117TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
117–547

ASUNCIÓN VALDIVIA HEAT ILLNESS AND FATALITY PREVENTION ACT OF 2022

NOVEMBER 7, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SCOTT of Virginia, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2193]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2193) to direct the Occupational Safety and Health Administration to issue an occupational safety and health standard to protect workers from heat-related injuries and illnesses, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

39–006

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022".

SEC. 2. EMPLOYER DUTIES.

Each employer shall—

(1) furnish employment and a place of employment free from conditions that may reasonably be anticipated to cause death or serious physical harm from heat stress; and

(2) comply with standards, regulations, rules, and orders promulgated under this Act.

SEC. 3. WORKER HEAT PROTECTION STANDARDS.

(a) DESIGN OF STANDARDS.—

(1) IN GENERAL.—The Secretary shall promulgate a worker heat protection standard that, in accordance with the best available evidence, establishes the maximum protective program of measures an employer shall implement to regulate employees' exposure to heat stress and prevent heat-related illness and injury that attains the highest degree of health and safety protection to the extent feasible.

(2) CONSIDERATIONS.—

(A) DEMONSTRABLY ACHIEVABLE MEASURES.—The Secretary may presume that any requirement substantially equivalent to a requirement adopted by a State plan approved by the Occupational Safety and Health Administration pursuant to section 18(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667(c)) and that has been in effect for at least 1 year is feasible.

(B) PRIORITIZING WORKER PROTECTION.—In weighing any considerations during rulemaking, the Secretary shall place preeminent value on assuring employees a safe and healthful working environment.

(C) AVAILABLE EXPERTISE.—If the Secretary adopts any finding or recommendation by the Institute, the American Conference of Governmental Industrial Hygienists, or the National Academies of Sciences, Engineering, and Medicine relevant to heat stress in a rulemaking pursuant to this Act, such finding or recommendation shall be considered the best available evidence.

(D) EMPLOYER CATEGORIES.—The Secretary may, in any rulemaking analysis or design of standards, cluster relevant employers in any categories such as standard industry or occupational classifications or any common or related features of heat sources, conditions of employment, employer practices, employee characteristics, or nature of place of employment that, in the Secretary's reasonable determination, are useful for designing an effective and practicable program of standards, regulations, and enforcement that maximizes the health and safety of employees.

(3) PROTECTIVE PROGRAMS.—

(A) IN GENERAL.—In addition to measures specified by this Act, the Secretary may develop a worker heat protection standard with such additional requirements that, in the Secretary's reasonable judgment, are necessary or appropriate to achieve the purposes of this Act. Such measures may include the following:

(i) ENGINEERING CONTROLS.—Requirements to eliminate hazardous levels of heat stress through engineering controls, such as isolation or shielding of employees from sources of heat, exhaust ventilation, insulation of hot surfaces, or climate-control technologies, as well as technology-based standards that encourage the development of such controls.

(ii) ADMINISTRATIVE CONTROLS.—Requirements to limit exposure to hazardous levels of heat stress by adjustment of work procedures, work schedules, or other work practices.

(iii) PERSONAL PROTECTIVE EQUIPMENT.—Requirements to provide, at the employer's expense, personal protective equipment such as water-cooled garments, air-cooled garments, heat-reflective clothing, and cooling vests.

(iv) HEALTH-RELATED PROTOCOLS.—Requirements to conduct medical symptom monitoring, emergency response protocols, medical removal

protection, or training of employees and supervisors in recognition of symptoms of heat-related illness and appropriate responses.

(v) TRAINING REQUIREMENTS.—Requirements to train employees and supervisors in topics reasonable or necessary to achieve the implementation of the requirements of a standard or the purposes of this Act, including—

(I) training of employees in signs and symptoms of heat-related illness, emergency response procedures, and their rights under this Act; and

(II) training of supervisors in monitoring heat conditions and environmental forecasts, recognizing signs of heat-related illness, and protocols for responding to likely heat-related illness.

(vi) PLANNING REQUIREMENTS.—Requirements for a heat illness and injury prevention plan that—

(I) is of sufficient quality to effectuate the purposes of this Act and to effectuate the requirements of the standard that apply to the employer;

(II) is developed, updated, and implemented with the meaningful participation of the employer's employees and, where applicable, such employees' representatives, for all aspects of the plan;

(III) is produced and maintained in writing and updated in light of changing conditions or practices; and

(IV) is made available, upon request, to any employee, the employee's representative, and the Secretary.

(vii) STANDARD HEALTH AND SAFETY MEASURES.—Any measures described in section 6(B)(7) of the Occupational Safety and Health Act of 1970 (29 USC 655(B)(7)).

(B) INNOVATIVE SOLUTIONS.—As the relevant scientific evidence develops, technological solutions improve, and environmental conditions or new work practices aggravate the risk of heat-related illness or injury, the Secretary may modify, supplement, or revise a worker heat protection standard by rule in order to improve such standard in light of such changes, even if it departs from long-standing past practice, provided that the resulting standard is consistent with this Act.

(C) CORE PRACTICES.—The Secretary shall establish criteria under which an employer who exposes or may reasonably be anticipated to expose an employee to heat or heat stress that is not reduced below hazardous levels by engineering controls or personal protective equipment shall implement a reasonable program that includes—

(i) suitably cool potable water or appropriate hydration, provided at employer expense;

(ii) periodic paid rest breaks scheduled to reduce heat stress below hazardous levels;

(iii) access to shade or suitable cool-down spaces;

(iv) acclimatization policies; and

(v) such measures that are necessary or appropriate to ensure effective implementation of the requirements of this subparagraph.

(4) OTHER SPECIFICATIONS.—

(A) PROTECTION OF PAY.—The Secretary shall require that, for any required duration such as rest breaks, medical removal protection, and training, an employee shall receive compensation at the regular rate at which such employee is employed.

(B) LANGUAGE ACCESS.—Any required training, poster, label, hazard alert, or written plan shall be provided in English and a language understood by the employees, if such is not English, and prepared appropriately for the vocabulary, educational level, and literacy of the employees.

(C) TEMPORARY LABOR CAMPS.—The Secretary shall revise the Secretary's standard for temporary labor camps to the extent necessary to achieve the purposes of this Act.

(5) MAINTAINING PROTECTION.—No worker heat protection standard promulgated under this Act may reduce the protection afforded employees by an existing worker heat protection standard.

(b) INITIAL STANDARDS.—Not later than the date that is 1 year after the date of enactment of this Act, the Secretary shall promulgate, without regard to the requirements of chapters 5 and 6 of title 5, United States Code, subchapter I of chapter 35 of title 44, United States Code (commonly known as the "Paperwork Reduction Act"), or the National Environmental Policy Act of 1969 (42 U.S.C. 431 et seq.), an interim final rule establishing a worker heat protection standard and related recordkeeping and reporting requirements. Such rule shall take effect upon issuance

(except that it may include a reasonable delay in the effective date), shall have the legal effect of an occupational safety and health standard as defined by section 3(8) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652(8)), and shall remain in effect until superseded by a final rule promulgated pursuant to this Act.

(c) RULEMAKING PROCEDURES.—For any rulemaking pursuant to this Act after publication of the initial final rule in subsection (b), the following procedures shall apply:

(1) IN GENERAL.—The Secretary shall, upon a showing by a petitioner pursuant to paragraph (2) or the Secretary's own determination that a worker heat protection standard is necessary or appropriate to regulate employees' exposure to conditions known to cause or that may reasonably be anticipated to cause heat-related illness or injury, promulgate any worker heat protection standard in accordance with the policies set forth in this section and in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title).

(2) PETITIONS FOR RULEMAKING.—Any person may petition the Secretary to promulgate or modify a worker heat protection standard. Within 18 months after receipt of a petition, the Secretary shall either grant or deny the petition by publishing a written explanation of the reasons for the Secretary's decision. The Secretary may not deny a petition solely on the basis of inadequate resources or insufficient time for review.

(3) TIMELINES.—Except as otherwise provided in subsection (b), the Secretary shall observe the following schedule for rulemaking:

(A) PROPOSED STANDARDS.—Within one year after granting a petition for rulemaking under paragraph (2), the Secretary shall publish a proposed worker heat protection standard consistent with this section.

(B) FINAL STANDARDS.—The Secretary shall promulgate, within one year after such publication, such standards with such modifications as the Secretary deems appropriate.

(C) EFFECT.—Standards or revisions thereof shall become effective upon promulgation, except that the Secretary may include a reasonable delay in the effective date.

(4) TRANSPARENCY IN RULEMAKING.—For any rulemaking notice pursuant to this Act, the Secretary shall place in the public record not later than the date of such rulemaking notice the following:

(A) The drafts of such rulemakings prepared before publication and submitted by the Secretary to the Office of Management and Budget for any interagency review process prior to publication, all documents accompanying such drafts, all written comments thereon by other agencies, and all written responses to such written comments by the Secretary.

(B) A summary of the substance of any changes between the text of the draft rulemaking that the agency provided to the Office of Management and Budget under section 6(a)(3)(B)(i) of Executive Order 12,866 and the text published in the Federal Register, excluding any non-substantive changes such as spelling or grammatical corrections or re-ordering of text that has no legal effect.

(C) A statement identifying any party or entity at whose request any such change was made.

(5) JUDICIAL REVIEW.—

(A) FILING OF PETITION.—A petition for review in accordance with section 702 of title 5, United States Code, of action of the Secretary in promulgating any worker heat protection standard or any other nationally applicable regulation or final action taken by the Secretary pursuant to this Act may be filed only in the United States Court of Appeals for the District of Columbia. The filing of a petition for review shall not postpone the effectiveness of such rule or action.

(B) TIMELY FILING.—Any petition for review under this paragraph shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register.

(C) NOT SUBJECT TO REVIEW.—Action of the Secretary with respect to which review could have been obtained under this paragraph shall not be subject to judicial review in civil or criminal proceedings for enforcement. Failure to promulgate any standard pursuant to the schedule established by this section shall be subject to review.

SEC. 4. IMPLEMENTATION AND ENFORCEMENT.

(a) IN GENERAL.—Except as otherwise provided by this section—

(1) a worker heat protection standard shall have the same legal effect as an occupational safety and health standard as defined by section 3(8) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652(8)); and

(2) any rule, regulation, or order promulgated pursuant to this Act shall have the same legal effect as a rule, regulation, or order promulgated pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(b) ENFORCEMENT.—

(1) STATUTE OF LIMITATIONS FOR CITATION.—No citation for any violation of section 2 or any standard, rule, regulation, or order pursuant to this Act may be issued under this section after the expiration of four years following the occurrence of any violation.

(2) REVIEW.—The Commission shall grant substantial deference to any reasonable interpretation by the Secretary of this Act or any standard, regulation, or order pursuant to this Act.

(c) RECORDKEEPING AND REPORTING.—

(1) IN GENERAL.—With regard to recordkeeping and reporting, the Secretary and Secretary of Health and Human Services shall have the same authority to prescribe regulations related to this Act as under section 8 of the Occupational Safety and Health Act (29 U.S.C. 657).

(2) CONSOLIDATING REQUIREMENTS.—The Secretary may incorporate recordkeeping and reporting requirements under this section into existing recordkeeping and reporting requirements promulgated pursuant to section 8 of the Occupational Safety and Health Act (29 U.S.C. 657), provided that a violation of such a requirement with regard to implementation of this Act shall be enforced as a distinct violation separate and apart from any other simultaneous violation of a requirement pursuant to the Occupational Safety and Health Act.

