



ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV

January 14, 2025

The Honorable Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Comments to NPRM on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings [Docket No. OSHA-2021-0009]

Dear Assistant Secretary Parker:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Occupational Safety and Health Administration in response to the above-referenced proposed rule published on Aug. 30, 2024, at 89 Federal Register 70,698.¹

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 23,000 member companies. ABC and its 67 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.²

The vast majority of ABC's contractor members are also small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)³ and industry workforce employment (nearly 81% of the construction industry is employed by small

¹ NPRM Extension of Comment Period, 89 Federal Register 94,631 (Extending the comment period to Jan. 14, 2025, and announcing notice of informal hearing).

² See, e.g., [ABC's 34rd National Excellence in Construction Awards program from 2024.](#)

³ U.S. Census Bureau 2021 County Business Patterns: <https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

businesses).⁴ In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States and account for 69% of all construction industry employment.⁵

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for varied customers. These include private sector businesses as well as federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations concerning small business utilization.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC's Road Map to Industry-Leading Safety and Health

ABC strives to provide all members with the knowledge and tools to achieve industry-leading health and safety in the construction industry. It is ABC's purpose to ensure all our construction workers get home in the same—or better—condition than when they arrived on the jobsite every day.

A culture of both physical and mental health and safety cannot exist without leadership taking a stand that includes an unwillingness to compromise safety and modeling this belief in their every action. Challenging and transforming the status quo to create a belief that all incidents are preventable creates a culture where safety is considered a moral obligation not just for leadership, but for all employees.

ABC's commitment to safety is centered on the STEP Safety Management System.^{®6} Founded in 1989 as a safety benchmarking and improvement tool, STEP has evolved into an industry-leading safety management system that demonstrates safety leadership and cultural transformation to clients. STEP is a proven system that provides the framework to measure, strengthen and build industry-leading safety programs. STEP companies prove that industry-leading safety is achievable with a companywide commitment to safety as a core value. By applying these processes, construction companies can dramatically improve safety performance among participants regardless of company size or type of work.

⁴ 2023 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2023), at page 4, <https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf>.

⁵ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at <https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true>.

⁶ <https://www.abc.org/ABCSTEP>.

ABC's Safety Performance Report documents the effectiveness of STEP.⁷ ABC's annual SPR is based on data gathered from STEP participants that recorded more than 900 million hours of work in construction, heavy construction, civil engineering and specialty trades. Since 2018, the SPR has captured the results of ABC STEP member companies performing real work on real projects to identify what comprises an industry-leading safety program.

ABC member firms participating in STEP measure their safety processes and policies on key components and the criteria for best practices through a detailed questionnaire, with the goal of implementing or enhancing safety programs that reduce jobsite incident rates. The 2024 SPR documents the dramatic impact of using proactive health and safety practices and leading indicators. The report shows that contractors that implemented STEP best practices in 2023 reduced recordable incidents by up to 83%, making the best-performing companies 576% safer than the industry average.

In 2023, ABC added total human health⁸ as a key component of an effective health and safety program. Total human health is focused on building a resilient workforce that is connected through relationships and engaged in performing construction work to a high standard of safety, quality and effectiveness.

Our people are our greatest asset, and ABC will continue to advance industry-leading safety for construction workers through valuable resources like the SPR. If we choose to lead, if we choose to commit and if we choose to transform, together we will create the conditions for everyone to do their work without incident and go home safer, healthier, happier and fulfilled every day.

These efforts demonstrate that while ABC has concerns with the proposed standard (as outlined in detail below), we remain committed to protecting workers from hazards including heat injury and illness. ABC looks forward to opportunities to partner with OSHA to maintain and improve safety for construction workers.

Background on OSHA's Heat Injury and Illness Prevention Rulemaking

On Oct. 27, 2021, OSHA issued an Advance Notice of Proposed Rulemaking on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings,⁹ which requested information on how to implement regulations to protect workers from hazardous heat. ABC, as a steering committee member of the Construction Industry Safety Coalition,¹⁰ submitted comments in response to the ANPRM on Jan. 26, 2022, stating that any regulatory approach—if adopted—must be simple and should integrate the key concepts of “water, rest, shade.”¹¹

⁷ <https://www.abc.org/SPR>.

⁸ <https://www.abc.org/Safety/Total-Human-Health>.

⁹ 86 Federal Register 59,309.

¹⁰ <https://www.buildingsafely.org/about-cisc/>.

