such as how to respond in the event of a heat-related emergency), already aligning with many of the recommendations in OSHA's Heat Illness Prevention campaign. Member companies also ensure that supervisors, employees, and contractors are all educated about good nutrition, proper hydration, and self-monitoring when working in hot conditions. For outdoor work, member companies ensure that employees have plenty of shaded areas or shelters in which to escape the sun. Frequent breaks are encouraged and cool drinking water is provided (some member companies provide ice pops). For indoor work, member companies provide air conditioning or cooling methods in breakrooms and control rooms, or otherwise allow for natural air flow, cooling fans, and local exhaust ventilation. Many use administrative controls to protect against excessive heat, such as modification of work schedules and activities, job rotation, frequent breaks, and adjustments to workloads.

While many member companies deploy similar safety measures, no two companies have the exact same heat injury and illness prevention plan. That is because member companies vary greatly from the work they perform to where they are located. But each member company knows from experience how best to protect their employees from the dangers of excessive heat while still attending to the needs of their business.

This is why Coalition member companies – particularly those who operate small businesses – are concerned that OSHA's "one-size-fits-all" proposed standard will be overly burdensome and less effective than the focused, tailored efforts already in place. OSHA should continue to address heat injuries and illnesses through appropriate guidance and local emphasis programs as necessary, rather than develop a new nationwide standard. Moreover, OSHA has authority through the General Duty Clause to address hazards associated with protecting workers from heat exposure both in indoor and outdoor work settings. Creating additional regulatory burdens is not likely to result in additional workplace safety with regard to heat related illnesses.

**IV. The Proposed Rule Does Not Establish that Heat is a “Significant Risk,” Improperly Seeks to Regulate Non-occupational Hazards, Raises Constitutional Concerns, and Does Not Establish that Increased Costs for Employers are Reasonable and Justified.**

- a. The Proposed Standard Fails to Provide Sufficient Evidence That the Same Heat Triggers Pose a “Significant Risk” to All the Employees Who Would be Covered by the Standard.*

Congress intended OSHA “to regulate unacceptably severe occupational hazards, and not ‘to establish a utopia free from any hazards’ or to address risks comparable to those that exist in virtually any occupation or workplace.” 81 Fed. Reg. 16286, 16290 (citing 116 Cong. Rec. 37614 (1970), Leg. Hist. 480-82).

Under section 3(8) of the OSH Act, standards must be “reasonably necessary or appropriate,” which the Supreme Court has construed to mean that OSHA must find that “significant risks are present and can be eliminated or lessened by a change in practices.” *Industrial Union Department, AFL-CIO v. American Petroleum Institute (“Benzene”)*, 448 U.S. 607, 642 (1980). As to what is a “significant risk” the Supreme Court explains that:

Some risks are plainly acceptable, and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it. Although the Agency has no duty to calculate the exact probability of harm, it does have an obligation to find that a significant risk is present before it can characterize a place of employment as “unsafe.”

448 U.S. at 655.

OSHA contends that heat levels at or above the initial heat trigger pose a significant risk of harm. But OSHA has not shown this to be the case. With a typical health hazard, OSHA has data showing ill effects at a certain threshold. For example, in promulgating the Hearing Conservation standard, 29 C.F.R. 1910.95, OSHA could point to data showing that exposure to a specific noise level over a typical work shift would result in hearing loss to a particular percentage of employees.

In contrast, it is not clear that heat, including at 80°F or 90°F, is alone hazardous for most people most of the time.<sup>2</sup> An employee’s response to heat is highly individualized and based on factors such as his or her health condition and his or her acclimatization.

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<sup>2</sup> Notably, most states have not adopted heat-illness regulations. Among the few states that have done so, there is little consistency. They use various temperatures as heat triggers, may apply only to workers in specific industries, may apply only to indoor or only to outdoor workers, and may include other limiting



OSHA does acknowledge a long list of individualized factors that affect an employee's risk for heat-related health effects. *Id.* at 70726-70728. These include variation of genotype, gene expression, and body mass; differences in thermoregulation between the biological sexes or as people age; pregnancy; health status including the presence of cardiovascular disease, diabetes, or obesity; the use of medications that reduce thermoregulatory functions; prior episodes of significant heat-related illness; recent or concurrent acute illness or infection such as upper respiratory infections and gastrointestinal infections; and the use of alcohol, caffeine, amphetamines, methamphetamines, and cocaine. *Id.*

Indeed, OSHA observes that “[a]nalyzes of occupational heat-related fatalities find amphetamines and methamphetamines to be an important risk factor.” *Id.* at 70728. OSHA explains:

In Lin et al.'s 2023 review of heat-related hospitalizations and fatalities documented through NIOSH Fatalities in Oil and Gas Database (2014–2019) and OSHA's Severe Injury Report Database (2015–2021), *50% of identified fatalities occurred in workers that had tested positive for amphetamines or methamphetamines after they died.*

*Id.* (emphasis added).

OSHA also explains that “observational evidence tends to show that elderly individuals, particularly those with co-existing chronic or acute diseases, are at highest risk for morbidity or mortality related to heat exposures, and that risk increases with age.” *Id.* at 70726. Yet, counterintuitively, other studies “of occupational populations often find that younger workers experience greater rates of heat-related illness than do older workers” and some commentators “suggest that this could be a result of a greater number of younger workers being employed in high-risk occupations. *Id.* at 70726-70727. Moreover, OSHA hypothesizes that “younger workers have less work experience, meaning that younger workers are less familiar with the heat risks associated with their jobs, how their body responds to heat, and/or how to respond if they experience symptoms of heat-related illness.” *Id.* at 70727.