(d) WHISTLEBLOWER PROTECTIONS.—

(1) COMPLAINT.—Any employee who believes that such employee has been discharged or otherwise discriminated against by any person in violation of section 11(c)(1) of the Occupational Safety and Health Act (29 U.S.C. 660(c)(1)) with regard to any matter under or related to this Act may, within 180 days after such violation occurs, file a complaint with the Secretary following the procedures in paragraph (2) of such section alleging such discrimination.

(2) ACTION.—If the Secretary fails to notify the complainant of the Secretary's determination on the complaint within 90 days pursuant to section 11(c)(3) of the Occupational Safety and Health Act (29 U.S.C. 660(c)(3)) or determines not to bring an action pursuant to paragraph (2) of such section, such employee may bring an action in any appropriate United States district court against such person for all appropriate relief in accordance with paragraph (2) of such section as well as reasonable attorney's fees and costs.

SEC. 5. GENERAL PROVISIONS.

(a) SEVERABILITY.—If any provision of this Act is held invalid, the remainder of this Act shall not be affected thereby. If the application of any provision of this Act to any person or circumstance is held invalid, the application of such provision to other persons or circumstances shall not be affected thereby.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated from sums not otherwise appropriated, for each fiscal year, such sums as may be necessary to carry out this Act.

SEC. 6. AGENDA FOR FURTHER REVIEW AND ACTION.

The Secretary shall update the National Agricultural Workers Survey with such questions that, in the Secretary's judgment, are useful to identify the incidence and prevalence of heat-related illness and injury and assess the impact of standards and enforcement pursuant to this Act. Within one year of the date of enactment of this Act, the Secretary shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report on the Secretary's implementation of this subsection.

SEC. 7. DEFINITIONS.

For purposes of this Act:

(1) The term "Commission" means the Occupational Safety and Health Review Commission.

(2) The term "employee" has the same meaning as in section 3(6) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652(6)).

(3) The term "employer" has the same meaning as in section 3(5) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652(5)).

(4) The term "heat stress" means the load of heat that a person experiences due to—

(A) sources of heat or heat retention (including the combined contributions of metabolic heat, environmental factors, and clothing or personal protective equipment); or

(B) the presence of heat in a work setting.

(5) The term "heat-related illness" means a material impairment of health that occurs due to heat stress.

(6) The term "heat-related injury" means an injury caused by exposure to heat or sources of heat or occurring as a result of heat stress.

(7) The term "Institute" means the National Institute for Occupational Safety and Health.

(8) The term "Secretary" means the Secretary of Labor.

(9) The term "worker heat protection standard" means a standard that regulates employee exposure to heat stress and prevents heat-related illness and injury by requiring conditions or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide employment and places of employment that are safe or healthful.

PURPOSE AND SUMMARY

The purpose of H.R. 2193, the *Asunción Valdivia Heat Illness and Fatality Prevention Act* (Act),[1] is to protect workers from illness, injury, and fatality risks caused by heat stress. It does so by clarifying employers' duties to protect employees from heat stress and directing the Secretary of Labor (Secretary) to initiate rulemaking that would regulate employees' exposure to heat stress. It establishes the scope of rulemaking authority on occupational heat stress, mandates promulgation of an interim final rule within one year, and sets procedures for subsequent rulemakings as heat hazards increase or science evolves over time. It enables meaningful enforcement and implementation of heat stress standards, and it requires the Secretary to survey farmworkers in order to track the incidence of heat-related illness and injury and the effectiveness of the Act.

H.R. 2193 has been endorsed by the AFL–CIO; Alianza Nacional de Campesinas, Inc.; Alliance of Nurses for Healthy Environments; American College of Occupational and Environmental Medicine; American Federation of State, County & Municipal Employees (AFSCME); American Indian Mothers, Inc.; American Industrial Hygiene Association; American Postal Workers Union, AFL–CIO; American Public Health Association; American Sustainable Business Council; Amity Foundation; Asian Pacific American Labor Alliance, AFL–CIO; Association of Farmworker Opportunity Programs; Association of Occupational and Environmental Clinics; Association of Western Pulp and Paper Workers; Beyond Toxics; Broome Tioga Green Party; Cannabis Workers Coalition; Catholic Labor Network; Catskill Mountainkeeper; CATA–E1 Comite de Apoyo a los Trabajadores Agricolas; Center for Biological Diversity; Center for Health, Work and Environment; Center for Progressive Reform; Central Florida Jobs with Justice; Centro de los Derechos del Migrante, Inc.; Child Labor Coalition; Climate Health Now; Climate Jobs PDX; Climate Psychiatry Alliance; Climate Psychiatry Alliance-Early Career Network; Climate Solutions; Climate Tucson; College of Veterinary Medicine and Biomedical Sciences, Colorado State University; Communications Workers of America (CWA); Concentra; Connecticut Council for Occupational Safety and

[1] Here and throughout the legislative history, we are correcting the bill title to reflect that the person for whom the bill was named spelled his first name with a diacritical mark over the *o* in *Asunción*. As explained later, the Amendment in the Nature of a Substitute for H.R. 2193 amended the short title of the Act to reflect the correct spelling.

Health; Courage California; CrearConSalud; CRLA Foundation; Department of Environmental and Radiological Health Sciences, Colorado State University; Disciples Refugee & Immigration Ministries; Earthjustice; Employee Rights Center; Episcopal Farmworker Ministry; Erotic Service Providers Union; Farm Worker Ministry Northwest; Farmworker Association of Florida; Farmworker Justice; Farmworker Association of Florida; Farmworker Justice; Farmworker's Self-Help; Fayetteville Police Accountability Community Taskforce; Florida Center for Fiscal & Economic Policy; Florida Immigrant Coalition; Florida People's Advocacy Center; Food & Water Watch; Food Chain Workers Alliance; Friends of the Earth US; Garment Worker Center; Government Accountability Project; Greater New York Labor Religion Coalition; HEAL (Health, Environment, Agriculture, Labor) Food Alliance; Healthy Work Campaign—Center for Social Epidemiology; Healthy Workplaces; HeumannHealth Consulting; High Plains Intermountain Center for Agricultural Health and Safety; Honesty Home Care; Human Rights Watch; Ilana Slaff Medical PLLC; Institute for Agriculture and Trade Policy; Interfaith Worker Justice; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers; International Brotherhood of Teamsters; International Chemical Workers Union Council (ICWUC); International Safety Equipment Association (ISEA); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); IUE–CWA; Jersey Renews Coalition; Justice at Work; Justice at Work Pennsylvania; Justice for Black Farmers; Justice for Migrant Women; Korey Stringer Institute; La Isla Network; La Union Del Pueblo Entero; Labor Education Program, University of Massachusetts Lowell; Legal Aid Justice Center; Lomakatsi Restoration Project; MassCOSH (Massachusetts Coalition for Occupational Safety & Health); Methodist Federation for Social Action; Michigan Postal Workers Union; Mississippi Workers' Center for Human Rights; National Consumers League; National Council for Occupational Safety and Health; National Day Laborer Organizing Network; National Employment Law Project; National Farm Worker Ministry; Natural Resources Defense Council; New Mexico Center on Law and Poverty; Northeast Organic Farming Association—New Hampshire; Northeast Organic Farming Association—New York (NOFA–NY); Northeast Organic Farming Association of Vermont; Northwest Center for Alternatives to Pesticides; Northwest Workers' Justice Project; OLÉ (Organizers in the Land of Enchantment); Oregon Climate and Agriculture Network; Oregon Environmental Council; Oregon League of Conservation Voters; Philaposh; Physicians for Social Responsibility, Arizona Chapter; Piñeros y Campesinos Unidos del Noroeste; Progressive Democrats of America; Progressive Democrats of America, Tucson Chapter; Public Citizen; Public Justice; Puerto Rico Clinicians for Climate Action; Refugee Women's Network; Retail, Wholesale and Department Store Union (RWDSU); OLÉ (Organizers in the Land of Enchantment); RI Committee on Occupational Safety and Health; SafeWork Washington; San Francisco Bay Physicians for Social Responsibility; Service Employees International Union (SEIU); Sisters of Charity, BVM; Sisters of Charity of Nazareth Congregational Leadership; Sisters of Charity of Nazareth Western Province Lead-

ership; Sisters of the Humility of Mary; Solstice Market NYC; Student Action with Farmworkers; Sur Legal Collaborative; Toxic Free North Carolina; Transport Workers Union Local 555; Union of Concerned Scientists; United for Respect; United Church of Christ, Justice and Local Church Ministries; United Farm Workers; United Farm Workers Foundation (UFWF); United Food and Commercial Workers International Union; United Scenic Artists Local USA 829, IATSE; United Steelworkers International Union; USDA Coalition of Minority Employees; Utility Workers Union of America; Virginia Clinicians for Climate Action; WeCount!; Whistleblowers of America; Western New York Council on Occupational Safety and Health (WNYCOSH); Women's Voices for the Earth; and Worksafe.

COMMITTEE ACTION

103RD CONGRESS

On March 2, 1993, Rep. George Miller (D–CA–07) introduced H.R. 1173, the *Agricultural Worker Protection Reform Act of 1993*, which would have, among other things, required agricultural employers to protect employees from heat stress. The bill was referred to the Committee on Education and Labor (Committee). The bill had 16 Democratic cosponsors.

On September 15, 1993, the Committee's Subcommittee on Labor Standards, Occupational Health and Safety held a hearing entitled "Hearing on H.R. 1173 and H.R. 1999" (1993 Hearing). Among the 14 witnesses, three mentioned issues related to heat illness and the requirement in H.R. 1173 for a heat stress standard: Ms. Ellen Braff-Guajardo, Attorney, California Rural Legal Assistance, Fresno, CA; Mr. Douglas W. Mosber, Vice President, California Farm Bureau Federation, Sacramento, CA; and Mr. Mark Schact, Attorney, California Rural Legal Assistance, Sacramento, CA. No further action was taken on the legislation.

116TH CONGRESS

On July 10, 2019, Rep. Judy Chu (D–CA–27) introduced H.R. 3668, the *Asunción Valdivia Heat Illness and Fatality Prevention Act of 2019*. The bill would have directed the Secretary to promulgate a standard on prevention of exposure to excessive heat. The bill was referred to the Committee. The bill had 79 Democratic cosponsors.

On July 11, 2019, the Committee's Subcommittee on Workforce Protections held a hearing entitled "From the Fields to the Factories: Preventing Workplace Injury and Death from Excessive Heat" (2019 Hearing). The hearing assessed the severity of heat-related illness in outdoor and indoor workplaces and the necessity for worker protections. Witnesses for the hearing were: Mr. Thomas E. Bernard, Ph.D., Professor, College of Public Health, University of South Florida, Tampa, FL; Mr. Javier Rodriguez, Warehouse Worker, Worker Resource Center, Ontario, CA; Mr. Kevin Cannon, Senior Director of Safety and Health Services, Associated General Contractors of America, Arlington, VA; Ms. Ronda McCarthy, MD, MPH, National Medical Director, Medical Surveillance Services, Concentra, Waco, TX; Mr. Bryan Little, Director of Labor Affairs, California Farm Bureau Federation, Sacramento, CA; and Mr.

Arturo Rodriguez, Former President, United Farm Workers, San Antonio, TX.

On October 1, 2020, Sen. Kamala Harris (D–CA) introduced a companion bill, S. 4781, the *Asunción Valdivia Heat Illness and Fatality Prevention Act of 2020*. The bill was referred to the Committee on Health, Education, Labor, and Pensions (HELP Committee). The bill had five Democratic cosponsors. No further action was taken on the legislation.