¹¹ <https://www.buildingsafely.org/wp-content/uploads/2022/01/CISC-Comments-OSHA-2021-0009-Heat-Injury-and-Illness-Prevention-ANPRM-1.26.2022.pdf>.

In December 2023, ABC submitted comments as a steering committee member of the CISC and the Coalition for Workplace Safety¹² in response to OSHA's potential standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings following its review of the Small Business Advocacy Review Panel materials and the SBAR Panel's final report.¹³ In September, the SBAR Panel hosted six video conferences to gather input from small entity representatives.¹⁴ An ABC member participated as a SER during one of the video conferences.¹⁵

In its comments CISC stated, "The construction environment is inherently fluid and CISC has significant concerns with any regulatory approach that imposes prescriptive, complicated requirements on construction industry employers."¹⁶ Further, CWS' comments stated, "The CWS supports recommendations expressed in the Panel Report, and in other comments submitted to the agency, recognizing that flexibility, versus a 'one-size-fits-all' standard, is necessary for employers to prevent or mitigate heat-related injuries and illnesses in their workplaces the most effectively."¹⁷

Based on the heat standard as proposed, ABC shares the concerns and recommendations provided in extensive comments filed to this docket by the CISC and the CWS and joined both coalitions in their respective comments. Therefore, ABC adopts and incorporates by reference both the CISC and CWS comment letters.

ABC's Comments in Response to OSHA's Proposed Rule

ABC opposes OSHA's one-size fits all approach and urges the agency to withdraw the rule as proposed and revise it to allow greater flexibility.

ABC strongly supports worker health and safety and protection from heat injury and illness, while maintaining flexibility for the fluid nature of the construction environment. Throughout the heat rulemaking, ABC has continued to urge OSHA to focus on the key concepts of "water, rest, shade" and provide construction employers the necessary flexibility to make such a standard effective.

ABC believes employers should equip their employees and leadership teams to develop their own health and safety plans, unique to their jobsites. We also provide tools to employers so that they can equip and empower supervisors to recognize the signs and symptoms of heat illness as well as provide necessary rest, water and shade that is dependent on local

¹² <https://workingforsafety.com/about-cws/>.

¹³ <https://www.osha.gov/sites/default/files/Heat-SBREFAPanel-Report-Full.pdf>.

¹⁴ <https://www.osha.gov/heat/sbrefa>.

¹⁵ See, infra. at 11-13.

¹⁶ https://www.buildingsafely.org/wp-content/uploads/2024/01/CISC-Comments-on-OSHA-Heat-Injury-and-Illness-Prevention-SBREFAPanel-Report_12.22.23.pdf.

¹⁷ https://workingforsafety.com/wp-content/uploads/CWS-comments-SBAR_SBREFA-panel-on-Heat-Illness-FINAL-12.2023.pdf.

conditions. ABC's members work to ensure that jobsites are safe and strive to implement the most appropriate practices for working in extreme heat conditions that focus on the individual worker.

Unfortunately, the more than 1,000-page proposed rule imposes prescriptive, complicated requirements on construction industry employers, limiting all flexibility, which could weaken contractor efforts to prevent heat stress for workers. Flexibility is limited because OSHA has imposed rigid requirements, which include heat triggers, the acclimatization schedule for new and returning employees, mandatory rest breaks and the use of a heat safety coordinator, among others. OSHA failed to recognize the practical applications needed on construction jobsites. Employers and employees need flexibility to account for differences among worksites, geographical locations, work responsibilities and available technology. Additionally, construction job sites vary in size, time, scope and duration, and flexibility is needed to ensure feasibility for compliance.

OSHA's one-size-fits all approach to the proposed heat standard is contrary to the U.S. Supreme Court's holding in *National Federation of Independent Business v. Dep't of Labor*.¹⁸ This NFIB case dealt with the COVID-19 Vaccination and Testing; Emergency Temporary Standard and the Court recognized that OSHA failed to distinguish between the various industries swept up into the COVID-19 ETS. The same principle applies here since the proposed rule covers general industry, agriculture, construction, and maritime. The Court stated that the agency did not have the authority to use a "blunt instrument ... that draws no distinction based on industry or risk."¹⁹

As a member of the CISC steering committee, ABC has consistently urged OSHA to develop a separate regulatory approach for the construction industry. To combine all employers conducting outdoor and indoor work in general industry, construction, maritime, and agriculture sectors into one regulatory approach is misguided. ABC and its coalition partners urged OSHA to recognize that there are significant differences in the types of job tasks, the work performed, and even the environmental conditions in which construction industry employees work. Moreover, there is existing precedent for the agency to develop a separate standard for the construction industry based on previous rulemakings, including a standard for respirable crystalline silica in construction,²⁰ Confined Spaces in Construction,²¹ and Cranes and Derricks in Construction,²² among others.