Ultimately, OSHA concedes:

The evidence . . . demonstrates that there are numerous factors that can affect risk of heat-related illness (e.g., genetics, age, body mass, some chronic conditions, prescription medications and drugs). Because prevalence data show that a majority of working-age adults live with or experience at least one risk factor, these factors should be considered an important component of understanding how individuals can be at increased risk for heat-related illness. *OSHA acknowledges, however, that*

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factors. *See* 89 Fed. Reg. at 70707. The absence of consensus among state regulators over the existence of a significant risk of heat-illness at a specific temperature or in specific conditions is telling.

*for most of the described risk factors, the evidence is not robust enough to determine the full picture of how the factor impacts risk of heat-related illness or to establish the degree to which the risk factor contributes to overall risk of developing heat-related illness. There is also a lack of evidence evaluating the way in which multiple risk factors combine to affect risk of heat-related health outcomes.*

*Id.* at 70728. But OSHA downplays the potential link between employees' risk of heat-related illness and these individualized risks factors, including preexisting health conditions. It states:

[E]xposure to workplace heat contributes to heat stress for all workers and can be detrimental to workers' health and safety regardless of individual risk factors. OSHA is not suggesting that application of the proposed standard would depend on an employer's knowledge or analysis of these factors [that may exacerbate the risk of workplace heat-related hazards] for their individual workers. Nor do these individual risk factors detract from the causal link between occupational exposure to heat and adverse safety and health outcomes or an employer's obligation to address that occupational risk.

*Id.* at 70726.<sup>3</sup>

In asserting that heat-related illness poses a significant risk, OSHA states that its "analysis of BLS data indicated an annual average of 40 heat-related deaths (2011–2022) and 3,389 HRIs involving days away from work (2011–2020) among U.S. workers." 89 Fed. Reg. at 70767. OSHA also has calculated a "working lifetime risk of HRI estimate based on BLS's annual incidence estimates" of "135 cases per 100,000 workers." *Id.* at 70768.

But it does not appear that the studies and data upon which OSHA relies account for the individualized risk factors and health conditions of employees who suffer heat-related illnesses. As a result, OSHA's proposed standard, which would apply the same heat trigger requirements to nearly all employees in nearly all industries in all regions, is overbroad. That is, OSHA has failed to show that heat at a particular level is a significant risk to nearly all employees in nearly all industries in all regions irrespective of employees' individualized risk factors and health conditions. Indeed, OSHA has not shown that heat is the primary significant risk in many cases of

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<sup>3</sup> Yet OSHA simultaneously acknowledges individual variation among employees when it comes to the training requirements imposed by the proposed standard. For example,

Proposed paragraph (h)(1)(iii) would require employers to provide training on risk factors for heat-related injury or illness, including the contributions of physical exertion, clothing, personal protective equipment, a lack of acclimatization, and personal risk factors (e.g., age, health, alcohol consumption, and use of certain medications). As noted above, physical exertion, clothing, and personal protective equipment all increase an employee's heat load.

*Id.* at 70796.

apparent heat-related illness as opposed to an employee's other risk factors, such as cardiovascular disease, diabetes, and so on.

[B]efore promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But “safe” is not the equivalent of “risk-free.” There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities “unsafe.” Similarly, a workplace can hardly be considered “unsafe” unless it threatens the workers with a significant risk of harm.

*Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980).

Here, the data upon which OSHA relies does not to meet OSHA's burden of showing heat threatens nearly all employees everywhere with a “significant risk” of harm.

*b. The Proposed Standard Improperly Seeks to Regulate Non-Occupational Hazards.*

To the extent the proposed standard addresses outdoor workers and any other workers who are exposed to heat that has as its source the weather, the proposed standard attempts to regulate, in part, ordinary conditions of everyday life and not occupational safety and health risks.

In this regard, OSHA's proposed standard is similar to the agency's COVID-19 vaccine mandate. *See National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 595 U.S. 109 (2022). The Supreme Court found that the vaccine mandate, issued in response to the COVID-19 pandemic, was akin to a *public health* measure and was not a *workplace safety* standard. *Id.* at 117. The Court explained:

Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

*Id.*, at 118.

Here, weather-related heat is more ubiquitous than COVID-19. In almost all regions of the country, throughout history, weather-related heat has affected everyone at one time or another, including “at home, in schools, during sporting events, and everywhere else that people gather.” *Id.* Weather-related heat can affect children playing outdoors, youth and adults participating in outside athletic or scouting activities, homeowners mowing their lawns, hikers traversing the Grand Canyon, and vacationers sunbathing at the beach, among a nearly infinite variety of other

situations. Weather-related heat is thus a “kind of universal risk” that is “no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” *Id.*

Based on the Court’s decision in *NFIB v. OSHA*, there is a serious question whether OSHA is authorized “to regulate the hazards of daily life” like weather-related heat “simply because most Americans have jobs and face those same risks while on the clock.” *Id.* This is especially true with respect to a broad regulation like the proposed standard, which applies to nearly all employers and workers in nearly all industries in all regions of the country.

Where a regulation expansively covers a “day-to-day danger” like COVID-19, which is a risk that is in no way distinct to workplaces or employment, the question arises whether the regulation can be considered “occupational.” *Id.* at 118-119. This is in contrast to regulations that narrowly target “occupation-specific risks.” *Id.* With respect to COVID-19, the NFIB Court explained:

Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face. OSHA’s indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.”