117TH CONGRESS

On March 26, 2021, Rep. Chu introduced H.R. 2193, the *Asunción Valdivia Heat Illness and Fatality Prevention Act of 2021*. The bill was referred to the Committee. The bill has 112 Democratic cosponsors.

On April 12, 2021, Sen. Sherrod Brown (D–OH) introduced a companion bill, S. 1068, the *Asunción Valdivia Heat Illness and Fatality Prevention Act of 2021*. The bill was referred to the HELP Committee. The bill has 15 Democratic cosponsors and one Independent cosponsor.

The Committee's Subcommittee on Workforce Protections held a hearing on May 25, 2022, entitled "Examining the Policies and Priorities of the Occupational Safety and Health Administration" (May 25 Hearing). The witnesses were Mr. Douglas Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC, and Mr. Thomas Costa, Director of Education, Workforce, and Income Security, Government Accountability Office, Washington, DC. During this hearing, Assistant Secretary Parker testified on multiple topics, including the need for a heat standard and the slowness of the OSHA rulemaking process.

The Committee held a markup of H.R. 2193 on July 27, 2022. The Committee adopted an Amendment in the Nature of a Substitute (ANS) offered by Rep. Alma S. Adams (D–NC–12).

The ANS made the following changes:

- Revises the short title by adding a missing accent mark to the name *Asunción* and changing the year to *2022*;
- Clarifies that employers have an ongoing general duty to provide jobs free from dangerous heat stress;
- Requires the Secretary to develop a strong standard on heat stress;
- Mandates an interim final rule within one year and spells out procedures with tight timelines for any updates to the heat stress standards in the future;
- Requires transparency in the rulemaking docket of comments received and changes made during rulemaking review by the White House Office of Management and Budget;
- Sets a statute of limitations of four years for heat-related regulatory violations and 180 days for heat-related whistleblower retaliation claims, with additional procedural avenues for retaliation claims; and
- Requires the Secretary to update the National Agricultural Workers Survey to include questions useful for tracking heat-related illness and injury and the effectiveness of this Act.

Three amendments to the ANS were offered:

- Rep. Fred Keller (R–PA–12) offered an amendment to eliminate the provision of the ANS requiring petitions for judi-

cial review of a standard to be filed within 60 days of promulgation in the U.S. Court of Appeals for the District of Columbia. The amendment failed by a vote of 19 Yeas and 27 Nays.

- Rep. Michelle Steel (R–CA–48) offered an amendment to require the Secretary to convene a small business review panel before issuing an interim final rule. The amendment failed by a vote of 19 Yeas and 27 Nays.
- Rep. Bob Good (R–VA–5) offered an amendment to reduce the statute of limitations for regulatory violations from four years to six months. The amendment failed by a vote of 19 Yeas and 27 Nays.

H.R. 2193 was reported favorably, as amended, to the House of Representatives by a vote of 27 Yeas and 19 Nays.

COMMITTEE VIEWS

INTRODUCTION

Millions of American workers are vulnerable to the severe and often deadly health effects of heat stress. Excessive heat stress can cause heat-related illnesses such as heat cramps, organ damage, heat exhaustion, stroke, and even death. Data from the Bureau of Labor Statistics (BLS) show that, between 1992 and 2017, heat-related illness and injury killed hundreds of workers in the U.S. and severely injured tens of thousands. Climate change is intensifying the risk. Although several states and the U.S. military have policies in place to prevent heat-related illness and injury, the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL) has not issued a workplace health and safety standard on this hazard to protect workers' lives and wellbeing.

H.R. 2193, the *Asunción Valdivia Heat Illness and Fatality Prevention Act*, would establish an employer's general duty to provide employment and places of employment free from hazardous heat stress and prevent heat-related illness and injury; direct the Secretary of Labor (Secretary) to promulgate a strong worker heat protection standard within one year; and improve OSHA governance capacity to enforce the standard and update it over time.

HEAT STRESS IS A HAZARD TO WORKERS' HEALTH AND SAFETY

When a worker experiences environmental heat and internal body heat combining to reach levels that overwhelm the capacity of the body's natural heat-regulating systems, the resulting heat stress can cause serious illnesses and injuries. The risk of these heat-related illnesses and injuries is significant throughout the U.S. workforce, although some populations have a particularly higher risk.

Heat Stress and Its Effects

The National Institute for Occupational Safety and Health (NIOSH) defines heat stress as the "net heat load to which a worker is exposed from the combined contributions of metabolic heat, environmental factors, and clothing worn which results in an in-

crease in heat storage in the body."[2] Metabolic heat is the heat generated in the body by metabolic processes that convert chemical energy, such as that in food and fat stores, into the energy required for work and physical exertions.[3] Environmental factors include ambient heat; direct sunlight, which can intensify heat above its general ambient measured level; and humidity, which can interfere with the body's ability to regulate internal heat. Clothing and personal protective equipment (PPE) increase the thermal load of metabolic heat and environmental heat during work.[4]

Heat stress becomes hazardous when it exceeds the body's thermoregulatory capacity. The human body is designed to operate at a temperature of 98.6 degrees Fahrenheit (98.6°F), with slight variations. During intense physical work, the body's temperature will increase; working in the presence of environmental heat, such as that from a hot summer day or a furnace, will increase the body's heat even more. The thermoregulatory system is a set of mechanisms to cool the body, mainly through perspiration, which is intended to pull heat out and cool the body from the evaporation of sweat. These mechanisms can be compromised by heat from the ambient environment or radiant indoor sources, humidity, low air velocity, and some types of clothing. The body's thermoregulatory system also has its own limits, such as dehydration, and can be overwhelmed in a short amount of time given sufficient heat, even without exertion. Heat stress occurs when the heat generated by the body cannot be adequately dissipated to the ambient environment, causing heat to accumulate in the body and core body temperature to rise.[5]

Too high an increase in core temperature leads to a variety of heat-related illnesses, from heat rashes to heat stroke. Heat stroke is particularly dangerous. Triggered when the body's temperature exceeds 105.8°F, heat stroke is characterized by neurological impairment and an overheating of tissue that breaks down proteins and can cause liver and kidney damage.[6] The longer the body stays above 105.8°F and the greater the elevation above 105.8°F, the more likely heat stroke will become fatal.[7] Even if not fatal, it can cause permanent damage to the brain, kidneys, and liver.[8] Time is of the essence with heat stroke, which can lead to death or permanent disability if emergency medical treatment is not provided in time.[9]

Although occupational heat stress is most frequently discussed in terms of hard work in high temperatures, metabolic heat from overexertion alone can be significant enough to cause heat-related illness. Rhabdomyolosis, for example, is a serious condition associated with both heat stress and extended physical exertion, in which muscle fibers break down and become necrotic, threatening renal

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[2] BRENDA JACKLITSCH *et al.*, NAT'L INST. FOR OCC. SAFETY & HEALTH, DHHS (NIOSH) PUB. NO. 2016–106, NIOSH CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO HEAT AND HOT ENVIRONMENTS xx (rev. 2016) [hereinafter NIOSH Criteria].

[3] *Id.* at xxi, xxiii, 1.

[4] *Id.* at 15–22.

[5] *Id.* at 23–58.

[6] *Heat Stress—Heat Related Illness*, NAT'L INST. FOR OCC. SAFETY & HEALTH, https://www.cdc.gov/niosh/topics/heatstress/heatrelillness.html (last visited Aug. 1, 2022) [hereinafter Heat Illness Facts].

[7] NIOSH Criteria, *supra* note 2, at 47–52.

[8] *Id.* at 52.

[9] *Id.*

failure.[10] Firefighters are at particular risk,[11] although the condition may be better known from news coverage of exercise enthusiasts who aggressively push themselves beyond healthy physical limits.[12]

Heat stress has a wide variety of effects short of heat stroke. As body temperature rises, workers lose the ability to think clearly, and perception, planning, and other mental processes become impaired.[13] Between this impaired mental functioning and weakened physical performance from the effects of heat stress, workers are also predictably at greater risk of injury. These injuries other than the usual symptoms of heat-related illness are referred to as heat-related injuries.[14]

Heat-related injuries might outpace illnesses. Researchers analyzing more than 11 million workers' compensation claims in California observed a link between heat and injury:

> [H]otter temperature significantly increases the likelihood of injury on the job. A day with high temperatures between 85 and 90°F leads to a 5 to 7 percent increase in same-day injury risk, relative to a day in the 60's. A day above 100°F leads to a 10 to 15 percent increase. . . .
>
> [C]laims for many injuries not typically considered heat-related rise on hotter days. These include injuries caused by falling from heights, being struck by a moving vehicle, or mishandling dangerous machinery. The increase in injuries affects a wide range of body parts, suggesting that the mechanisms may not be limited to heat-illnesses such as heat stroke or heat syncope.[15]

These injuries, one of the researchers explained to the House Select Committee on the Climate Crisis, were "the vast majority" of excess claims in the data set.[16]

Widespread Risk

According to BLS data, heat stress killed 907 U.S. workers between 1992 and 2019, for an average of 32 worker deaths per year.[17] In 2019 alone, according to government data, occupational heat stress killed 43 workers.[18] The true death toll is likely much higher. A Public Citizen analysis of BLS and Centers for Disease Control and Prevention (CDC) data suggests that one in 17 heat-related deaths is occupational, meaning that more than 700 work-

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[10] *Id.* at xxi, 42, 52–54.
[11] *Id.* at 54–55.
[12] *See, e.g.*, Matt Hart, *Does CrossFit Have a Future?*, NEW YORKER (July 20, 2021), https://www.newyorker.com/sports/sporting-scene/does-crossfit-have-a-future; Richard Morgan, *Rhabdo Is Rare but Potentially Fatal. Here's Why Fitness Experts Fear a Rise in Cases This Summer*, WASH. POST (June 28, 2021), https://www.washingtonpost.com/lifestyle/wellness/rhabdomyolosis-workout-gym-symptoms-kidney/2021/06/28/b5940292-d5cc-11eb-9f29-e9e6c9e843c6_story.html; Julia Ries, *Bodybuilder Dana Linn Bailey Got 'Rhabdo' After CrossFit: What to Know*, HEALTHLINE (Apr. 10, 2019), https://www.healthline.com/health-news/fitness-star-ends-up-in-er-for-rhabdo-what-is-it; Gemma Wilson, *Deadly Condition Linked to CrossFit on the Rise*, N.Y. POST (Apr. 7, 2017), https://nypost.com/2017/04/07/deadly-condition-linked-to-crossfit-on-the-rise/.
[13] Heat Illness Facts, *supra* note 6.
[14] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,309, 59,310 (Oct. 27, 2021) [hereinafter Heat ANPRM].
[15] R. JISUNG PARK, NORA PANKRATZ & A. PATRICK BEHRER, IZA DP NO. 14560, TEMPERATURE, WORKPLACE SAFETY, AND LABOR MARKET INEQUALITY 2–3 (2021).
[16] *Advancing Environmental Justice Through Climate Action: Hearing Before the H. Sel. Comm. on Climate Crisis*, 117th Cong. 20 (2021) (testimony of R. Jisung Park).
[17] Heat ANPRM, *supra* note 14, at 59,310 (citation omitted).
[18] *Id.* (citation omitted).

ers die every year because of occupational heat stress.[19] Even with the prospect of undercounting, the BLS data reveal a troubling trend: "A recent analysis of BLS data by National Public Radio and Columbia Journalism Investigations found that the three-year average of heat-related fatalities among U.S. workers has doubled since the early 1990s." [20]