ABC strongly urges OSHA to withdraw the current rule as proposed and revise it to allow greater flexibility for affected industries, and at a minimum develop a separate standard for the construction industry.

¹⁸ 595 U.S. 109, 115 (2022).

¹⁹ *Id.*

²⁰ Respirable crystalline silica, 29 C.F.R. § 1926.1153.

²¹ 29 C.F.R. § 1926 Subpart AA.

²² 29 C.F.R. § 1926 Subpart CC.

The proposed rule's heat triggers are unworkable.

Under the proposed rule, the initial heat trigger temperature is set at 80°F heat index and the high-heat trigger temperature is set at 90°F heat index.²³ Heat triggers should be determined by the contractor and those deemed competent persons in the field and not mandated by the federal government. ABC does not support any defined heat triggers because there are too many variables regionally, geographically and by type of construction—indoor versus outdoors (e.g., heating, ventilation and air conditioning or drywall installation versus roofing or heavy highway). And taking into account the acclimatization of individuals to the areas in which they live, what some may consider hot in the northern states may be very pleasant and ideal building weather in the Southwest.

Applying a standard that accounts for all influencing factors and variables is quite complex. Therefore, contractors are in the best position to provide education, “water, rest, shade” and implement internal heat illness and injury prevention plan programs that encompass awareness, prevention, intervention and, if necessary, the qualification of competent individuals. This approach would allow the HIIPP to accommodate a wide range of applications, including cold weather plans.

Unfortunately, OSHA appears to completely ignore geographic differences in the proposed rule and instead relies merely on a basic temperature applicable to everyone, regardless of location. If the agency decides to move forward with heat triggers in the final rule, the triggers should be tailored to varying geographic regions in order to accurately reflect the climates that contractors experience and that workers are acclimated to. For example, southern states that frequently see temperatures above the currently proposed initial heat trigger of 80° F should have their initial triggers raised so that it more accurately represents their working environments.

Rest breaks should be flexible.

The proposal's mandatory paid rest breaks of 15 minutes at least every two hours are impracticable. Under OSHA's proposal, if the high-heat trigger (heat index of 90°F) is reached, employers must provide mandatory paid rest breaks of 15 minutes at least every two hours (an unpaid meal break may count as a rest break).²⁴ It should be noted in locations such as Las Vegas, the average temperature for the months from May until October exceeds the high-heat trigger, so in these locations employers would need to provide 15-minute breaks for potentially more than half the year.

In October 2024, ABC surveyed members on the proposed heat rule and 61% of surveyed members responded that mandatory paid rest breaks of 15 minutes at least every two hours would be difficult to implement on a jobsite. For example, many tasks are time-sensitive, and safety and quality would suffer if these prescriptive mandatory breaks are required. In

²³ 89 Federal Register at 70,742-70,749.

²⁴ 89 Federal Register at 70,790-70,791.

addition, entry and exit from work areas can be complicated, making breaks difficult to complete within the 15-minute rest break schedule as proposed in the NPRM.

Further, when considering installation of perishable products such as concrete, roofing tar, pitch or paving products, it is impractical to think that work would ever be shut down completely. Nor can employers rotate their employees out for breaks as this would be infeasible given that these employees are needed for the installation. It also is unduly burdensome to require employers to prove infeasibility of the measure considering job functions, timing, scope and manpower vary day by day on construction sites.

One surveyed ABC member responded that, for concrete, it is a coordinating nightmare: "If you have a large pour, you need all the employees doing their task to ensure it is done properly since everything is timed in concrete. The mandatory rest breaks would cause a strain for the contractor to manage the concrete truck timing, concrete pour rate, coordinating trucks in and out and coordinating personnel breaks (who, how long, when, etc.)."

Another surveyed ABC member indicated that a mandatory rest break requirement would be difficult to implement when working on swing stages on tall buildings. The time to traverse the building to get to a break location would take longer than the break itself.

