

Hot Summer Safety: Heat-Related Hazards and OSHA's Proposed Outdoor and Indoor Heat Rule

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Transcript

Welcome to Jackson Lewis's podcast, We Get Work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind: How will my business be impacted?

To address the increasingly hot temperatures nationwide, OSHA has moved closer to a final rule for workplace heat injury and illness prevention by issuing its notice of rulemaking in the Federal Register. On this episode of We Get Work, we discuss how most employers prioritize protecting employees from outdoor and indoor heat exposure, the importance of reevaluating current heat plans and how OSHA's proposed outdoor and indoor heat rule will give employers additional guidance to keep their workforce safe from heat-related hazards.

Today's hosts are Denaa Griffin, Karl Kumli and Adrienne Wood, associates in Jackson Lewis's Raleigh, Boston and New Orleans offices and members of the firm's Workplace Safety and Health Group. They all help employers proactively monitor and ensure compliance with all applicable safety and health laws.

Denaa, Karl, and Adrian the question on everyone's mind today is, how can employers protect employees from heat exposure and how does that impact my business?

Karl F. Kumli

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The first thing that we want to talk about with this new proposed heat rule is exactly where this leaves the regulated community in the process of getting a new rule. And right now OSHA has released the language of the proposed rule and it will be released in the federal register if it hasn't already by time of publication. That will give the regulated community a chance to review the rule.

And then OSHA holds an opportunity for public comment over the next few months. That gives us the opportunity to highlight areas of the regulation that may be problematic for certain employers or work through issues that the employers want to specifically address about their industry or about certain employee groups who may have needs that OSHA hasn't thought about in their initial proposed rule.

These kinds of things are going to focus really heavily in this particular rule on the types of work that's being done and the locations where that work occurs. And I think it would be helpful to have Denaa talk to us a little bit about what the status of the current heat rules are on a state-plan level.

Denaa J. Griffin

Associate

Thanks, Karl. Some of our state-plan states have already implemented their own standard expressly addressing heat illness prevention in the workplace. These states include California, Colorado, Minnesota, Oregon and Washington. But what we're seeing is that the language is tracking this proposed rule that we have regarding heat illness, in particular California. And I know we always talk about California being super specific with some of their employee regulations, but it has its own heat illness prevention standard, which requires California employers to take steps to do extra rest breaks, water, shade and heat illness prevention training.

These are some of the types of things that on the federal OSHA level that OSHA, the agency, would like to see every employer kind of get on board. OSHA has this National Emphasis Program on heat illness prevention, and I'm going to flip it over to Adrienne to talk a little bit about that.

Adrienne M. Wood

Associate

Great. Thank you, Dina. OSHA, back on April 8, 2022, started their National Emphasis Program. Their goal was to target the vulnerable worker. And they made it very clear that heat was going to be a priority of this administration.

The National Emphasis Program, for the first time, was a nationwide enforcement for OSHA to proactively inspect workplaces for heat-related hazards. The way that works is OSHA, with the creation of the NEP, was able to generate random inspection lists and then conduct inspections of indoor and outdoor employers on those lists without any advance warning. This is in place for three years — it'll run through April 8, 2025.

The way OSHA creates those lists is basically by looking at workplaces that fall within certain industries on any given day where the National Weather Service has announced a heat warning or advisory for that local area. And then they also look at workplaces that have had high incidences of employer-related hospitalizations

related to heat. So that kind of moves [select workplaces] to the top of the list if they've had a lot of inspections before or there's been a lot of complaints or they've had a lot reportable injuries.

To date, OSHA has conducted more than 5,000 inspections this way. So, employers need to be on the lookout for that if they are a workplace that has a lot of heat-related activity. OSHA can show up any time without any type of warning.

Kumli

Thanks, Adrienne. This is the kind of thing that employers who have outdoor employees who would be subject to those National Weather Service heat warnings need to know.