BLS estimates that, from 2011 to 2019, there were 31,560 work-related heat injuries and illnesses serious enough to require workers to spend days away from work, averaging 3,507 such illnesses and injuries every year.[21] As with heat-related fatalities, the heat-related illnesses and injuries are likely undercounted. In fact, although labeled "heat-related illnesses *and injuries*," the BLS data actually count only illnesses, because heat-related injuries are tracked simply as injuries. For example, if a worker is weakened by heat stress, falters, and then falls from a height, the resulting injury would show up in BLS data as a fall, not specifically as a heat-related injury.[22] Some heat-related illnesses also may present in a clinical setting as non-heat-related heart attacks or other conditions and be recorded as such in available public health data.[23] A report examining the undercount observes that California employers reported 300 times more heat-related incidents to the state's workers' compensation system than to the state's occupational safety regulatory agency; if the pattern holds nationwide, then there may be as many as 170,000 heat-related occupational illnesses and injuries every year.[24]

Populations at Heightened Risk

Workers are at risk of heat-related illness and injury in both outdoor and indoor work settings. A study of millions of workers' compensation claims in California found claims across both settings:

> As one might expect, hotter temperature significantly increases injuries in predominantly outdoor industries such as agriculture, utilities and construction. But higher temperatures also increase injuries in some industries where work typically occurs indoors. In manufacturing, for instance, a day with highs above 95°F increases injury risk by approximately 7 percent relative to a day in the low 60's. In wholesale, the effect is nearly 10 percent.[25]

Among outdoor workers, workers in agriculture and construction have been found to be at particularly heightened risk, according to multiple studies:

- A study of government data from 2000 to 2010 found that the three sectors with the most heat-related occupational fa-

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[19] JULEY FULCHER, PUBLIC CITIZEN, BOILING POINT: OSHA MUST ACT IMMEDIATELY TO PROTECT WORKERS FROM DEADLY TEMPERATURES 15 (2022).
[20] Heat ANPRM, *supra* note 14, at 59,310 (citation omitted).
[21] *Id.* (citation omitted).
[22] FULCHER, *supra* note 19, at 11.
[23] Diane M. Gubernot *et al., The Epidemiology of Occupational Heat-Related Morbidity and Mortality in the United States: A Review of the Literature and Assessment of Research Needs in a Changing Climate*, 58 INT'L J. BIOMETEOROL. 1779 (2015).
[24] FULCHER, *supra* note 19, at 12.
[25] PARK *et al., supra* note 15, at 1–2.

talities in this period were agriculture, construction, and support/waste/remediation.[26]

- The fatality risk for farmworkers is approximately 20 times greater compared to all civilian industries[27] and 35 times greater than all sectors other than agriculture, construction, and support/waste/remediation.[28]
- A 2019 study found that construction workers accounted for 36 percent of all occupational heat-related deaths between 1992 to 2016, despite making up only 6 percent of the total American labor force.[29]

Among the likely contributors to the heightened risk for agricultural and construction workers is that both groups often labor in direct sunlight, which can compound heat stress by increasing the heat index by 15°F.[30] Both groups also work with some sort of personal protective equipment (PPE), such as construction safety gear or the layers of clothing farmworkers don to protect themselves against toxic pesticide exposures, and this PPE can increase the temperature felt on bare skin by up to 27°F.[31]

Persistent social inequalities also show up in the heat stress data. Low-wage workers bear a disproportionate burden of occupational heat-related illness and injury:

> [T]emperature exposure at work may exacerbate trends in labor market inequality. . . . Due to the fact that lower wage workers are more likely to work in dangerous occupations, more likely to live and work in places with greater heat exposure, and experience larger marginal increases in risk on hotter days, the net effect on injuries is far greater for low[-]income groups. [F]or someone from the bottom quintile of the zip-code level residential income distribution, the annual effect is approximately 5 times larger than for someone from the top quintile of the residential income distribution.[32]

Immigrants and people of color are overrepresented in the low-wage workforce[33] and in industries with high levels of risk for heat-related illness and injury:

- According to DOL's 2015–2016 survey of agriculture workers, 76 percent of farmworkers were foreign-born and 49 percent did not have valid work authorization.[34]

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[26] Diane M. Gubernot, G. Brooke Anderson & Katherine L. Hunting, *Characterizing Occupational Heat-Related Mortality in the United States, 2000–2010: An Analysis Using the Census of Fatal Occupational Injuries Database*, 58 AM. J. INDUS. MED. 203 (2015).

[27] UNION OF CONCERNED SCI., FARMWORKERS AT RISK: THE GROWING DANGERS OF PESTICIDES AND HEAT 4 (2019), https://www.ucsusa.org/sites/default/files/2019-12/farmworkers-at-risk-report-2019-web.pdf.

[28] Gubernot *et al., supra* note 26.

[29] Xiuwen Sue Dong *et al., Heat-Related Deaths Among Construction Workers in the United States*, 62 AM. J. INDUS. MED. 1047 (2019).

[30] *Id.*

[31] *Id.*

[32] PARK *et al., supra* note 15, at 4.

[33] RANDY CAPPS *et al.*, URBAN INST., IMMIG. FAMS. & WRKS. BRIEF NO. 4, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE (Nov. 2003), https://www.urban.org/sites/default/files/publication/59111/310880-A-Profile-of-the-Low-Wage-Immigrant-Workforce.PDF; David Cooper, *Workers of Color are Far More Likely to Be Paid Poverty-Level Wages Than White Workers*, ECON. POL. INST. (June 21, 2018), https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/.

[34] TRISH HERNANDEZ & SUSAN GABBARD, JBS INT'L, U.S. DEP'T OF LAB., RES. REP. NO. 13, NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS i (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

- Immigrant workers are a significant proportion of workers in construction (24.8–26 percent), in particular roofing (46.3 percent), and warehousing (21 percent), as well as in a wide variety of manufacturing industries.[35]
- People of color represent 42 percent of the construction workforce, 34.8 percent of manufacturing, 26.6 percent of mining, and 73 percent of farm work.[36]

Unsurprisingly, these disparities are also reflected in the harms attendant to occupational heat stress:

- Hispanic workers comprise one third of heat-related occupational fatalities since 2010 but only 17 percent of the U.S. workforce.[37]
- According to a 2019 study on heat-related deaths of U.S. construction workers, Black construction workers were found to have, on average, a 51 percent higher likelihood of a heat-related death.[38]
- Construction workers in the U.S. who had been born in Mexico had a 91 percent higher risk of death from extreme heat.[39]

Heat stress is a hazard across the U.S. workforce, and these social determinants intensify the risk in inequitable ways.

HEAT STRESS IS A DRAIN ON THE ECONOMY

While each instance of a heat-related illness, injury, or fatality is a blow to working families, who bear most of the costs of occupational illness and injury in general,[40] heat stress also costs employers. Heat-related diminishment in workers' physical and mental capabilities reduces productivity.[41] According to a 2015 Environmental Protection Agency (EPA) report, the United States will lose 1.8 billion labor hours across the workforce in the year 2100 due to extreme temperatures under a business-as-usual climate change scenario. That adds up to $170 billion in lost wages.[42] The National Oceanic and Atmospheric Administration (NOAA) estimates that heat-related labor capacity losses—that is, reduction in acclimated workers' capacity to perform sustained labor under environmental heat stress—are projected to double globally by 2050.[43] Moreover,

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[35] DONALD KERWIN *et al.*, CTR. FOR MIG. STUDS., US FOREIGN-BORN ESSENTIAL WORKERS BY STATUS AND STATE, AND THE GLOBAL PANDEMIC (May 2020), https://cmsny.org/wp-content/uploads/2020/05/US-Essential-Workers-Printable.pdf; *Building America: Immigrants in Construction and Infrastructure-Related Industries*, NEW AMER. ECON. RES. FUND (Sept. 3, 2020), https://research.newamericaneconomy.org/report/covid19-immigrants-construction-infrastructure/.

[36] *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cps/cpsaat18.htm (last visited Aug. 1, 2022); HERNANDEZ & GABBARD, *supra* note 34, at i.

[37] Julia Shipley *et al., Heat is Killing Workers in the U.S.—and There Are No Federal Rules to Protect Them*, NPR (Aug. 17, 2021), https://www.npr.org/2021/08/17/1026154042/hundreds-of-workers-have-died-from-heat-in-the-last-decade-and-its-getting-worse.

[38] Dong *et al., supra* note 29.

[39] *Id.*

[40] *See generally* J. Paul Leigh, *Economic Burden of Occupational Injury and Illness in the United States*, 89 MILBANK Q. 728 (2011) (finding that workers' compensation absorbs less than 25% of the total economic costs of workplace illness and injury).

[41] UNITED NATIONS DEV. PROG. *et al.*, CLIMATE CHANGE AND LABOR: IMPACTS OF HEAT IN THE WORKPLACE 3 (Matthew McKinnon *et al.* eds., 2016), https://www.undp.org/publications/climate-change-and-labor-impacts-heat-workplace.

[42] ENVTL. PROT. AGENCY, CLIMATE CHANGE IN THE UNITED STATES: BENEFITS OF GLOBAL ACTION 28 (2015), https://www.epa.gov/sites/production/files/2015-06/documents/cirareport.pdf.

[43] John P. Dunn *et al.*, *Reductions in Labour Capacity from Heat Stress Under Climate Warming*, 3 NATURE CLIMATE CHANGE 563 (2013).

heat-related injuries and illnesses increase workers' compensation costs and hospital-related healthcare expenses.[44]

HEAT-RELATED ILLNESS AND INJURY AT WORK ARE PREVENTABLE

Heat stress has been widely recognized as a threat to human health for a very long time. The modern scientific basis for understanding the hazard, preventing heat-related illness and injury, and responding to heat-related emergencies has been developed over at least a century. Ways to prevent illness and injury are readily achievable, and the means to do so are well within the ability of employers to provide.

Long-Recognized Hazards

Heat stress has been recognized as a health hazard for working people since ancient times. Heat stroke is considered to be the oldest known medical condition.[45] Ancient Greeks, Romans, and Egyptians recognized the hazard and described it in relation to the dog star Sirius; to this day, we still refer to the "dog days of summer."[46] Deadly heat-related illness is documented in the Old Testament several times.[47] A body of scholarship on the treatment of heat-related illness dates back to at least 400 BC, when Hippocrates prescribed pouring cold water on the body of a person suffering heat-related illness.[48]

Just as long recognized is the need to *prevent* heat-related illness for people exerting themselves in hot conditions. In 332 BC, for example, military advisors counseled Alexander the Great against embarking on a long march in hot conditions without sufficient water supplies.[49] *The Canon of Medicine of Avicenna*, published in 1020 AD, had precautions against thirst, traveling in hot conditions, and heat stroke. Among other things, it recommended periodic breaks in the shade and cooling down with water.[50] Observers in the Civil War noted that seasoned soldiers took care to prevent "sunstroke" by stopping their advance when symptoms hit, moving to shaded areas, loosening their uniforms, and resting until symptoms ended.[51] An 1883 medical manual reviewing centuries of discussion about treatments for heat illness declared "a little water, and often, should be the rule."[52]

The U.S. military adopted a preventive program for heat stress in 1952, built on a body of research and observations stretching back to at least the late 19th Century:

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[44] Sidney Shapiro & Katherine Tracy, *Occupational Health And Safety Law, in* PUBLIC LAW AND CLIMATE DISASTERS (Rosemary Lyster *et al.* eds. 2018); U.S. GLOB. CHANGE RES. PROG., FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II (Nov. 2018), https://nca2018.globalchange.gov/.

[45] Douglas J. Casa, Robert Carter & Kent Scriber, *Historical Perspectives on Medical Care for Heat Stroke, Part 1: Ancient Times Through the Nineteenth Century: A Review of the Literature*, 2 ATHLETIC TRAINING & SPORTS HEALTH CARE 132 (2010).