*Id.* at 119.

Here, too, the proposed standard fails to distinguish “between occupational risk and risk more generally” when it comes to weather-related heat.<sup>4</sup>

*c. The Proposed Standard, if Adopted, Will Increase the Risk the OSH Act Will be Found Unconstitutional.*

OSHA’s authority to enact and enforce workplace safety standards that it deems “reasonably necessary or appropriate to provide safe or healthful employment and places of employment,” 29 U.S.C. §§ 652(8), 655(b), may violate the non-delegation doctrine under the United States Constitution. *See Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490 (2024) (Thomas, J, dissenting from the denial of certiorari). As Justice Thomas observed, “[the OSH Act] may be the broadest delegation of power to an administrative agency found in the United States Code.” *Id.* at 2491. There is a substantial question whether the OSH Act’s “broad authority

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<sup>4</sup> Indeed, there are some regions of the country in which ambient temperature may exceed 80°F much of the year. When people spend much of their day-to-day lives at or above the proposed standard’s initial heat-trigger, it is contrary to common sense to believe that temperature could be deemed a significant risk.

is consistent with our constitutional structure.” *Id.* See also Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008).

Notably, the more aggressive OSHA is in issuing standards the necessity and appropriateness of which are arguable and marginal, as is the case with the proposed standard, the greater the risk that the OSH Act and OSHA will be found unconstitutional. *Id.* at 1447-1448. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (“If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional under the Court’s reasoning in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539, 55 S.Ct. 837, 847, 79 L.Ed. 1570, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446.”).

The question of the OSH Act’s constitutionality under the non-delegation doctrine is destined to become more pointed following the Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2254, 219 L. Ed. 2d 832 (2024). *Loper Bright* overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), under which courts were required to defer to an agency’s permissible construction of a statute that is “silent or ambiguous with respect to the specific issues” at hand.

*Chevron* was decided in 1984, just fourteen years after the OSH Act’s enactment. For the past forty years, and for the majority of the OSH Act’s existence, OSHA has benefited from *Chevron* deference. Following the fall of *Chevron*, courts will now be called upon to exercise their independent judgment in deciding whether OSHA has acted within its statutory authority and without deference to the agency’s interpretation of the OSH Act. In coming years, courts will be more closely scrutinizing the ambiguous and broad provisions of the OSH Act.

In light of *Loper Bright* and the likelihood courts will increasingly confront non-delegation issues related to the OSH Act, it would be prudent for OSHA to avoid overreaching. See Sunstein at 1448 (noting one way to avoid the OSH Act’s constitutional problems might be “to parse the statutory language to create floors and ceilings on agency action,” such “that the agency may not regulate trivial risks (as held in *American Petroleum*), ignore significant risks, or regulate beyond the point of feasibility”).

The proposed standard does the opposite. Rather than represent a constrained effort to regulate a clearly significant risk well within the standards of feasibility, the proposed standard pushes OSHA’s delegated authority to the maximum extent, raising numerous questions about whether the risks OSHA seeks to regulate are significant and whether the requirements it seeks to impose on nearly all employers are economically feasible. The proposed standard will inevitably invite scrutiny not only of the viability of the standard itself but also the constitutionality of the OSH Act as a whole.<sup>5</sup>

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<sup>5</sup> Notably, Congress has repeatedly failed to enact the Asunción Valdivia Heat Illness and Fatality Prevention Act. That bill would have directed OSHA to promulgate a standard that requires employers to implement certain measures for protecting workers from heat stress and related illnesses or injuries.

**V. The Proposed Standard Presents Implementation Challenges and Would Potentially Undermine Existing Heat Safety Plans.**

*a. Indoor and Outdoor Heat Monitoring and Work Area Controls.*

Proposed subsection (d), “Identifying heat hazards,” outlines employers’ obligations to monitor temperatures in both outdoor and indoor work settings. The Coalition understands that employers must be aware of both outdoor and indoor temperatures to keep employees safe from workplace heat. However, the specific requirements of the proposal raise implementation questions for the Coalition.

i. Outdoor Work

First, the proposal would require employers to monitor “with sufficient frequency” employees’ exposure to heat in *outdoor* work settings. For Coalition member companies that operate retail facilities, it is not clear whether OSHA considers outdoor monitoring a requirement when there is no reasonable expectation of exposure at or above the initial heat trigger (e.g., when most retail employees are working inside). Additionally, OSHA should modify the proposed standard to allow retailers to forego monitoring and simply assume that the heat index will be 80° or 90° F when indicated by the National Weather Service or OSHA-NIOSH Heat Safety Tool cell phone application. These options are indicated in the preamble of the proposal but should be included in any final regulation.

Second, Coalition members are concerned that both of the compliance options – tracking local heat index forecasts or taking frequent on-site measurements – will unduly interfere with their member companies’ business operations. Take on-site measuring, for example. The preamble states that employers who choose on-site measuring “would need to set up monitoring devices at or as close as possible to the work area” and this likely means “setting up the device(s) on a tripod a few yards away from an employee.” These employers will also “need to develop a reasonable measurement strategy that is adapted to the expected conditions.” To take measurements, employers would need to “either use heat index monitors or measure temperature and humidity with separate devices” or, if using WBGT, “take into account differences in solar radiation and wind between work areas when deciding whether a single measurement could be used for multiple work areas.”

