

OSHA Pushes Heat Standard

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The Occupational Safety and Health Administration (OSHA) has made clear that heat illness is a top priority, and the forthcoming heat exposure standard is certain to affect construction firms.

The standard has been on the front burner for the Biden Administration. The then-acting assistant secretary of labor for Occupational Safety and Health announced in June 2021 that OSHA would have “some very, very good, very thorough stakeholder engagement and involvement” while it develops the rule. Further, the permanent assistant secretary, in early-March 2022, highlighted that the heat standard is second only to the agency’s COVID-19 strategy, emphasizing his concern that extreme heat events affect minority and elderly workers, as well as migrant workers, disproportionately.

Proposal

On October 27, 2021, OSHA published an Advance Notice of Proposed Rulemaking (ANPRM) for “[Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings](#)” in the *Federal Register*. OSHA later extended the comment period for the ANPRM through January 26, 2022, and [sought information](#) on certain topics, including the following:

- Occupational illnesses, injuries, and fatalities due to hazardous heat, including their under reporting and magnitude across geographic regions or among various industries, occupations, job tasks, or businesses of various sizes
- Determinants of hazardous occupational heat exposure and heat-related illness in the workplace
- Inequalities in exposures and outcomes among workers of color and low-wage earners
- Structure of work and work arrangements affected by hazardous heat
- Existing efforts on heat illness prevention, including by OSHA, states, employers, or other industry associations
- Costs, economic impacts, and benefits
- Impacts of climate change on hazardous heat exposure for outdoor and indoor work settings

In addition, OSHA sought input on the following strategies to reduce occupational heat-related injury and illness:

- Heat illness prevention plans and programs
- Engineering controls, administrative controls, and personal protective equipment (PPE)
- Acclimatization
- Physiologic and exposure monitoring
- Planning and responding to heat illness emergencies
- Worker training and engagement

Currently, OSHA protects workers against extreme heat by using the General Duty Clause,

a “catch-all” provision in the Occupational Safety and Health Act (OSH Act) that requires employers to provide employment and places of employment that are free of recognized hazards, including heat exposure. However, the agency has acknowledged its use of the General Duty Clause has faced significant legal challenges and the lack of “specific, authoritative exposure thresholds” has made it challenging for OSHA to prove the existence of a recognized hazard. In particular, the agency has pointed to a 2019 case, *A.H. Sturgill Roofing Co. v. Secretary of Labor*, in which the Occupational Safety and Health Review Commission (OSHRC) set a high bar for use of the General Duty Clause in cases involving heat exposure and other potentially dangerous environmental conditions. In 2020, an OSHRC judge followed *Sturgill* and overturned five heat-hazard citations against the U.S. Postal Service, holding that OSHA could not rely on a National Weather Service guide to determine heat severity.

The ANPRM noted potential gaps in existing standards. For example, OSHA’s sanitation standard does not specify how much potable water must be available to employees and the PPE standard does not specifically identify hazardous heat as a hazard for which workers need training or PPE.

The ANPRM repeatedly references the construction industry. For example, it highlights the problem heat poses to construction workers and states highway, street, and bridge construction workers were among those most frequently hospitalized for heat-related issues since 2018. The ANPRM concludes that the construction industry had 13 times the risk of heat-related deaths than the average annual heat-related workplace fatality rate in all other industries.

The ANPRM suggests that OSHA may attempt to address various work arrangements in the final heat standard, such as the use of contingent workers (including non-U.S. workers) and multi-employer worksites.

Existing Guidance

Currently, OSHA provides guidance on “[Working in Outdoor and Indoor Heat Environments](#),” and it suggests that employers:

- Provide workers with water, rest, and shade.
- Allow new or returning workers to gradually increase workloads and take more frequent breaks as they acclimatize or build a tolerance for working in the heat.
- Plan for emergencies and train workers on prevention.
- Monitor workers for signs of illness.

Given that construction is among a few industries repeatedly referenced in the ANPRM and that summer is around the corner, construction employers should keep an eye out for the final rule.

Please contact a Jackson Lewis attorney with any questions.

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