[46] *Id.* at 133.

[47] *Id. See also, e.g., Judith* 8:2–3 (King James) (recounting the story of Judith's husband, who "died in the barley harvest. . . . For as he stood overseeing them that bound sheaves in the field, the heat came upon his head, and he fell on his bed, and died in the city of Bethulia.").

[48] Casa *et al., supra* note 45, at 133–34.

[49] *Id.* at 133.

[50] *Id.* at 134.

[51] Douglas J. Casa, Robert Carter & Kent Scriber, *Historical Perspectives on Medical Care for Heat Stroke, Part 2: 1850 Through the Present: A Review of the Literature*, 2 ATHLETIC TRAINING & SPORTS HEALTH CARE 178, 180 (2010).

[52] Casa *et al., supra* note 45, at 135.

> After World War II, much attention regarding [exertional heat stress] focused on prevention by instituting measures such as heat acclimatization guidelines, work-rest cycles, and hydration intake guidelines. Prior to this period, commanders erroneously ignored the consequences of exercise in the heat, and many withheld water during intense or prolonged maneuvers and field operations because it "toughened the troops." In 1954, the Navy Bureau of Medicine and Surgery evaluated the wet bulb globe temperature (WBGT) as part of its heat injury prevention program, and in 1956 the WBGT index was adopted by the U.S. Marine training command at Parris Island, SC. . . . Shortly thereafter, the use of WBGT became widespread within the U.S. military community and heat illness rates subsequently decreased. The WBGT, as a new climatic heat stress index, replaced many existing indices around the world. The British Army developed guidelines based on WBGT and acclimatization strategies in the 1960s and 1970s, in response to a large number of heat illnesses among troops deployed to Cyprus, Malaya, and Kuwait.[53]

The armed forces continue to apply the WBGT in a color-coded flag system for conveying the heat-related risk level and advising commanders on levels of physical activity and cautionary observation.[54]

The risk of heat stress from exertion in hot environments has also been long recognized in the context of athletics. The National Center for Catastrophic Sport Injury Research has tracked heat stroke deaths among football players since 1931[55] and has tracked heat-related illness in other sports since 1982.[56] Multiple athletics bodies and sports medicine authorities have for some time maintained position statements or policies related to heat stress.[57]

OSHA, too, has long known of the need to address occupational heat stress. NIOSH first published a set of recommendations to OSHA for a heat stress standard in 1972, with revisions in 1986 and 2016.[58] Even though OSHA denied a 2011 petition for rulemaking, its leadership at the time understood that workers needed protections from heat stress. In fact, during the Deepwater Horizon oil spill cleanup and recovery period in 2010, OSHA leaders facili-

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[53] Casa *et al., supra* note 51, at 185.

[54] *When the Days Get Hot, the Navy Color Coded Flag System Aims to Keep Sailors Safe: Flag Colors Change Based on the Temperature*, WTKR (July 23, 2021), https://www.wtkr.com/news/military/when-the-days-get-hot-the-navy-color-coded-flag-system-aims-to-keep-sailors-safe; Samantha L. Rivero, *Can't Take the Heat? Flags Show the Reason*, THE FLAGSHIP (June 6, 2011), https://www.militarynews.com/norfolk-navy-flagship/news/top_stories/can-t-take-the-heat-flags-show-the-reason/article_77f479d5-b7b5-5083-b947-f70d6b98929d.html.

[55] Allyson S. Howe & Barry P. Boden, *Heat-Related Illness in Athletes*, 35 AM. J. SPORTS MED. 1385, 1386 (2007).

[56] *Annual Reports*, NAT'L CTR. FOR CATASTR. SPORTS INJ. RES., https://nccsir.unc.edu/reports/ (last visited Aug. 11, 2022).

[57] *See, e.g.*, Douglas J. Casa et al., *National Athletic Trainers' Association Position Statement: Exertional Heat Illnesses*, 50 J. ATHL. TRAIN. 986 (2015); Nat'l Fed'n of State High Schl. Assoc'ns, *Position Statement and Recommendations for Hydration to Minimize the Risk for Dehydration and Heat Illness* (2008), http://ossaa.net/docs/Baseball/position%20statement%20drinksREV.pdf; Inter-Assoc'n Task Force on Exert. Heat Ill., *Inter-Association Task Force on Exertional Heat Illnesses Consensus Statement* (2003), https://www.nata.org/sites/default/files/inter-association-task-force-exertional-heat-illness.pdf; Comm. on Sports Med. & Fitness, Am. Acad. of Peds., *Climatic Heat Stress and the Exercising Child and Adolescent*, 106 PEDS. 158 (2000); Am. Coll. of Sports Med., *Position Stand on the Prevention of Thermal Injuries During Distance Running*, 19 MED. SCI. SPORTS EXERC. 529 (1987).

[58] NIOSH Criteria, *supra* note 2, at iii.

tated the development of policies to prevent heat-related illness and injury that proved successful in protecting workers from heat-related illness:

> During the Deepwater Horizon response in 2010, OSHA and NIOSH prepared guidelines based on the military's for high temperatures and humidity of the Gulf Coast. BP provided training and specified work and rest cycles based on the ambient conditions. For instance, they restricted work to 20 minutes with 40 minutes of rest in a shaded area when the temperature was between 92 and 98. Considering they employed 50,000 unfit workers on long shifts, it is amazing there were few serious heat exhaustions and no heat strokes.[59]

Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health at the time, later explained that the agency denied the petition because it was overwhelmed by active work to develop standards on other health hazards.[60] Dr. Michaels has subsequently taken the position that the hazard is so severe and the risk is rising so quickly that a standard is imperative.[61]

States are already acting. Five states have developed heat standards for workers in the absence of a federal standard. California paved the way with a heat stress standard for outdoor workers, and a standard for indoor workers is in development. Oregon's standard covers both indoor and outdoor workers, Washington's standard covers only outdoor workers, and Minnesota's standard covers only indoor workers.[62] The standard in Colorado, which is the most recent state to pass such a law, applies only to agricultural workers.[63]

Within Employers' Control

Employers do not control the weather, but they do control the workplace and the conditions of work.[64] The means to prevent heat-related illness and injury are well known and within employers' power to provide.

For example, a witness in the 2019 Hearing described conditions in a southern California warehouse that illustrate the impact of employer choices on heat-related risks:

> The work pace . . . was extremely high . . . We had to load or unload 450 boxes per hour, boxes between 10 and 100 pounds, carry [them] up to 40 feet out to the container and to the warehouse floor, and stack onto the carts or pallets for 8 hours per day. You will have to load, carry, and

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[59] *From the Fields to the Factories: Preventing Workplace Injury and Death from Excessive Heat*, 116th Cong. 12 (2019) (statement of Prof. Thomas E. Bernard) [hereinafter 2019 Hearing].

[60] *As Climate Heats Up, Government Must Protect Workers from Heat*, PUB. CIT. (July 17, 2018), https://www.citizen.org/news/as-climate-heats-up-government-must-protect-workers-from-heat/.

[61] *Id. See also* David Arkush & David Michaels, *Climate Change Isn't Just Cooking the Planet. It's Cooking Our Workforce*, WASH. POST (July 19, 2018), https://www.washingtonpost.com/opinions/climate-change-isnt-just-cooking-the-planet-its-cooking-our-workforce/2018/07/19/15dd33e0-89fd-11e8-85ae-511bc1146b0b_story.html.

[62] Heat ANPRM, *supra* note 14, at 59,316.

[63] *Colorado Department of Labor and Employment Issues Groundbreaking Farmworker Safety Standards*, TOWARDS JUSTICE (Feb. 10, 2022), https://towardsjustice.org/2022/02/10/colorado-department-of-labor-and-employment-issues-groundbreaking-farmworker-safety-standards/.

[64] *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017).

> stack a box container containing a microwave [or a] TV every 7½ seconds. I saw workers at this warehouse faint from the heat.
>
> People will feel sick and not know how to get help. Instead of providing the rest of us with information on how to protect ourselves, the company told the workers who fainted or feel sick and were facing heat distress to rest or go home, and told the rest of us keep working at the same pace of before.
>
> We who worked at the warehouse knew that these conditions were dangerous. We received training from educators and occupational health expert[s] from the institutions like UCLA. We began to ask for clean water, education around heat, and more breaks. The manager refused. . .
>
> We have . . . a picture of some coworkers with thermometers inside the warehouse showing 102 degrees that summer. Some of us who ask for protections or who take breaks, we are not brought back to work. But the . . . warehouse managers and the staffing agency leads will constantly remind us that we are temps, and that there will be not work for those who speak up or slow down.[65]

Mr. Rodriguez's testimony raises many possible points of intervention in the employer's control: the physical environment itself; the load and pace of work; the availability of training; the availability of clean water; the number of rest breaks allowed; and the management posture toward workers taking breaks or requesting protection. Small changes at these points can make the difference between a workplace that reduces or magnifies the risk of heat-related illness and injury.

When employers provide unsafe workplaces, fail to take steps to prevent heat-related illness and injury, or press workers to continue despite obvious hazards, the consequences for workers can be grave. These concerns are raised repeatedly in news reports, surveys, and worker complaints such as the following:

- Clergy & Laity United for Economic Justice-CA, UCLA Labor and Occupational Safety and Health Program, and Warehouse Workers United published a study in 2011 of health and safety hazards in the warehouse industry in Southern California. Of 101 warehouse workers surveyed, 73 percent reported "excessive heat or cold as a problem," 69 percent reported a lack of ventilation, and 48 percent reported lacking an "adequate supply of drinking water."[66]
- AT&T technicians in Texas were reported in 2011 alleging that they were not allowed to use the air conditioning in their trucks to cool down. The company responded that workers may idle their vans in order to use air conditioning for health and safety reasons, but the workers replied that managers use sen-

[65] 2019 Hearing, *supra* note 59, at 22 (statement of warehouse worker Javier Rodriguez).

[66] WAREHOUSE WORKERS UNITED & DEOGRACIA CORNELIO, SHATTERED DREAMS AND BROKEN BODIES: A BRIEF REVIEW OF THE INLAND EMPIRE WAREHOUSE INDUSTRY (2011), https://workercenterlibrary.org/wp-content/uploads/2021/08/Shattered_Dreams_and_Broken_Bodies718.pdf [hereinafter SHATTERED DREAMS AND BROKEN BODIES].

sors to track when vehicles idle and repeatedly send the message that idling will result in termination.[67]

• A wildlands firefighter in a standard training exercise on a particularly hot day in 2019 began to lag behind his peers. Even though his captain "recognized that he hadn't given his body enough of a rest yet," the captain nevertheless ordered a repeat of the exercise, during which the firefighter "stumbled and told his supervisor he felt exhausted—two telltale signs of heat stress." Not until he collapsed did his captain summon an airlift to a hospital. The firefighter died the next day.[68]

• In an NBC News investigation, UPS employees shared that their trucks, which do not have air conditioning, can reach temperatures as high as 152°F.[69] Workers in eight states alleged that UPS fails to comply with its own heat policies: "Managers push employees to keep working even when they're sick and discourage them from reporting illnesses, they said. When employees insist on treatment, they said they are often taken to urgent care centers that cannot administer IVs, delaying crucial care." [70]

• An Idaho farmworker told *Politico* in 2021 that her supervisors provide rest breaks and water, but only on their timetable—not when the workers themselves need them. "When the heat is at its worst, you often can't go get water until you're done or until there is a designated break," she explained. "But sometimes, it's not about having a designated break. If your body is giving out, it's giving out regardless of when the scheduled break is." [71]

• Multiple current and former restaurant workers submitted comments to an OSHA rulemaking docket in 2021 and 2022 urging standards to reduce extreme heat in restaurant kitchens. Their comments cited experiences of dehydration, heat exhaustion, and other challenges because of broken thermostats and insufficient climate control in the "back-of-the-house" areas of restaurants.[72] A worker center organizing restaurant workers has conducted surveys annually since 2005 and received reports every year about heat stress.[73]

Achievable Protections

Regulating workers' exposure to heat stress on the job to prevent heat-related illness and injury is feasible. In the 2019 Hearing, a

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[67] Amy Davis, *Workers Claim Company Is Putting Them In Danger*, KPRC LOCAL 2 (Aug. 24, 2011), https://www.click2houston.com/news/2011/08/24/workers-claim-company-is-putting-them-in-danger/.