Performing these frequent and detailed measurements will obviously limit and interfere with necessary work that must be performed.<sup>6</sup> This is especially problematic for small businesses. OSHA, on the other hand, maintains that performing these measurements “will take the designated person 1 minute each time they measure the heat index or ambient temperature and humidity.” The Coalition disagrees with OSHA’s time assumption. First, OSHA provides no basis for this assumption. Second, OSHA does not account for the time that it might take to physically walk over to the monitoring device or fix or recalibrate the monitoring device. OSHA also fails to

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<sup>6</sup> OSHA should not specify an interval for frequency of monitoring for either indoor or outdoor work settings as this would intrude too much on employer operations.

account for how this monitoring requirement will be disruptive to workflow, as not all workplace tasks can be simply paused and recommenced with no additional accumulation of time (e.g., machines need to power off and on, the designated monitor might have to don/doff PPE or descend/ascend a ladder).

Indeed, many member companies operate locations that may only have two or three employees on-site at any given time. For example, various members of the Coalition have crews of no more than three employees that work frequently outdoors catching poultry. Often, multiple crews spread out across the countryside working at various farms throughout a single day. The crews' working at each of these farms can take multiple hours. Assigning one of these employees to continuously monitor temperatures would severely detract from their ability to perform their primary duties, thereby reducing overall productivity. In turn, this requirement would also increase operational costs, which would likely be passed on to consumers.<sup>7</sup>

For employers who might think that tracking local heat index forecasts might be an easier way to comply with this provision, language in the preamble may cause them to think twice.

If, for example, the employer consulted the OSHA-NIOSH Heat Safety Tool before the work shift and it indicated that the heat index would exceed the initial heat trigger but not the high heat trigger during the last four hours of the work shift, the employer would need to either: (1) implement control measures in accordance with paragraph (e) for those four hours, or (2) consult the Heat Safety Tool again later in the day and implement control measures in accordance with paragraph (e) only for the hours during which real-time conditions reported by the application exceed the initial heat trigger (which may be more or less than four hours if the forecast earlier in the day underestimated or overestimated the heat index). However, if the employer consulted the OSHA-NIOSH Heat Safety Tool before the work shift and it indicated that the heat index would be close to the initial heat trigger but not exceed it, employers would need to check the forecast again later in the day to determine whether the trigger was exceeded. Employers would need to use short-term forecasts (i.e., hourly) rather than long-term forecasts (e.g., weekly, monthly) to comply with proposed paragraphs (d)(1) and (2).

This is a complicated formula that will be difficult for employers to understand, especially for an option that is supposed to have a "minimal" impact on the designated monitor's time. Any final regulation should provide employers assurance that OSHA will not seek citations in the event the employer relies on local forecasts but is reasonably delayed in re-consulting forecasts as the weather changes throughout the day.

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<sup>7</sup> Many of these crews are required to operate fans across the barn they are working at to ensure appropriate temperature and monitor noise changes to ensure appropriate environments for the chickens. This process is already heavily controlled to ensure the safety of the chickens as well as the employees.

ii. Indoor Work

For indoor work, the proposed standard requires employers to identify work areas where there is a reasonable expectation that employees are or may be exposed to heat. Once such areas are identified, the proposal then requires employers to “develop and implement a monitoring plan” covering these areas and subsequently monitor the temperature “at or as close as possible to the work area(s).” Coalition member companies have already taken steps to protect employees from radiant heat generated by indoor machinery and operations (such as insulating hot equipment). Where existing hazards have been identified and addressed, OSHA should allow employers to continue their current safety protocols without additional administrative or substantive requirements.

Further, it may be especially challenging for Coalition member companies to ascertain where these “hot” areas begin and end as part of a larger industrial structure. Many of these companies maintain large industrial plants that include tens of thousands or hundreds of thousand square feet of floor space, and six or seven digit cubic feet totals when areas with high ceilings are included. Some facilities require a very small number of operators who work through a very large facility, with multiple floors, multiple buildings, and other areas. In certain times of the year in certain geographic locations, these “indoor” facilities feel very much like the “outdoors.” Temperature controls may not be feasible in these facilities because they are designed to be open or partially open to the outside. Specifically, Coalition members have loading areas in their facilities that are not fully under the air conditioned control used across the rest of the facility. Employees will work indoors with the loading doors open, but this will lead to temperatures vacillating throughout a shift. This setting creates a moving target for employers to hit in order to comply with the proposed rule. Moreover, installing air conditioning in these work areas would not be physically possible, would be cost prohibitive, and could have a negative impact on both dust control and suppression, as well as the integrity of the bulk commodities that some member companies store.<sup>8</sup> The proposed standard does not offer employers operating these types of businesses sufficient clarity regarding their monitoring obligations in these situations.

The proposed standard also fails to understand the nuances between climate monitoring requirements Coalition members must deploy for safety and integrity of their products, and the potential safety requirements applicable to employees. In the preamble, OSHA refers to a variety of studies based on cooling controls in dairy barns to support the use of fans as a useful means of cooling indoor workplace environments. OSHA attempts to use these studies to demonstrate that while not directly applicable to the reduction of heat related illness in humans that “this research provides insight into the extent to which industrial fans can be installed in large barn or warehouse-like structures.” But rather than supporting OSHA’s proposition that the use of indoor cooling

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<sup>8</sup> The presence of fans or blowers could exacerbate the risk of dust explosions, making it a less viable option for ensuring worker safety. OSHA acknowledges this issue in the preamble by admitting that fan use can be an effective tool at reducing heat stress, but “fans may [also] introduce additional hazards in some workplaces due to the increase in air movement.” Specifically, OSHA acknowledges that in indoor settings where air contamination is a concern, the use of fans may interfere with existing ventilation and increase worker exposure to hazards.



controls such as fans is an easy “fix” for employers, to the contrary, these studies demonstrate how difficult it will be to apply the proposed standard in the poultry and livestock industries.