But this proposed rule goes beyond that for indoor heat as well. What are the kinds of industries that have been key targets for the national emphasis program so far on the indoor side? Are we really looking at things that make total sense like bakeries or is it hospitality and those sorts of things as well?

Wood

That's a great question, Karl. They're not necessarily targeting an office setting, but they are targeting any places in hospitality where there's high heat in the kitchen, where there's tons of commercial stoves and burners and ovens. It gets really hot in there, so they're going to look at those areas. They're going to look at the manufacturing sector anywhere where there's any type of furnace and things like that — so mills, foundries, metal production, motor vehicle, aerospace products and parts, all kinds of stuff like that, where it can get really, really hot. Automotive repair and maintenance gets really hot in there, there's a lot of heat going on. Waste collection is going to be big; saw mills, bakeries . . . tortilla manufacturing was one identified area.

Another area that we haven't talked about yet is going to be employees that are mostly in vehicles. That's going to be a big question about whether air conditioning is going to be required in those vehicles, if they're going to be required to have breaks, all that kind of stuff.

Kumli

That's a really good point, especially for folks who have delivery drivers as a part of their operation, where the cab of the vehicle may be air conditioned, but the back of the vehicle may not be. We'll need to keep a real tight focus on how much time employees are spending out of the air-conditioned area and whether or not that trips the threshold that OSHA has identified in this proposed rule of more than 15 minutes in an hour exposed to the heat level. That's something where, as employees move around over the course of the workday, employers really need to have a pretty good idea of what employees are doing in terms of their heat exposure.

Wood

That brings up a really good point. One big question that we've been getting around this rule is: Are there going to be triggers? And the answer to that is yes. That's what

we've learned from the text of the rule.

There's kind of two triggers embedded in this rule. There's the initial heat trigger, which is going to be a heat index of 80 degrees — I should be very specific here. When those conditions are present, then there's going to be additional controls required on a work site. A lot of this will apply to outdoor work sites but will apply to indoor as well. There'll be things like:

- Available drinking water
- Break areas
- Acclimating new and returning employees
- Rest breaks, if needed to prevent overheating
- Effective communication
- Maintenance of PPE controlling properties, if that's applicable

Some of the big ones are going to be access to water. They're very specific in the text, the rule about that. It cannot just be we have a hose outside. It has to be access to cool water as well as bathrooms so that employees are encouraged to actually drink water and properly hydrate. Additionally, the water must be readily accessible and “suitably cool” is the term that OSHA used because the temperature of the water can impact the hydration levels. They even go as far as to say that employers should provide access to one quart of drinking water per employee per hour and this water cannot come at a cost to employees. You can't be charging them for this kind of stuff.

Then that also goes into break areas — and these break areas have to be adequate, meaning each one has to be a place where employees can hydrate. Each one has to be a space big enough to fit all the employees, and employees must be able to remove any protective gear that they're wearing to cool down.

Then you also have to acclimate employees. This is something that we kind of saw coming and we knew was going to be big with this rule. This doesn't apply to just new employees. This will also apply to employees who've been on leave and have come back. You know, if an employee starts their job and it's the first day of July and they're in South Louisiana, you can't just throw them out on the work site all day. You got to acclimate them slowly.

Interestingly enough, the proposed rule does provide two different options for that. One of them is you can acclimate the employees through everyday kind of [exposure]. On their first day you start them at 20 percent of the work exposure that they would feel to heat. So maybe they're inside a lot that day and you only put them outside for 25 percent a day. The other option is they get 15-minute rest periods at least every two hours to observe them for signs and symptoms of heat injury and illness. And, you have to provide certain hazard alerts with specific information about heat illness and show an employee how to seek help if necessary. So, they are providing some flexibility in the rules in terms of how to acclimate your employees.

Then there's also going to be a requirement for rest breaks. These rest breaks can be unscheduled and they must be paid. You can't just ride in saying “we're going to give you a rest break in the morning, one in the afternoon.” No, if an employee's not

feeling well, if they're clearly feeling the effects of heat, they have to be allowed to take a break.