Based on member feedback, the proposal's mandatory paid rest breaks would be exceedingly difficult to manage on construction jobsites due to time and schedule-based activities interdependencies. Rather than take a prescriptive approach, employees should be able to communicate the intent of taking a break with a supervisory person so that the supervisor can understand the conditions and respond accordingly. ABC recommends that OSHA allow supervisors and employees to work together and coordinate safe approaches for rest breaks, focusing on the individual employee's needs, the nature of work and the specific workplace environmental conditions.

The proposed rule's acclimatization schedule for new and returning employees will be particularly onerous for the construction industry.

Under the rulemaking, OSHA is proposing acclimatization schedules for new employees and returning employees (those employees returning to the worksite after having been away from the job for more than 14 days). Employers are required to acclimatize these employees either by implementing their high-heat procedures for seven days or imposing a gradual ramp-up schedule limiting the number of hours these individuals can work during a one-week period.²⁵

The enforcement of this provision will be administratively burdensome if the employer and/or the employee are required to provide documentation to prove compliance, particularly for the small businesses who make up a vast majority of the construction industry. OSHA must allow the employer the flexibility to modify and carry out their acclimatization plan without burdensome documentation.

²⁵ 89 Federal Register at 71,071.

It should be noted that compared to other industries, construction workers are more likely to be naturally acclimated to the work environment. Often, before starting a new job at a construction worksite, workers are from the same geographic location and accustomed to the weather or they recently came from a job where they performed similar tasks in similar conditions. Requiring these new employees to then undergo a strict acclimatization schedule provides no safety benefit to the employee. Further, the proposed acclimatization schedule for new employees could impact short-term assignments. By the time the new employee has gone through the scheduled acclimatization process, the short-term assignment may already have been completed.

Further, the proposed rule's acclimatization schedule for employees returning to work after vacations or from short leaves is impracticable. Every time an employee leaves work for two weeks, they will need to acclimatize, which means it could occur all the time during the hot months. Thus, depending on the pace of the project, an employer could have one or hundreds of returning employees that are acclimatizing. Many workers across the country perform service work that requires them to be at a jobsite within a specific timeframe, and to perform and complete work within that specific timeframe. The acclimatization requirements would not only hurt returning employees, but also businesses who have a short window to perform critical maintenance, repair and other jobs as needed.

In fact, 65% of surveyed ABC members responded that the proposed rule's acclimatization schedule would be difficult to implement at jobsites, and feedback included:

- Construction employees move around from job to job and sometimes employer to employer. Establishing who is acclimated and who is not will be problematic. The acclimatization process itself is too rigid and will create huge delays in construction projects and huge cost impacts.
- This would be difficult for any jobsite. Just because an employee is no longer present on a jobsite does not mean that they are suddenly no longer acclimated to the heat.
- For construction firms that hire daily and have jobsites with peak headcounts of over 1,000 employees, managing individual acclimatization compliance in addition to all of the other new hire training and onboarding requirements would pose an unrealistic compliance burden on supervisors.
- It would be extremely difficult to keep track of all the information required to implement this requirement.

Any acclimatization requirements must allow for flexibility. ABC urges OSHA to focus on heat hazard awareness training and allow employers to develop acclimatization protocols tailored to their worksite.

OSHA lacks the statutory authority to define “employee representative.”

Under the proposed rule, OSHA asks the public to comment on whether the agency should define “employee representative” and, if so, should the agency specify that nonunion

employees can designate a nonemployee third party (e.g., a safety and health specialist, a worker advocacy group or a community organization) to provide expertise and input on their behalf.²⁶

ABC previously opposed OSHA's overexpansion of the concept of an "authorized employee representative" in the agency's finalized walkaround regulation.²⁷ Further, ABC joined a coalition of business groups in filing a lawsuit in the U.S. District Court for the Western District of Texas, Waco Division against OSHA's final rule arguing it exceeds OSHA's statutory authority.²⁸

OSHA lacks any authority under the Occupational Safety and Health Act²⁹ to define "employee representative" in the context of this proposed heat standard. Moreover, Section 9 of the National Labor Relations Act makes clear that only a union that has been chosen by a majority of employees in an appropriate bargaining unit can claim to be an "authorized representative." To respect employee rights to choose or reject collective representation, the National Labor Relations Board created procedures to assess whether a proposed "authorized representative" actually enjoys the support of the relevant employees. OSHA should not inject itself into labor-management disputes and cast doubt on its status as a neutral enforcer of the law. Instead, the agency should stay within its mandate—focusing on promoting jobsite health and safety by building strong relationships with employers and promoting effective health and safety practices.