For example, the 2012 *Calegari et al.*, study notes that using fans and water misting devices reduces heat stress and improves comfort amongst cows. OSHA attempts to offset this complexity by stating that “[t]he authors noted that fans were also easier to personalize cooling by directing air flow towards specific workers, rather than cooling an entire area; they could be transported to remote workspaces and could be used both during work and at specific cooling areas where workers take intermittent cooling breaks.” (citing to Morris et al., 2021). But fans used for production needs relating to poultry and livestock cannot simply do “double duty” as fans that might be deployed to help cool workers:

- How can employers properly ensure gradual temperature changes needed to avoid stress in chickens?
- How do employers use fans to ensure adequate ventilation to remove excess heat, humidity, and harmful gases like ammonia? Ventilation can be a part of environmental heat control, but drafts created from fan ventilation should be minimized in livestock collection as they can create a direct impact on certain livestock.
- Are employers able to use fans or other cooling devices that might be less effective on a cooling front in exchange for minimal sound? Sound can have a direct impact on how livestock collection can successfully occur.

Any final regulation must demonstrate a better understanding of the workplaces which it will cover.

Further, OSHA should refrain from requiring employers to make additional investments in workplace controls to moderate heat.<sup>9</sup> The preamble states, “OSHA understands that effective control methods can vary based on workspace circumstances and the nature of the heat source and is therefore giving employers options regarding indoor work area controls.” Any final regulation should expressly preserve this flexibility for employers.<sup>10</sup>

Beyond the basic monitoring obligations, the requirement in subsection (i) for employers to “have written or electronic records” of indoor temperature measurements and retain those records for six months will necessitate the development of data collection and storage mechanisms, both of which will be costly. The preamble acknowledges that investment in new hardware will

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<sup>9</sup> OSHA should not establish specifications related to monitoring devices nor should OSHA specify a permissible accuracy level for monitoring devices. As discussed, Coalition member companies know how to keep their employees safe from workplace heat. Meddling in the minute details of device specifications and calibrations will not increase or strengthen worker protection and would be overly intrusive, and inevitably, costly.

<sup>10</sup> OSHA should not specify an interval for frequency of monitoring for either indoor or outdoor work settings as this would intrude too much on employer operations without strengthening worker protection.

likely be required, stating that “[t]here are several commercially available heat monitoring devices that are capable of maintaining electronic logs of recorded measurements for six months.” OSHA also claims that an appropriate monitoring/logging device would cost \$99. However, it does not account for the fact that employers would likely need multiple monitors, many employers have multiple locations, and the devices would eventually need to be repaired or replaced. This would result in costs far exceeding \$99 across hundreds of operating units and thousands of crews. In addition, OSHA fails to explain how maintaining temperature measurement records protects employees from high heat. Instead, OSHA’s inclusion of this provision seems intended to provide an additional way to issue citations alleging violations of the standard even when employees are not exposed to an actual hazard.

*b. Heat injury and illness prevention plan – Heat Safety Coordinator.*

The proposed rule would require employers to “designate one or more heat safety coordinators to implement and monitor the HIIPP.” The Coalition understands that, pursuant to the preamble, the heat safety coordinator “could be a supervisor or an employee” and that employers will not be required to hire new individuals to fill the proposed role. Still, OSHA should provide further guidance as to who may fill this role. Other questions about this provision include the following:

- Can the coordinator be someone in the human resources department or corporate office, or does the role need to be filled by someone who has more frequent and direct interaction with employees?
- Another problem resulting from the lack of clarity surrounding the role of the heat safety coordinator concerns employee scheduling and attendance. Does a heat safety coordinator need to be present for every shift? Must employers designate multiple heat safety coordinators in that case? If there must be a heat safety coordinator with every group of workers, then the logistics and costs of training these individuals would become highly problematic. What if the heat safety coordinator is out sick or on vacation? Are employers required to have a “backup” heat safety coordinator?
- Regardless of who is the heat safety coordinator, the Coalition is concerned that any duties thrust upon this individual could potentially distract from the completion of safe and successful work.
- OSHA should clarify that the role of heat safety coordinator should not be an indicia of supervisor status under federal law.

If the final rule retains the requirement to designate a heat safety coordinator, OSHA must provide employers with more guidance as to the requirements of the role.

*c. The Rest Break Requirements Are Unclear, Ignore the Realities of Business Operations, and Raise ADA Concerns.*

As emphasized above, Coalition member companies take important steps to protect their employees from excessive heat in the workplace, such as providing access to air-conditioned break rooms and cool drinking water. Coalition member companies know from experience how to ensure their employees' safety by allowing needed breaks while maintaining business operations. The Coalition is concerned that the lack of clarity and flexibility surrounding the "if needed" and mandatory break requirements starting at the initial 80°F heat trigger could disrupt employee scheduling and workflow without increasing worker safety.