[68] Shipley *et al.*, *supra* note 37.

[69] Lisa Riordan Seville *et al., In the Hot Seat: UPS Delivery Drivers at Risk of Heat-Related Illnesses*, NBC NEWS (July 18, 2019), https://www.nbcnews.com/business/economy/hot-seat-ups-delivery-drivers-are-risk-heat-stroke-kidney-n1031321.

[70] Lisa Riordan Seville & Adiel Kaplan, *Heat Takes Down More UPS Workers During Hottest Summer Ever*, NBC NEWS (Aug. 22, 2019), https://www.nbcnews.com/business/economy/heat-takes-down-more-ups-workers-during-hottest-summer-ever-n1044396.

[71] Ximena Bustillo, *Western Heatwave Highlights Need for Better Farmworker Protections*, POLITICO (July 8, 2021), https://subscriber.politicopro.com/article/2021/07/western-heatwave-highlights-need-for-better-farmworker-protections-2067572.

[72] *Rulemaking Docket: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*, REGULATIONS.GOV, https://www.regulations.gov/docket/OSHA-2021-0009/comments?filter=restaurant&pageNumber=2 (last visited Aug. 2, 2022).

[73] Tim Carman, *As Temperatures Rise, Chefs Find They Can't Stand the Heat Anymore*, WASH. POST (Aug. 1, 2022), https://www.washingtonpost.com/food/2022/08/01/heat-restaurant-workers-osha/.

public health official from Waco, Texas shared the impact from a few simple measures:

> After noting increased accidents, injuries, and illnesses during the summer months in outdoor workers, and little to no preventive measures in place, I explained the benefits of a heat-related illness prevention program to the employer. The city manager agreed to the prevention program for at-risk workers in streets, traffic, parks and recreation, solid waste, and utilities departments.
>
> I used the information from OSHA's technical manual on heat stress and NIOSH's criteria for standard occupational exposure to heat and hot environments to create the city's heat stress awareness program. This program included hydration, access to shade, supervisor and worker training on heat stress and heat-related illness, first aid and emergency response procedures, establishing a 3- to 4-day gradual heat acclimatization schedule, altered high heat work schedules, communication procedures, and medical monitoring of the at-risk workers.[74]

University of Pennsylvania researchers analyzed the program data and found that the Waco program was successful at reducing harms to workers and costs for employers:

> The total number of heat-related cases significantly decreased after implementation of the heat stress awareness program, and the workers' compensation costs went down 50 percent for heat-related illness.[75]

These steps can be taken without undue burden on employers. Many of the tools to protect workers are not costly and can be implemented without major disruptions to work processes. In particular, the core practices of hydration, rest in shaded or cooled areas, and acclimatization are known widely, proven to be effective, and well within the power of employers to provide.[76]

Frequent hydration is critical to protect workers from heat-related illness.[77] Prolonged exposure to heat can cause dehydration as the body perspires and depletes the body's water.[78] Consuming eight ounces of cool water or other hydrating beverages every 20 minutes through the workday can reduce the probability of heat illness.[79] OSHA also recommends employers provide electrolyte-rich drinks for workers working more than two hours in the heat, as workers lose salt and electrolytes through perspiration.[80] By providing water or electrolyte-rich beverages at regular intervals, employers can reduce the occurrence of heat-related illness.

Periodic rest breaks in shaded or cooled areas can also be beneficial in preventing heat-related illness. Shade and breaks allow workers to recuperate from heat stress and stabilize their body

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[74] 2019 Hearing, *supra* note 59, at 40.
[75] *Id.*
[76] See NIOSH Criteria, *supra* note 2; *Water. Rest. Shade.*, OCC. SAFETY & HEALTH ADMIN., https://www.osha.gov/heat-exposure/water-rest-shade (last visited Aug. 1, 2022) [hereinafter Water/Rest/Shade Campaign].
[77] Water/Rest/Shade Campaign, *supra* note 76.
[78] Cal/OSHA, *What Is Heat Illness?*, CAL/OSHA HEAT ILLNESS PREVENTION E-TOOL, https://www.dir.ca.gov/dosh/etools/08-9006/whatis.htm (last visited Aug. 10, 2022).
[79] Water/Rest/Shade Campaign, *supra* note 76.
[80] *Id.*

temperatures.[81] Employers have access to many detailed recommendations on how to provide cool-down breaks. OSHA recommends employers provide rest breaks, in cool locations if possible, and to increase the duration of the breaks as the temperature increases.[82] NIOSH and the American Conference of Governmental Industrial Hygienists provide specific recommendations for work and rest schedules depending on the labor and weather conditions.[83]

Acclimatization is the progressive exposure of workers to heat to improve their physiological response and tolerance to heat stress.[84] Acclimatized workers are physiologically better able to handle high temperatures and less likely to suffer heat-related illness.[85] Acclimatization can be an effective preventive measure for new workers and existing workers returning to hot conditions.[86] The absence of an acclimatization policy likely explains a particularly troubling pattern: nearly 50 percent of heat-related deaths happen on a worker's first day, and over 70 percent occur in a worker's first week.[87] NIOSH and OSHA currently recommend that an acclimatization schedule should schedule workers to work for approximately 20 percent of the regular workday in the heat on the first day and then increase the duration of work under heat stress by an additional 20 percent each subsequent day.[88]

In addition to these core practices, NIOSH recommends such practical preventive measures as increasing the number of workers assigned to a duty to minimize the exertion, pairing workers together to monitor each other for heat-related illness symptoms, and implementing a system to notify workers of a possible heat wave.[89]

Employers can also engineer their workplaces to reduce or eliminate hazardous heat. If the heat is generated by an industrial source, such as ovens or furnaces, adding additional layers of insulation to shield workers from heat sources can offer significant protection to workers with limited disruption to work processes.[90] Other ways in which heat can be controlled in indoor settings include adding fans, air conditioning, or increased ventilation for locations where workers congregate. As NIOSH guidance notes, "increasing air movement by the use of fans or blowers is often the simplest and usually the cheapest approach."[91] These engineering measures are often simple and effective measures that have been used for decades to protect workers.

Whatever the combination of measures in a preventive program, supervisors and employees must be trained to understand and apply it. As exposure to high temperatures is correlated with cognitive impairment and slower response times, workers experiencing heat stress may not be able to identify the risk they are in and re-

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[81] *Id.*
[82] *Id.*
[83] See NIOSH Criteria, *supra* note 2; Water/Rest/Shade Campaign, *supra* note 76.
[84] *Heat: Protecting New Workers,* OCC. SAFETY & HEALTH ADMIN., https://www.osha.gov/heat-exposure/protecting-new-workers (last visited Aug. 1, 2022) [hereinafter *New Workers*].
[85] NIOSH Criteria, *supra* note 1.
[86] *New Workers, supra* note 84.
[87] Sheila Arbury *et al., Heat Illness and Death Among Workers—United States, 2012–2013,* 63 MORB. & MORT. WKLY. REP. 661 (2014).
[88] *Id.*
[89] *Heat Stress—Recommendations*, NAT'L INST. FOR OCC. SAFETY & HEALTH, https://www.cdc.gov/niosh/topics/heatstress/recommendations.html (last viewed Aug. 10, 2022).
[90] 2019 Hearing, *supra* note 50, at 13.
[91] NIOSH Criteria, *supra* note 2.

spond to the threat.[92] Even those who can respond and request rest or medical intervention are at the mercy of their supervisors, who likewise need training to understand symptoms and respond quickly.

The benefits of a sound heat stress preventive program will be significant to workers and employers. Prevention will save lives and avert the downstream consequences of occupational illness and injury that can severely impact working families' economic wellbeing. It will also avert the costs to employers discussed above and reduce their workers' compensation costs.

Industry lobbying groups are very likely to reply that these simple measures will break the bank. However, the costs they imagine likely bear no relation to reality; this tends to be the case when it comes to opposition to regulation.[93] The California experience is proof that prevention pays.The California Farm Bureau Foundation, for example, testified in the 1993 Hearing against the idea of an outdoor heat standard, citing concern for employers' ability to comply with a standard successfully and avoid litigation.[94] By the 2019 Hearing, however, the same organization had changed its tune. Favorably describing California's 2006 outdoor heat illness prevention standard, a representative of the group testified that "the heat illness prevention standard is coming a long way toward achieving its goal."[95] He went on to credit California's outdoor heat stress standard with saving lives and celebrated the employers in his group for widespread compliance with the standard.[96] This change of heart shows that a standard based on proven, effective measures to prevent heat-related illness can protect workers without undue harm to employers.

THE THREAT TO WORKERS IS GROWING RAPIDLY

NIOSH first advised OSHA on the need for a heat stress standard 50 years ago.[97] OSHA did not develop a standard. The current and projected consequences of climate change, however, dictate the need for immediate action. Workers cannot wait another 50 years.

Recent years have been much hotter than years past. In fact, "nineteen of the hottest years [on record] have occurred since 2000."[98] June 2021 was the hottest June ever recorded in U.S. his-

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[92] Adel Mazloumi *et al., Evaluating Effects of Heat Stress on Cognitive Function among Workers in a Hot Industry*, 4 HEALTH PROMO. PERSP. 240 (2014).

[93] SIDNEY SHAPIRO *et al.,* CTR. FOR PROG. REF., WHITE PAPER NO. 1109, SAVING LIVES, PRESERVING THE ENVIRONMENT, GROWING THE ECONOMY: THE TRUTH ABOUT REGULATION (2011), https://cpr-assets.s3.amazonaws.com/documents/RegBenefits-1109.pdf; RUTH RUTTENBERG & ASSOCS., PUB. CIT., NOT TOO COSTLY, AFTER ALL: AN EXAMINATION OF THE INFLATED COST-ESTIMATES OF HEALTH, SAFETY AND ENVIRONMENTAL PROTECTIONS (2004), https://www.citizen.org/wp-content/uploads/migration/not-too-costly.pdf; HART HODGES, ECON. POL. INST., EPI BRIEF. PAPER NO. 69, FALLING PRICES: COST OF COMPLYING WITH ENVIRONMENTAL REGULATIONS ALMOST ALWAYS LESS THAN ADVERTISED (1997), https://www.epi.org/publication/bp69/; Pew Clean Energy Init., *Government Regulation: Costs Lower, Benefits Greater Than Industry Estimates*, PEW TRUSTS (May 26, 2015), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/05/government-regulation-costs-lower-benefits-greater-than-industry-estimates.

[94] *Hearing on H.R. 1173 and H.R. 1999 Before the Subcomm. on Lab. Stands., Occ. Health & Safety of the H. Comm. on Educ. & Lab.,* 103rd Cong. 91 (1993) (testimony of Doug Mosber, Second Vice President of the California Farm Bureau Federation).

[95] 2019 Hearing, *supra* note 59, at 50.

[96] *Id.* at 51–61.