The final requirement for the initial heat trigger at 80 degrees is effective communication, meaning you have to let employees and employers talk about what's going on in the workplace. It can't just be one-way communication where the employer's making the announcements, not taking into account what the employees are thinking and feeling in terms of protecting themselves from heat.

And then the second trigger is when there's a heat index of 90 degrees. When these conditions are present, the additional controls are more frequent rest breaks, which are breaks every 15 minutes every two hours. And that actually has to be a rest break. It can't just be we slowed down work for a bit. Employees actually have to be allowed to rest. Then there's heightened observations for signs and symptoms of heat illness. And then there has to be a warning sign in your workplace for excessively high heat areas.

Kumli

Those are two really good points, Adrienne. We're talking about those two thresholds of 80 and 90 degrees. And you mentioned that those are heat index, not true temperatures, which obviously means, if you're looking at an app on your phone, the "it feels like number" not the actuals number. And that can be a little tricky for employees who are working in indoor environments where the thermostat on the wall may not reflect the heat index, it may just reflect the temperature.

It sounds to me like with the signs and symptoms requirements and the heat index requirements that there's going to be a pretty significant learning curve for managers to keep an eye on folks for potential issues and really be aware of their obligations in informing employees when we hit these thresholds. What kind of training generally does OSHA like to see for managers and employees in addressing an awareness for heat illness and heat sickness?

Wood

That's a great question. Employers are going to need to train their supervisors and managers on how to spot the signs and symptoms of excess heat exposure. They need to be looking for [indicators such as] are their employees experiencing headaches? Are they dizzy? Are they fainting? Are they collapsing? Obviously, if your employees are fainting on the job, there's something going on.

They need to know first aid procedures. They need to know where to access any type of first aid. Employees need to have access to that as well. The managers and supervisors also need to be trained on how protective clothing can affect their employees — if you're working on an oil rig and you're wearing a flame-retardant suit, that's going to really trap in heat well. They need to be aware that there's heightened exposure in those times.

Employers also need to be aware of the effects of drug and alcohol, how that can exacerbate heat illness and injury.

One of the big requirements under this rule is going to be if you have 10 or more

employees, you're going to need to have a written program in place called a "heat injury and illness prevention program."

Kumli

Dena, what are we looking at in one of those heat illness and injury prevention plans? That sounds like a whole lot of extra paperwork for the employers.

Griffin

It does. To be frank, some of the outdoor or most of the outdoor employers already have a written program similar to what Adrienne mentioned earlier. We want to talk about those additional breaks for those heat thresholds that we mentioned. We want to talk about adequate access to water. And again, this is not 80-degree water. We have to have this water chilled a bit. Shade or some kind of respite from the heat. For some employers, this means going into an air-conditioned break room and making sure that everybody can get into that break room to get that relief. Also talking about training.

We talked a little bit about acclimation earlier with our new employees and then our employees returning from leave. We also think about all the employees as it transitions from a cool spring day to sweltering summer heat. We may have to have employees trained so that they recognize that they may need to take those extra breaks and that they have the opportunity to request them, but also for our supervisors and managers so that they know this acclimation process isn't just for our new employees and employees returning from leave at the beginning of the summer — everybody's in there and needs to be acclimated as well.

In our heat illness prevention plans, we also want to include a point person for first aid and who would contact emergency personnel if need be; making sure that that person or that group of people has a great understanding of their role and how important it is.

Kumli

That sounds like a really great initial overview. With the state-plan states that have this in place, the outdoor employers that seem to be doing a good job of complying with these plans in response to the National Emphasis Program, is this something that there's going to be a significant amount of disturbance for industry or is this something that most industries are kind of ready for it?