According to the proposal, at the initial 80°F heat trigger, employers must provide employees rest breaks "if needed." These paid "if needed" rest breaks must be permitted and "encouraged" at the initial heat trigger. When the heat index reaches 90°F or higher, employees must be given a mandatory 15-minute break every two hours. While the proposed regulation clearly requires "breaks" in these two situations, OSHA does not define what that means, demonstrating OSHA's lack of familiarity with the day-to-day operations of member companies.

Unfortunately, the inflexibility of the proposed standard does not allow employers to manage employee heat breaks while minimizing impacts on operations. For example, the proposed standard does not permit the time spent donning and doffing this additional layer of PPE as counting toward the break, which will present a time-management challenge for employers if the proposal is finalized as written. Some workplace tasks cannot simply be paused at the end of the day and recommenced the following morning. In these situations, mandatory and "if needed" rest breaks will inevitably prolong work and delay project completion. The longer the project takes, the longer employees may be exposed to heat and other unsafe conditions. The proposal does not account for the real-life cadence of work completion. The Coalition encourages OSHA to consider ways to ease compliance burdens for employers engaging in this unique line of work.

Finally, contrary to OSHA's language in the preamble that relies on academic studies, the Coalition is concerned, based on their member companies' lived experiences, that some employees will abuse the "if needed" break requirement. OSHA should therefore provide employers with flexibility with regard to how they may address situations in which an employee takes multiple and repeated "if needed" breaks throughout their shift. Specifically, OSHA should explain when this repeated break use can be an indication that the employee is not able to do the work assigned or that the interactive reasonable accommodation process under the Americans with Disabilities Act (ADA) should be invoked. Such a situation would also reveal a general underlying flaw in OSHA's premise to regulate workplace heat: workers bring with them to the workplace their own individual underlying health characteristics, lifestyle routines, and exercise habits. A worker who has a heart condition, or who is a heavy smoker, or who is hungover, or who perhaps just over-exerted him/herself at the gym prior to the start of their shift are all going to have different risk profiles when it comes to heat in the workplace.<sup>11</sup>

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<sup>11</sup> Employers must have more flexibility than is currently afforded by the Equal Employment Opportunity Commission's (EEOC) "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act." Pursuant to the ADA's prohibition on health-related inquiries, this guidance prohibits employers from adjusting work tasks to take into account personal conditions such as age,

*d. The Proposal's Shade and Water Requirements Need Clarification.*

The proposal also requires employers to provide shaded or air-conditioned break areas that can accommodate all employees on break. According to the proposal, employers may offer “artificial shade (e.g., tent, pavilion) or natural shade (e.g., trees), but not shade from equipment, that provides blockage of direct sunlight and is open to the outside air.” The prohibition on “shade from equipment” raises questions for member companies whose work crews use heavy equipment and large vehicles that provide shade comparable to trees.

The preamble takes steps towards answering these questions, but falls short. The preamble states, “OSHA is not allowing the use of equipment used in work processes, such as tractors, for shade due to the risk of accidental run-overs caused by the start-up and movement from operators who are not aware of the presence of workers nearby.” The preamble further draws an important distinction between “equipment” and “vehicles” and acknowledges “that in some mobile outdoor work environments shade structures may not be practical and employers may wish to utilize the flexibility of shade provided by large vehicles that are already on-site.” OSHA then concludes, “[L]arge vehicles such as trucks and vans which are used to transport employees or goods to the work site, but not as part of the work itself could be used as shade as long as the vehicle is not running.”

Thus, OSHA prohibits using equipment involved in work processes for shade but permits using vehicles such as vans or trucks for shade. Any final regulation should clearly establish in the regulatory text itself that vans or trucks may be used as shade. This clarification should not be buried in the preamble and would be an easy fix to the regulation. Furthermore, OSHA should consider allowing employers to use equipment to provide shade as long as certain protocols are followed to ensure worker safety.

Proposed paragraph (e)(2)(ii) would require that employers provide access to potable water that is “suitably cool.” The preamble notes that the temperature of drinking water impacts hydration levels, as cool or cold water has been found to be more palatable than warm water, thus leading to higher consumption of cool water and decreased risk of dehydration. The preamble further highlights evidence demonstrating that cool fluid ingestion has beneficial effects for reducing heat strain. The requirement that drinking water be “suitably cool” is consistent with OSHA’s existing field sanitation standard (29 CFR 1928.110(c)(1)(ii)) and with California's heat standard for outdoor workplaces. OSHA has previously stated that to be suitably cool, the temperature of the water “must be low enough to encourage employees to drink it and to cool the core body temperature.” Employers could comply with this provision by providing drinking water from a tap or fountain that maintains a cooler temperature, providing water in coolers or by providing ice or ice packs to keep drinks cool. OSHA should refrain from setting a required temperature range for water required to be supplied to employees at the initial high heat trigger. Nor should OSHA require the provision of electrolyte supplements/solutions in addition to water.

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body-mass index, morbidities and medications. In this way, the EEOC guidance makes it harder for employers to adequately protect employees from heat. OSHA should consult with EEOC to seek ways of easing a difficulty that employers encounter when seeking to protect their employees from heat.

These problems could be resolved in any final standard by permitting employers with existing heat safety programs to continue their current break policies.

e. *Acclimatization (for new and returning employees).*

The proposed rule outlines acclimatization protocols for both new and returning employees, as OSHA asserts that “evidence indicates that new and returning employees are at increased risk for HRIs [heat-related illnesses and injuries].” Employers would have two options for acclimatizing new or returning employees. The first option is to initiate the “high heat trigger” (heat index at or above 90°F) protocols, even when temperatures are at or above the lower “initial heat trigger” (heat index at or above 80°F). The second option is for employers to gradually expose the employee to heat over three days (for returning employees) or four days (for new employees). The proposal establishes strict percentages for this “normal work shift exposure duration.” There is an exception from acclimatization “if the employer can demonstrate the employee consistently worked under the same or similar conditions as the employer's working conditions within the prior 14 days.”