[97] *See* text accompanying note 58 *supra.*

[98] *Key Indicators*, NASA GLOB. CLIM. CHANGE: VITAL SIGNS OF THE PLANET, https://climate.nasa.gov/vital-signs/global-temperature/#–text=Nineteen%20of%20the%20hottest%20years,source%3A%20NASA%2FGISS (last visited Aug. 10, 2022).

tory.[99] Cities and states known for their temperate summers have been reporting record-breaking temperatures over the past few years. In June 2021, for example, the Pacific Northwest states of Oregon and Washington reported significantly high temperatures that the region had never seen before.[100] Climate scientists from across the globe concluded the heat anomalies in the Pacific northwest in 2021 were "virtually impossible without human-caused climate change." [101]

The projections for the future are grim. According to the Union of Concerned Scientists (UCS), the impacts of climate change will be significant as soon as the middle of this century:

- Absent significant climate action, Florida and Texas will likely both experience an additional month worth of days with heat indices above the worker-safety threshold of 90°F, increasing the need for an enforceable OSHA standard to prevent heat-related illness.[102]
- Of the nation's 481 urban centers with more than 50,000 people, nearly one-third will experience a month's worth of days with a heat index above 105°F.[103]
- Indiana and Illinois, with current combined agricultural exports of $12.8 billion,[104] are expected to experience an average of 100 days above the 90°F threshold, above which workers are especially vulnerable to heat-related illness.[105]
- If the United States does not implement measures to combat climate change, outdoor workers are likely to experience three to four times more days with a heat index above 100°F by 2050.[106] Indoor workers are also impacted by climate change, especially during the summer, when temperatures in warehouses can exceed temperatures outdoors.[107]

The effects of climate change will be felt broadly, but workers will be at heightened risk. A study of OSHA heat citations noted that the heat index for the fatality and illness claims in the period covered ranged between 84°F and 105.7°F.[108] The projections above forecast an increase in days with temperatures in that range and beyond.

Workers have been called the "climate canaries" in part because, although the effects of climate change will be felt broadly, employers and the work environments they create may limit workers' abil-

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[99] FULCHER, *supra* note 19, at 6.

[100] *Western North American Extreme Heat Virtually Impossible Without Human-Caused Climate Change*, WORLD WEATHER ATTRIBUTION, https://www.worldweatherattribution.org/western-north-american-extreme-heat-virtually-impossible-without-human-caused-climate-change/ (last visited Aug. 10, 2022).

[101] *Id.*

[102] KRISTINA DAHL *et al.*, UNION OF CONCERNED SCI., KILLER HEAT IN THE UNITED STATES: CLIMATE CHOICES AND THE FUTURE OF DANGEROUSLY HOT DAYS 16 (2019), https://www.ucsusa.org/sites/default/files/attach/2019/07/killer-heat-analysis-full-report.pdf [hereinafter KILLER HEAT].

[103] These models do not incorporate or account for the urban heat island effect which makes cities hotter than non-urban areas, with the consequence of underestimating the prevalence and degree of hot temperatures in urban areas and, therefore, their impact on workers. *Id.* at 16.

[104] Ill. Dep't of Ag., *Facts About Illinois Agriculture*, ILLINOIS.GOV, https://www2.illinois.gov/sites/agr/About/Pages/Facts-About-Illinois-Agriculture.aspx (last visited Aug. 8, 2022); Ind. State Dep't of Ag., ISDA: ABOUT INDIANA AGRICULTURE, IN.GOV, https://www.in.gov/isda/3555.htm (last visited Aug. 8, 2022).

[105] KILLER HEAT, *supra* note 102, at 19.

[106] UNION OF CONCERNED SCI., TOO HOT TO WORK: ASSESSING THE THREATS CLIMATE CHANGE POSES TO OUTDOOR WORKERS (2021), https://www.ucsusa.org/sites/default/files/2021–09/Too-Hot-to-Work_9-7.pdf.

[107] SHATTERED DREAMS AND BROKEN BODIES, *supra* note 66.

[108] Arbury *et al., supra* note 87, at 662.

ity to adapt.[109] An enforceable standard, however, will require workplaces to adapt instead of exposing workers to dangerous heat.

OSHA'S CURRENT EFFORTS ARE INSUFFICIENT

The threat to workers from heat stress is significant, and it shows no signs of abating in the foreseeable future. OSHA does have three current initiatives underway to address this threat:

(1) a variety of education and outreach initiatives, including an educational campaign, a mobile app, and guidance to employers based on the National Weather Service heat index;

(2) enforcement citing an employer's general duty to provide employment free from recognized dangers; and

(3) a long-term effort to develop a standard on heat under the *Occupational Safety and Health Act of 1970* (OSH Act).[110]

As laudable as these initiatives are, they are not likely to achieve meaningful protection for workers from heat stress any time soon.

Limited Education and Guidance

Robust education to inform employers and workers about the hazards of heat stress and ways to prevent it can be valuable, but it is not sufficient in the absence of a standard. In fact, it is not clear if OSHA's current education efforts are even adequate.

OSHA provides guidance to employers counseling them to refer to the heat index and apply caution where warranted, but that heat index guidance falls short:

> There is only one federal vague recommendation tied to the heat index. Under OSHA's heat index, combined heat and humidity levels at less than 91 degrees are considered "lower caution" and temperatures between 91 and 103 are considered "moderate risk." Per the heat index, employers should begin "basic heat safety and planning" in the lower caution stage and "implement precautions and have heightened awareness" in the moderate stage. *The heat index does not advise employers to discontinue manual work*.[111]

OSHA and NIOSH have jointly developed a mobile app, the Heat Safety Tool, to advise workers in real time about their risks.[112] When researchers tested it with farmworkers in eastern North Carolina, the tool was found to be reasonably reliable for identifying low-risk conditions for heat stress but decreasingly reliable as risk conditions become increasingly severe. The app completely failed at identifying high and extreme risk conditions.[113]

Instead of embarking upon a standard during the Obama administration, OSHA ran an educational campaign: [114]

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[109] Cora Roelofs & David Wegman, *Workers: The Climate Canaries,* 104 AM. J. PUB. HEALTH 799 (2014).

[110] 29 U.S.C. § 651 *et seq.*

[111] Bustillo, *supra* note 71 (emphasis added).

[112] *OSHA–NIOSH Heat Safety Tool App,* NAT'L INST. FOR OCC. SAFETY & HEALTH, https://www.cdc.gov/niosh/topics/heatstress/heatapp.html (last visited July 30, 2022).

[113] Danielle Dillane & Jo Anne G. Balanay, Comparison *Between OSHA–NIOSH Heat Safety Tool App and WBGT Monitor to Assess Heat Stress Risk in Agriculture,* 17 J. OCC. & ENVTL. HYGIENE 181 (2020).

[114] Water/Rest/Shade Campaign, *supra* note 76.

> [OSHA leadership] touted the campaign as a success at the time. The numbers are less clear. The number of workers who succumbed to heat topped 61 cases during the campaign's inaugural year, in 2011—an all-time high. Another 65 workers would die from heat exposure in the ensuing two years, closer to the annual average for the decade, while the campaign remained an agency priority.[115]

Even if the campaign had been effective at the time, the agency has allowed it to become stale. An OSHA advisory group recently reviewed the agency's educational materials and found that they had not been updated in 10 years, were incomplete, did not fully apply across a range of workplaces, and may not reflect the current science.[116]

Education, guidance, and app-based hazard alerts are all worthwhile endeavors. However, when employers fail to provide healthy conditions of employment and discourage workers from taking basic steps to protect themselves, the education is all for naught.

Decreasing Access to General Duty Clause Enforcement

In the absence of a standard, OSHA can bring enforcement actions for heat-related violations using a fallback provision in the OSH Act, but this approach may have diminishing utility.

Section 5 of the OSH Act, widely known as the "General Duty Clause," requires employers to provide a safe and healthy workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[117] OSHA can bring an enforcement action under the General Duty Clause in situations without a specified standard on the books, but OSHA must prove (1) that employees were exposed to a hazard the employer failed to prevent, (2) that the hazard is generally recognized, (3) that the hazard is likely to cause death or serious physical harm, and (4) that there was a feasible method to correct the hazard.[118]

The General Duty Clause is not a substitute for an enforceable standard. During a review of OSHA's efforts to use General Duty Clause enforcement in the early days of the COVID–19 pandemic, OSHA officials admitted to the DOL Inspector General (IG) that the General Duty Clause is "harder to cite" than a standard.[119] The IG concurred, advising OSHA that a standard with enforceable criteria would be more effective given that "violations are rarely issued" under the General Duty Clause.[120] The record with respect to heat bears out OSHA and the IG's perspective. From 2013 to 2017, California used its heat standard to conduct 50 times more

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[115] Shipley *et al.*, *supra* note 37.

[116] Transcript of Heat Injury and Illness Prevention Work Group Meeting, Nat'l Adv. Comm. on Occ. Safety & Health, at 49–50, 53, 67, 76, 84 (Feb. 25, 2022), https://downloads.regulations.gov/OSHA–2022–0003–0004/content.pdf.

[117] 29 U.S.C. § 654(a).

[118] *See, e.g.,* Wiley Organics, Inc. v. OSHRC, 124 F.3d 201 (6th Cir. 1997); Whirlpool Corp. v. OSHRC, 645 F.2d 1096 (D.C. Cir. 1981); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

[119] U.S. DEP'T OF LAB., OFF. OF INSP. GEN., 19–21–003–10–105, COVID–19: INCREASED WORKSITE COMPLAINTS AND REDUCED OSHA INSPECTIONS LEAVE U.S. WORKERS' SAFETY AT INCREASED RISK 12 (Feb. 25, 2021).

[120] *Id.*

inspections discovering heat-related violations than OSHA did nationwide during the same period using the General Duty Clause.[121]

One of the disincentives to use of the General Duty Clause for heat stress may be the Occupational Safety and Health Review Commission (OSHRC). OSHA operates under a split enforcement model: OSHA inspectors issue citations, but penalties for those citations are assessed by OSHRC, an independent agency. An employer contesting a citation may file a challenge before an OSHRC Administrative Law Judge (ALJ), whose ruling may be reviewed at the Commission level by a panel of Senate-confirmed commissioners. This model of splitting the citation and assessment functions is very rare among federal regulatory and enforcement agencies:

> *Only one other agency in the entire federal government* is the subject of a similar arrangement—the Mine Safety and Health Administration (MSHA). In the rest of the government, the *Administrative Procedure Act* (APA) protects the rights of defendants without the problems that result from the split-enforcement arrangement.[122]

OSHRC and its ALJs have previously been receptive to General Duty Clause citations for heat-related hazards.[123] In fact, an ALJ once rejected a case about failure to require PPE in a molten steel operation precisely because the PPE could intensify heat stress and lead to heat-related illness.[124] At other times, OSHRC and its ALJs have rejected General Duty heat cases, not because heat is incompatible with the General Duty Clause but as a result of intensely critical scrutiny of DOL's case.[125] More recently, however, in the Commission-level decision *Sturgill* [126] and an ALJ-level decision in five related cases involving the U.S. Postal Service (USPS),[127] OSHRC has signaled that it is no longer willing to receive such cases at all.

Sturgill involved an incident in which a temporary employee for a roofing contractor developed heat stroke and later died. It appears, at first blush, to be the classic case of bad facts making bad

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[121] *85+ Groups Endorse Workplace Heat Protection Bill*, PUB. CIT. (Oct. 8, 2020), https://www.citizen.org/article/85-groupendorse-workplace-heat-protection-bill/#_edn14, at text accompanying note 14.