Griffin

I think some of the industries may be ready. Some of those that fall into the gray area — we're thinking about delivery folks who may be in the vehicle, which is air conditioned, but also they have to get out of that vehicle to make the delivery — of particular industries where there is a shared time between temperature-controlled space and the non-temperature controlled space may require an additional effort from employers to monitor the temperature, not just the heat index, but as they're kind of getting in and out of the vehicle, monitoring how much time they're out of the vehicle in the ambient temperature and the sweltering heat that we have now. In those spaces, we may see a little bit of disruption.

For the employers who already have outdoor work environments — agriculture, construction, outdoor construction sites, landscaping, oil and gas, so on and so forth. In the state plan states, it's already been implemented that they had to have these heat illness prevention plans. Maybe they have to update it to reflect the heat index specifics that we've talked about for this proposed rule. But by and large, they're already providing these additional breaks, they're doing these annual trainings, so on and so forth.

Wood

Dena brings up a really good point in that I think employers are ready for this. I hope they are because OSHA is citing them anyway. This is not brand new. When this rule goes through notice and comment period after 120 days and goes into effect, these aren't going to be brand new citations. OSHA is already citing employers under the general duty clause if there is any heat related illness and injury on site. And OSHA can also, if they're on site for anything else, can ask to see a heat related illness and injury prevention program that employers may not have and they may get cited under the general duty clause for not having that already.

Kumli

That's a great point, Adrienne. One of the things employers really need to be aware of is that this is just a continuation of the enforcement that they're already doing. This is making that national emphasis program permanent and writing it into OSHA's rules. And if employers aren't already ready and aren't prepared to interact with OSHA and discuss their HEAT program if they need one, this is the wake-up call that the time is now. Even with the fact that this has a few months to go into effect, they're being cited under the general duty clause and this is a good opportunity for them to make sure that their plan is compliant.

Griffin

Yes, they [OSHA] are citing. The other thing that we've been seeing a huge uptick on with the heat wave across the country is these "notice of complaints" that employers are having to respond to. Although they are an extra effort that companies have to make in order to respond so that OSHA doesn't dig any further right there, it's an excellent opportunity to level set, to retrain, to remind employees of their rights to take those additional breaks, especially since we haven't even really gotten into the sweltering, super sweltering months of summer yet.

Those are a great opportunity to review heat and illness plans — put one in place if you don't have one. Retrain your supervisors, retrain your employees; making sure that we have things posted in the bathrooms or in the other air-conditioned areas reminding employees that they can take these extra breaks and providing water in multiple places in the facility and letting employees know what they are.

The other thing that some companies are doing, especially as it gets warm and they're checking the temperatures before shift starts, is to do that when we do the safety stand down at the beginning of the shift, just to remind employees then, face-to-face, as we have the whole shift there: "We're going to take breaks at these intervals. If you need additional breaks, please just let someone know and go ahead

and take that. So on and so forth.”

To the extent your company has received some of these notice of complaints regarding heat illness prevention, it's definitely an opportunity to just pivot a little bit, if need be, or just reinforce some of the programs that you already have as a company.

Adrienne

Denaa brings up a really good point about reevaluation and the proposed rule. Let's say you have a plan in place, but employees are still getting injured from heat, they're fainting, there's OSHA reportable injuries on site. If that occurs, you have a duty under this rule to look back at your plan and reevaluate it because clearly something's off, something's not being enforced, it's not strong enough. So that is one thing that I'm really glad Denaa brought up because if you have a plan, you might want to reevaluate it to make sure it's compliant with some of these proposed rules and addresses the way heat is affecting our world more and more as summer gets hotter and hotter.

Kumli

That's a really good point, leaning into companies re-evaluating their plan, thinking about how this might change their plan, and then making sure that their training is up-to-date so that all of their employees are aware of what the new program might be.

If there are companies that have questions about how to do this, how to roll it out or a way to update their plan, that's what the Health and Safety Group here at Jackson Lewis is designed to help with and is positioned all over the country so that we're familiar with your specific environmental concerns and anything that we can help to do to make sure that your plan is there, compliant and keeping your folks safe on a daily basis.

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