These two proposed acclimatization options will be administratively difficult to implement. For member companies, experience demonstrates that regular work breaks and other administrative controls that are specifically tailored to the individual employer are effective in acclimatizing new or returning employees.

The proposed standard also does not properly account for changes in the weather during a new employee's acclimatization process. For example, what if an employee is gradually acclimatizing and it is 85°F on the first two days but dips to 75°F on the next two days? Under the proposed standard, would the acclimatization process have to start over? Another example is when the heat index trigger is not sustained for the entire workday. A day may start below OSHA's initial heat trigger, rise above it briefly between 12 pm to 2 pm, and then dip back below. This temperature fluctuation occurs frequently across crew sites.

To account for changes in the weather, the preamble offers a complicated compliance scheme:

Additionally, if the temperature of the work site fluctuates such that the initial heat trigger is only exceeded for a portion (e.g., 2 hours) of the work shift on some or all of the days during the initial week of work, employers choosing Option A would only be required to implement the requirements of paragraph (f) during those time periods. If they choose the gradual heat exposure option for acclimatization, employers would need to coordinate the employees' heat exposure for those days with the parts of the day that are expected to meet or exceed the initial heat trigger.

Again, the proposed micromanaging of employers' workday routines would be overly burdensome and would threaten to delay the completion of the important work performed by the Coalition's member companies without strengthening worker protections. Any final regulation, should it have any acclimatization provisions, should be clearer and more streamlined.

Finally, pursuant to paragraphs (e)(7)(i) and (ii) the requirements would not apply if the employer can demonstrate the employee consistently worked under the “same or similar conditions” as the employer's working conditions within the prior 14 days. What working conditions are the “same or similar?” For a member company located in the Southwest that operates primarily outdoors, would a new employee coming from the Southeast who worked for a roofing contractor need to be acclimatized? Or are those conditions the “same or similar?”

OSHA attempts to answer these questions in the preamble, stating, “Same or similar conditions means that new employees must have been doing work tasks that are similar or higher in level of exertion to the tasks that are required in the new job and that they conducted these tasks in similar or hotter heat conditions than the new job.” OSHA then describes some complicated and hair-splitting examples for how employers may determine “if tasks the employee conducted in the past two weeks were similar or higher in level of exertion to the tasks that are required in the new job:”

For example, picking tomatoes and picking watermelons would generally not be considered similar tasks because of the heavier weight of the watermelons. However, picking tomatoes and picking cucumbers could generally be considered similar tasks if other job conditions are similar. Installing telephone wires on poles and laying out communication wires in a trench dug using machinery would generally not be considered similar to laying out communication wires in a trench dug manually because of the greater work intensity involved with digging a trench manually. Laying communication wire in a pre-dug trench and conducting inspections on the ground might be considered similar tasks if both tasks primarily involve walking. Landscaping work involving weeding and laying out mulch versus hand digging trenches for drainage systems would generally not be considered similar tasks because of the greater work involved in digging trenches. However, hand digging trenches for drainage and hand digging holes to install trees and shrubs could generally be considered similar tasks if those are the primary tasks performed throughout the workday.

These examples are hard to understand and draw the lines of distinction too finely. Indeed, it is difficult to picture an employer parsing through this and coming away with a clear picture as to what “same or similar conditions” means. The difficulty of implementing the two acclimatization options or availing oneself of the exemption is indicative of the challenging nature of the underlying requirement. If OSHA finalizes this acclimatization requirement it should do so in a simpler streamlined way that makes it easier for employers to understand and comply.

*f. Observations for Signs and Symptoms.*

At the high heat trigger, the proposal would require employers to implement either: (i) a mandatory buddy system where co-workers observe each other, or (ii) provide observation by a supervisor or heat safety coordinator, with no more than 20 employees observed per supervisor or coordinator. Additionally, the proposal mandates a two-way communication system for employees working alone, with contact required at least every two hours. General observation of employees’

and colleagues' health and well-being is common sense, and the Coalition understands the importance of leveraging supervisors and team members to prevent heat-related hazards. However, the Coalition has concerns about how this requirement will be implemented in the workplace.

Setting this observational requirement in a workplace standard is an inappropriate attempt to codify human behavior—such as the day-to-day observation of co-workers and social interactions—into an enforceable obligation. Employees are not robotic cameras that can infallibly detect and diagnose their co-workers' health issues. Some people are simply more observant than others. Supervisors and workers might be particularly attentive to their co-workers one day but preoccupied or distracted by other matters the next. Symptoms might present differently depending on the individual worker and the circumstances. Symptoms such as dizziness, sweating, or nausea could result from something entirely unrelated to heat stress. Some employees, especially those who are shy, might be reluctant to approach a co-worker experiencing symptoms or notify a supervisor. Others might view the requirement as an invasion of their co-workers' privacy. Certain tasks might require intense concentration, making employees less observant of their fellow workers.

OSHA must remember that member companies' employees are not medical professionals. Supervisors, heat safety coordinators, and employees should not be involuntarily “deputized” as medical professionals with expertise in identifying and treating the signs and symptoms of heat-related illness. Observation for signs and symptoms of heat-related illness should be characterized as guidance or a best practice, rather than an enforceable requirement.