Surveyed ABC member feedback included the following concerns:

- Working with a third party would be needlessly complex and unnecessary. Employees are already represented by the company safety director whose job is to ensure the health and safety of all employees.
- An outside third party with no connection to the company or worksite has limited knowledge of the company's policies, procedures, actual working conditions and jobsite requirements. This also allows for third parties with agendas other than worker safety.
- Allowing a nonemployee third party access to a host's jobsite could potentially compromise a client's trade secrets and push unionization.

Because the OSH Act has not delegated to OSHA the authority to define "employee representative" in the context of this NPRM, ABC strongly opposes OSHA's attempt to do so in any final heat standard. OSHA has no authority to require employers to allow nonemployees to participate in an employer's internal company operating procedures and

²⁶ 89 Federal Register at 70,775.

²⁷ [Comments of the Associated Builders and Contractors in Response to Notice of Proposed Rulemaking on Worker Walkaround Representative Designation Process](#) (Docket No. OSHA-2023-0008).

²⁸ See, *Chamber of Commerce of the United States of America, et al. v. Occupational Safety and Health Admin.*, No. 6:24-cv-00271-ADA-DTG (W.D. Texas, Waco Div.).

²⁹ 29 U.S.C. § 655.

functions. There is nothing unclear or ambiguous in the wording of the OSH Act. There is no need for additional nonemployee oversight or influence on the development of an employer's internal policies and procedures relating to safety programs. Additionally, it is important to highlight the potential impact on merit shop contractors, where unions may attempt to discredit them.

OSHA should clarify who can serve as the heat safety coordinator.

Under the proposed rule, OSHA requires employers to have a heat safety coordinator at each worksite. The HSC must have the training to implement the HIIPP, control the work site and the authority to ensure compliance with all aspects of the HIIPP,³⁰ and OSHA views this position as separate from the competent person.

The duties and obligations of the HSC are identical to the definition of a competent person. If a competent person has the knowledge and authority to address risk, the proposal should not require the HSC be a different person. This would be an unreasonable burden for small contractors, particularly since they may have limited staffing and would have to hire a new employee to serve in the role of HSC. ABC strongly urges the agency to clarify that employers can designate their competent person to also be the HSC, who can be identified either by name or by position.

ABC also has concerns regarding the proposed rule's mandatory buddy system, specifically the potential for liability. Although OSHA offers this as one of two methods an employer must choose to observe employees for signs and symptoms of heat-related illness, ABC is concerned that the agency has not thought this through.³¹ Under the proposed rule, it is unclear what liability an employee or the employer could face if a "mandatory buddy" fails to recognize the signs and symptoms of heat related illness of a co-worker. Thus, employers and employees may be reluctant to participate in the buddy system. Essentially, ABC members would be forced to choose the other required method—observation by a supervisor or HSC with no more than 20 employees per supervisor or HSC.³²

Adding an HSC to a project will likely do little to significantly reduce heat-related injuries. The final decision should rest with the safety professional assigned to the project, who can determine whether heat is a concern and, if so, what measures should be implemented to address it for that particular work period (e.g., hours, schedule, tasks, etc.). Contractors could develop a training and education standard that qualifies a "competent" person, but this approach faces challenges such as consistency and tracking.

An alternative solution to hiring additional personnel would be to train, equip and integrate this responsibility into an existing supervisory role as a collateral duty, which is a more

³⁰ 89 Federal Register at 71,070.

³¹ 89 Federal Register at 71,070 (§1910.148(f)(3)(i)-(ii)).

³² *Id.* The third method involves monitoring employees working alone and requires employers to maintain effective two-way communications with employees.

practical and reasonable approach. ABC recommends that OSHA adopt this suggestion as another option for compliance.

Effective two-way communication should be practicable.

Under the proposed rule, employers would be required to maintain effective, two-way communication with employees who work alone and regularly communicate with them whenever the initial heat trigger is met or exceeded. When the high-heat trigger threshold is met, the employer is required to make contact with the lone employee at least every two hours.³³

ABC believes that requiring employers to reach out to lone employees more frequently than under normal conditions, such as every two hours, is overly prescriptive due to the nature of the work. Moreover, if the concern is observation, then the ability to observe the lone employee through video and/or tracking devices on the employee (or on tools or equipment), would meet the intent of this provision.

