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A Proactive Response to OSHA's Proposed Rule on Heat

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Special to the Legal

On Aug. 30, 2024, OSHA issued a notice of proposed rulemaking (NPRM or proposed rule) covering hazardous heat in the indoor and outdoor work environments. Several steps remain in the regulatory process until a final, enforceable rule, but employers should be proactive in reviewing it, understanding its requirements, and preparing (or shoring up) a workplace heat safety program. A proactive approach on heat should also have near-term benefits with respect to OSHA enforcement. Over the last several years, OSHA has been actively citing employers for heat-related issues—even without a specific regulation on hazardous heat—and those citations have relied upon key concepts from the proposed rule.

OSHA has historically used the general duty clause (GDC) to cite employers for heat-related issues. The GDC requires employers to provide a workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm.” This approach has presented challenges to OSHA. Namely, whether a hazard was “recognized” is not always clear-cut (think 75-degree weather). The GDC also requires OSHA to suggest a means of actually reducing



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or eliminating the hazard, known as “abatement,” which is also not always clear-cut (think delivery drivers who must step outside to deliver packages). Despite these challenges, OSHA has continued to issue heat-related GDC citations, and it has ramped up those efforts recently through its National Emphasis Program on Outdoor and Indoor Heat Related Hazards, Directive CPL 03-00-024.

In October 2021, OSHA initiated the process for passing a regulation by issuing an advanced notice of proposed rulemaking. Since then, OSHA has moved surprisingly quickly, completing the various tasks necessary to formalize a regulation, including meetings with labor and industry stakeholders. As noted, on

Aug. 30, OSHA issued an NPRM on hazardous heat. Although OSHA can make changes before publishing a final regulation, major changes to the proposed rule are unlikely. Over the last few years, OSHA has been fairly transparent about what the regulations would likely include, and the proposed rule largely tracks OSHA’s messaging.

The proposed rule broadly covers employers whose workers are exposed to indoor or outdoor heat. While it has a number of mandatory requirements, it is considered a “programmatic standard,” meaning employers must develop compliance programs that are tailored to their workplaces. Thus, the most significant component of the rule is that employers prepare a heat injury and illness prevention plan (HIIPP), which will vary among workplaces. The HIIPP outlines the employer’s policies to ensure compliance with the rule. Failing to have an HIIPP would result in a citation; conversely, failing to follow an HIIPP would also result in a citation. For employers with over 10 employees, the HIIPP must be written.

Another key component is the concept of heat triggers, at which employers must implement certain procedures. The “initial heat trigger” means an indoor or outdoor heat index of 80°F, at which employers must, among other things, ensure easy access to drinking water and provide shaded or air-conditioned break areas. Further, employers must

implement an “acclimatization protocol” whereby a new worker’s schedule is structured to allow the worker to get accustomed to the conditions over several days. The “high heat trigger” means a heat index of 90°F, at which employers must guarantee a minimum 15-minute paid rest break every two hours.

Since the proposed rule imposes requirements based on heat triggers, it unsurprisingly requires employers to monitor hazardous heat conditions, too. For outdoor work, employers can either track forecasts provided by reputable sources, such as the National Weather Service, or measure heat index or wet bulb globe temperature (WBGT) themselves. Outdoor monitoring must occur with “sufficient frequency” to measure heat exposure with “reasonable accuracy.” For indoor work, employers must identify work areas where there is a “reasonable expectation” of exposure at or above the initial heat trigger and must develop a plan to monitor those areas. When changes in production, equipment, or processes occur, employers must revisit the indoor monitoring plan to ensure that it still accurately captures heat conditions.

Like many OSHA regulations, the proposed rule includes an employee training component. It requires an initial training for employees prior to work at or above the initial heat trigger, covering, among other things, signs and symptoms of heat illness; supervisor-specific training, covering facility policies and procedures for hazardous heat; an annual refresher training for all employees; and supplemental training in the event of facility changes, updates to policies and procedures, or the occurrence of heat-related incidents. The rule also requires that employers have emergency response protocols as part of the HIIPP, including who to contact in the event of an emergency, and how to respond to employees experiencing symptoms of heat illness.

As for the regulatory timeline, the public comment period is now open on the NPRM and will close four months from now, on Dec. 30. Thereafter, OSHA

will prepare a final rule, which will make this rule enforceable. The length of time this whole process will take is uncertain. Since this is a programmatic standard, compliance is not just a matter of pushing a button. Employers must develop policies that are tailored to address the dangers of heat faced by workers in their unique work environments. For facilities that require vapor-impermeable clothing, such as nonbreathable personal protective equipment, some strategizing may be necessary to ensure compliance with OSHA requirements having potentially competing goals. Thus, employers may want to begin the process of drafting and implementing a HIIPP now.

A proactive approach would also have immediate benefits to employers when considering OSHA’s current strategy of addressing heat. As noted, without a heat regulation, OSHA has been citing heat issues under the GDC, which requires OSHA to recommend abatement measures that will materially reduce the cited safety hazard. Those measures must be outlined in GDC citations. Importantly, if an employer is already implementing the measures that OSHA proposes as abatement, the citation is generally invalid.

Our review of recent citations for heat issues has revealed that OSHA’s proposed abatement has increasingly reflected concepts in the proposed rule. OSHA’s abatement measures have included requiring an employer to establish a heat safety program, create schedules allowing for acclimatization, provide shaded break areas, prepare emergency response procedures, and formally train employees on the issue of hazardous heat. Sound familiar? For certain employers, OSHA has effectively been implementing the proposed rule via the GDC. So if employers use the rule as a template for a heat compliance program now, it will not only make full compliance easier when the rule becomes law, but it will also prevent heat-related citations in the meantime.

OSHA takes the issue of hazardous heat very seriously, and it has made that clear

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in different ways, not the least of which is the speed with which it has published the proposed rule after it formally announced an intent to do so. OSHA has indicated that its focus on this issue will increase as outside ambient temperatures keep rising. Employers should prepare for the expected final rule and protect themselves in the short term by implementing policies that address the issue of hazardous heat in the workplace. At this point in time, those policies need not exactly conform to the proposed rule. But the more they do conform, the more likely an employer will avoid an OSHA citation under the GDC, and the easier it will be eventually to come into full compliance with a final, enforceable hazardous heat rule.

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