*g. Review and Update of HIIPP/Re-training.*

The proposal would require employers to “ensure that each employee promptly receives, and understands, additional training whenever . . . A heat-related injury or illness occurs at the work site that results in death, days away from work, medical treatment beyond first aid, or loss of consciousness.”<sup>12</sup> This requirement misunderstands the purpose of the proposed HIIPP and is fundamentally impractical.<sup>13</sup>

Just because an employee suffers a heat-related injury or illness does not mean the employer's HIIPP is insufficient or otherwise out of compliance. To the contrary, when an employee receives medical treatment due to heat illness, this demonstrates that an employer's HIIPP is effectively working in that a co-worker or a supervisor recognized the signs and symptoms of heat illness, called for help, and took steps to treat the worker. If, for example, a supervisor notices that an employee is demonstrating signs of heat stress and the employee ultimately needs an IV to re-hydrate, this is evidence of a well-maintained and executed HIIPP. On top of this, the proposal does not explain how the supplemental training requirement makes workers safer in this example.

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<sup>12</sup> The term “work site” is defined in the proposed standard as “a physical location (e.g., fixed, mobile) where the employer's work or operations are performed.” This could be construed to mean one particular facility in a larger employer's multi-facility network, or the entirety of the employer's operations.

<sup>13</sup> OSHA should also only require employers to conduct a review of their HIIPP every other year. According to OSHA's own estimates, this will save employers \$86 million annually.

The fact that OSHA views all medical treatment or lost-time cases as indicating that an employer's HIIPP is inadequate is disappointing and discouraging. This is particularly true given the significant evidence OSHA cites establishing that personal medical conditions, medications, age, physical fitness, and other factors play an outsized role in causing heat illnesses. Rather than signaling an insufficient program, the fact that an employee recognizes that he/she needs help or a supervisor/co-worker recognizes the same thing is a sign that the employer's HIIPP is working to prevent serious illnesses.

*a. Heat Illness and Emergency Response Planning.*

Employers would be required to develop a "heat emergency response plan" that includes a list of emergency phone numbers (e.g., 911, emergency services); a description of how employees can contact a supervisor and emergency medical services; identifies individual(s) designated to ensure that heat emergency procedures are invoked; how to transport employees to a place where they can be reached by an emergency medical provider; and directions to the work site. As part of their existing efforts to keep employees, customers, and vendors safe from workplace hazards, many Coalition member companies already have emergency response plans in place and understand the need for advance planning for emergencies. However, the proposed "heat emergency response plan" raises more questions than answers and potentially poses compliance challenges for employers.

First, for member companies working remotely in urban areas, cell phone reception and easy access to emergency medical personnel, may be limited. In these cases, OSHA should offer employers an alternative method of compliance.

Second, pursuant to this proposed subsection, when an employee experiences signs and symptoms of heat-related illness, the employer must: (i) relieve them from duty; (ii) monitor them; (iii) ensure they are not left alone; (iv) offer them on-site first aid or medical services before ending monitoring; and (v) provide them with the means to reduce their body temperature. Member companies have concerns that these steps over-simplify their own experiences with addressing hazards in the workplace. For example:

- What if the employee exhibiting signs of heat-related illness refuses any of these action steps? OSHA should provide guidance to employers regarding their obligations in such a situation.
- The proposal does not indicate when the employee is permitted to return to work. Must all five action steps be completed before the employee returns to work? Or, for example, after being relieved of duty and taking a break, can the employee immediately return to work if he/she states that they feel better? Does it depend on the type of work the employee performs or where the work is performed (e.g., indoor, or outdoor)?

As part of their emergency response plan, the proposal will require all employers to have available means by which they can cool employees' body temperatures. To do this, the preamble recommends that employers have tubs of ice/cold water in which to immerse employees. The



preamble also recommends, when these tubs are not available, “ice sheets” (i.e., bed sheets soaked in ice water), and the tarp-assisted cooling oscillation (TACO) method. Absent clarification from OSHA, the proposal would require member companies to outfit all of their facilities, mobile work crew vehicles, and the like, with these or similar cooling supplies. Based on the realities of various facilities, crew vehicles, and other circumstances, these cooling supplies would not be usable in a way that increased worker protection. As such, complying with this requirement would be ineffective, costly, and the logistics of equipping every work site with these materials will be a massive undertaking.

## **VI. Conclusion**

As demonstrated above, the Coalition both understands and prioritizes the importance of protecting employees from excessive heat, which is why Coalition member companies have instituted heat illness prevention plans where appropriate. Of course, these plans are designed specifically for each particular location, type of work, and applicable employees. These uniquely tailored and voluntary programs stand in marked contrast to the enforceable, “one-size-fits-all” approach that OSHA takes with this proposal. OSHA must remember that it may only act within the authority granted to it by Congress, and in this case, OSHA fails to demonstrate that excessive heat presents a significant risk of material harm in the workplace and/or that the standard would substantially reduce or eliminate that workplace risk.

Even if the proposal meets the standard, it contains too many ambiguities while at the same time overly intrudes into the day-to-day functions of Coalition member companies without making employees safer. For these reasons, OSHA should withdraw the rule or alternatively, incorporate the suggestions as described in these comments.<sup>14</sup>

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<sup>14</sup> Should OSHA proceed to a final rule, a 12 month compliance window is appropriate and realistic given the complexity and sweeping nature of the proposal.

Presented by:

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