Surveyed ABC members offered feedback on this provision, which included:

- There needs to be clarity around what “effective” two-way communication means.
- Two-way communication is key but not at a set interval.
- While our crews are working on site, they are using power tools or may be up on scaffolding. It doesn’t seem practical to require them to get their phones out and check in every two hours.
- Often employees are not allowed to have phones on intrinsically safe sites.
- Remote locations may have limited cell or data services.

Further, 85% of surveyed members responded they currently have regular two-way communication with employees who are working alone, which includes company cell phones, text messaging, emails, two-way radios when needed, automated alerts, panic buttons, instant messaging apps and supervisors conducting scheduled check-ins with employees working alone at regular intervals throughout their shift. Prescriptive requirements such as those proposed in the rule could inadvertently create a greater hazard if the check-in requirements are set and inflexible. ABC recommends OSHA revise this section to allow greater flexibility to account for the differences in workplaces and job tasks.

The proposed rule’s prescriptive requirements will create challenges for small businesses.

In June 2023, OSHA announced it would be holding SBAR Panel meetings to gather input from small entity representatives on a possible Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings rule. The vast majority of ABC’s contractor members are small businesses. And as explained above, the construction industry has one of the highest

³³ 89 Federal Register at 70,791-70,792.

concentrations of small businesses. Data from the Bureau of Labor Statistics reports that 82% of all construction firms have fewer than 10 employees³⁴ and nearly 81% of the construction industry is employed by small businesses.³⁵

In September 2023, the SBAR Panel hosted six video conferences, and an ABC member participated as a SER during one of the video conferences that focused on the construction industry. During the SBAR Panel, the ABC member stressed that the key to dealing with the complexity of heat stress is by providing flexibility to adapt to a changing worksite.

On Nov. 3, 2023, the panel issued its final report, which recommended that OSHA “allow employers to tailor their heat injury and illness prevention program to their setting and situations.” Unfortunately, the proposed rule’s rigid requirements, such as those previously discussed, do not afford smaller employers with the flexibility that SERs had requested during the SBREFA panels.

In fact, 81% of surveyed ABC members indicated that the proposed rule will be more difficult for small businesses to implement, as opposed to larger firms with additional resources and staff. Feedback included:

- Smaller firms may not have dedicated safety personnel, requiring existing staff to take on additional responsibilities.
- Larger firms can more easily access specialized training and resources, while small businesses may need to rely on external consultants.
- The constantly changing information that will be required for proper implementation will overwhelm and burden small businesses. The constant processing of data and communication needed will drain time and resources away from programs that already need full attention.
- This is a resource-intensive standard. It requires written plans with frequent updates, initial and ongoing education of team members, understanding of the heat triggers and how to measure them. In addition, the requirements for a heat monitor person, extra paid breaks and limited work schedules during acclimatization will have a bigger impact on small businesses.
- Small businesses do not have the staff or resources to implement the additional proposed requirements. Risk management plans in place should be effective to prevent illness and injury without having to designate specific individuals to these tasks.
- Hiring additional personnel for oversight, documentation and training; purchasing additional equipment; adding down time for training and breaks. Increased competition from larger companies that can absorb some of these costs.

³⁴ U.S. Census Bureau 2021 County Business Patterns:

https://data.census.gov/table?q=CBP2021_CB2100CBP&tid=CBP2021_CB2100CBP&hidePreview=true and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

³⁵ 2023 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2023), at page 4, <https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf>.

- Small businesses are struggling to find workers, and this is going to be an additional burden on them.

Again, workers are safer when they have flexibility and are trusted and trained to make the right decisions.

Conclusion

ABC remains committed to protecting workers from hazards, including heat injury and illness. A standard addressing heat injury and illness must be a flexible, performance-based standard. Despite requests from ABC and its coalition partners in the construction industry requesting flexibility, OSHA's proposed rule is focused on a rigid, one-size-fits all approach. The very nature of construction means that the worksite will change hourly and daily.

To combine all employers conducting outdoor and indoor work in general industry, construction, maritime and agriculture sectors into one regulatory approach is misguided. In the event OSHA moves forward with the proposed rule, ABC reiterates its request that the agency withdraw the current proposal, add more flexibility for affected stakeholders and allow a phased-in approach to compliance. Absent that, ABC urges OSHA to consider a separate regulatory approach for the construction industry.

Respectfully submitted,



Greg Sizemore
Vice President, HSE and Workforce Development