[122] THOMAS MCGARITY *et al*., CTR. FOR PROG. REF., WHITE PAPER NO. 1003, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA 21 (2010) (emphasis added).

[123] Duriron Co., No. 77–2847, 1983 OSAHRC LEXIS 121 (OSHRC Apr. 27, 1983), aff'd by Duriron Co. v. Sec'y of Lab., 750 F.2d 28 (6th Cir. 1984); U.S. Post. Serv., No. 13–0217, 2014 OSAHRC LEXIS 63 (OSHRC ALJ Sept. 24, 2014); Post Buckley Schuh & Jernigan, Inc., No. 10–2587, 2012 OSAHRC LEXIS 20 (OSHRC ALJ Mar. 15, 2012) (accepting General Duty Clause citation for heat stress in an archaeological field work site).

[124] Oberdorfer Indus., Inc., Nos. 97–0469 & 97–0470, 2003 OSAHRC LEXIS 82 (OSHRC ALJ Aug. 29, 2003).

[125] Scrutiny *See, e.g.,* Indus. Glass, No. 88–348, 1992 OSAHRC LEXIS 34 (OSHRC Apr. 21, 1992); Aldridge Elec., Inc., No. 13–2119, 2016 OSAHRC LEXIS 62 (OSHRC ALJ Dec. 2, 2016).

[126] Sec'y of Lab. v. A.H. Sturgill Roofing, Inc. (*Sturgill II*), No. 13–0224, 2019 OSAHRC LEXIS 7 (Rev. Comm'n Feb. 28, 2019).

[127] The five unpublished decisions in cases from across the country were issued on the same day:

(1) Sec'y of Lab. v. U.S. Postal Serv. (*USPS Heat I*), No. 16–1713 (OSHRC ALJ July 15, 2020) (addressing claims from San Antonio, Texas);

(2) Sec'y of Lab. v. U.S. Postal Serv. (*USPS Heat II*), No. 16–1813 (OSHRC ALJ July 15, 2020) (addressing claims from Des Moines, Iowa);

(3) Sec'y of Lab. v. U.S. Postal Serv. (*USPS Heat III*), No. 16–1872 (OSHRC ALJ July 15, 2020) (addressing claims from Benton, Arkansas);

(4) Sec'y of Lab. v. U.S. Postal Serv. (*USPS Heat IV*), No. 17–0023 (OSHRC ALJ July 15, 2020) (addressing claims from Houston, Texas); and

(5) Sec'y of Lab. v. U.S. Postal Serv. (*USPS Heat V*), No. 17–0279 (OSHRC ALJ July 15, 2020) (addressing claims from Martinsburg, West Virginia).

law: it was not particularly hot on the day in question, the worker in question was older with a prior history of heart disease, and the work itself was light to moderate—at least, that is, according to the majority opinion at the Commission level. In a lower decision at the ALJ level,[128] however, the facts of the case indicate several classic hallmarks of heat stress. The following side-by-side highlights the contrasting presentation of facts relevant to heat stress:

STURGILL I (ALJ DECISION)

> The flat, *white, roof* consisted of a rubber roofing membrane over a layer of Styrofoam insulation. . . . To tear-off the roof, employees removed the roofing materials and cut the Styrofoam and rubber into smaller size pieces. . . . . The Styrofoam pieces were light-weight. . . . *The rubber pieces weighed up to ten pounds each.* The materials were loaded onto a cart and moved to a staging area at the roof edge, *where the materials were lifted over a 39[-] inch parapet wall and thrown into a dump truck below.*
>
> [The foreman] recalled that *the temperature that morning was in the 80s with a predicted high that day of [89°F].* . . . . That morning the *hourly high temperatures ranged from [72°F] to [83°F].* . . . . Much of the roofing work performed . . . that morning, as the noon hour approached, was *in direct sunlight* . . . . [The foreman] provided *no training* to [the temporary employee] *on heat-related hazards or on recognizing the signs and symptoms of heat-related illness.* . . .
>
> [The foreman] stated that he didn't want [the temporary employee] to pull the cart of discarded materials . . . because it was *heavy* and sometimes it *took two people to move the cart*. Other employees put the discarded roofing materials in the cart and then took the cart to [the temporary employee] for disposal. [The temporary employee] was assigned to take the materials, *remove them from the cart, lift them over the 39-inch parapet wall, and toss them* into the dump truck below.[129]

STURGILL II (COMMISSION DECISION)

> Removing the building's existing roof consisted of tearing off a single-ply sheet rubber membrane and Styrofoam insulation under that membrane so that a new roof could be installed . . . . One of the temporary employees was . . . a *60-year-old man with various preexisting medical conditions, including hepatitis C and congestive heart failure.* . . . He began work that day at 6:30 a.m. and was *tasked with standing near the edge of the roof* where other employees brought him a cart full of *cut-up pieces of roofing material* that he then *pushed off the roof into a dumpster below.* . . . When [he] began his work, the temperature was *approximately 72°F with 84 percent relative hu-*

[128] A.H. Sturgill Roofing, Inc. (*Sturgill I*), No. 13–0224, 2015 OSAHRC LEXIS 10 (ALJ Feb. 23, 2015).

[129] *Sturgill I,* 2015 OSAHRC LEXIS 10, at *3–*10 (emphasis added).

> *midity*. There is no dispute that [the foreman] encouraged all employees to utilize the immediate access to ice, water, rest, and shade, without fear of reprisal.[130]

As the dissenting opinion in *Sturgill II* observes, the majority's compressed accounting of the case disregarded important facts relevant to heat stress:

> [M]y colleagues fail to factor into their analysis of the heat index [the foreman's] testimony regarding the temperature on the roof on August 1. In his transcribed statement to the compliance officer, [the foreman] was asked whether the temperature on the roof was hotter than on the ground. He answered, "[it] was about a 10[-]degree difference." There is every reason to credit [his] testimony in this regard: he has done roofing work for eighteen years, and therefore, has surely developed an understanding of the difference in temperature that can exist between the roof and the ground. Moreover, he had no incentive to exaggerate this number. Taking [his] unrebutted statement into account, the heat index on the roof would have been in the "extreme caution" zone.[131]

Additionally, as the dissent observed, the majority highlighted the worker's age and prior medical history despite testimony from the coroner that the worker's preexisting condition may have made the worker "more likely to *succumb*" to heat-related illness but not "*to cause* the elevated body temperature." [132]

Moreover, the majority appeared to go out of its way to find a reason to reject DOL's case. In its discussion about one of the General Duty Clause elements (the existence of a feasible means of reducing the risk), the majority read DOL's argument so tendentiously that it effectively rewrote DOL's case. DOL argued that Sturgill failed to develop a heat-related illness and injury prevention program which could have included at least five reasonable measures such as a formal work/rest schedule and acclimatization policy. The majority professed to find the argument ambiguous: was DOL arguing, the majority asked, that these five measures are all elements of an overall program that would have been feasible to adopt in order to prevent illness, or was DOL arguing that these were five separate alternatives? [133] Of course, there was a ready way to resolve any actual ambiguity: OHSRC's own "basic axiom that citations are to be construed liberally." [134] Additionally, as the dissent pointed out, there was ample reason to take DOL at its word that its theory of the case was, indeed, the theory of the case,

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[130] *Sturgill II,* 2019 OSAHRC LEXIS 7, at *3–*4 (emphasis added).
[131] *Sturgill II,* 2019 OSAHRC LEXIS 7, at *54 (Atwood, Comm'r, dissenting).
[132] *Id.* at *56–*57 (Atwood, Comm'r, dissenting).
[133] *Id.* at *29–*30 ("[W]e must first determine whether the Secretary proposed each measure as an *alternative means of abatement,* in which case implementing any one of them would constitute abatement of the alleged violation, or as a *component of a single means of abatement*, in which case all of the measures must be implemented to abate the violation. If the former, the Secretary can prevail on this element only if he proves that Sturgill implemented none of the measures. If the latter, he need only show a failure to implement one of them.") (citation omitted and emphasis added).
[134] *Id.* at *71–*72 (Atwood, Comm'r, dissenting).

especially since both Sturgill's response and the ALJ's decision reflected the same understanding.[135]

Nevertheless, the majority arrogated to itself the power to reinterpret DOL's theory of the case. Now, instead of reviewing DOL's actual argument that Sturgill could feasibly have prevented the employee's death by adopting a five-point *program* of PPE, rest, monitoring, removal, and acclimatization, OSHRC decided that Sturgill could prevail if it had implemented any one of the five points of the program in isolation.[136] With this new restatement of the case, the majority sided with Sturgill that it had implemented two out of the five points and concluded that DOL had failed to make its case.[137]

Its shaky reasoning notwithstanding, the message of the *Sturgill II* opinion was clear: OSHRC will not treat kindly any OSHA citations of the General Duty Clause related to heat stress. That message appears to have been heard in the OSHRC ALJ ranks. In a recent set of five cases from across the country alleging that USPS failed to protect letter carriers from heat-related illness, OSHRC ALJ Sharon D. Calhoun noted that, although OSHRC "has not held absolutely that 'excessive heat' is not a cognizable hazard" for General Duty Clause purposes, "[t]he cited hazard is, however, difficult to establish under [*Sturgill II*]."[138] She found it "difficult" despite the obviousness of the hazard, USPS's acknowledgment of the hazard, and repeated evidence of multiple conditions of employment in USPS's control that likely contributed to workers' illnesses:

- The distinctive USPS Long Life Vehicles (LLVs) lack air conditioning, and the window opposite the driver's side cannot be rolled down while the letter carrier is driving and therefore tends to remain up. When a delivery route includes segments in which the letter carrier parks and walks between houses, letter carriers can leave the LLV windows down to try to release hot air only for as long as the LLV is within their line of sight; otherwise, the windows must be up and the vehicle secured. Routes may or may not include periods in which the LLV is parked in shade. LLVs become so heated that letter carriers describe the floorboards and other internal surfaces as being too hot to touch.[139]
- "[T]he records in the five [USPS] cases, across five cities," wrote the ALJ, "demonstrate rural and city carriers experience near-constant pressure to complete their routes faster and to discourage them from taking breaks, reporting injuries or illnesses, or calling in sick."[140] In two of the cases, workers reported that supervisors hide paperwork required to take additional time during a route or to obtain a medical release.[141] Workers reported threats of discipline or other retaliation for taking time off to recover from heat-related illness and for requesting a period of acclimatization with indoor work assignments upon return from medical leave.[142] Even a supervisor in

[135] *Id.* at *69–*80 (Atwood, Comm'r, dissenting).
[136] *Id.* at *31.
[137] *Id.* at *35–*36.
[138] *USPS Heat III,* at 49.
[139] *Id.* at 10–11.
[140] *Id.* at 42.
[141] *USPS Heat II,* at 12; *USPS Heat III*, at 15.
[142] *USPS Heat II,* at 16–17.

one case reported being pressured by a higher level manager against informing workers to take extra breaks.[143] This culture of time pressure is aided by technology that tracks carriers' movements and alerts supervisors when carriers have stopped for too long.[144]

- Supervisors were alleged to have failed to act in the face of symptoms of heat-related illness. Workers reported being ordered back to work or being given yet more work despite reporting symptoms of heat-related illness.[145] One supervisor allegedly told a letter carrier not to stop work without delivering all mail unless the worker was leaving in an ambulance.[146] Another worker reported experiencing headaches, nausea, and even memory loss, and her supervisor allegedly responded simply with a few bottles of water.[147] The record of the cases includes multiple accounts of workers attempting to use messaging tools to signal that they were in medical emergency situations only to receive no follow-up.[148] The supervisors may have been insufficiently trained; in one case, a route examiner was actually riding along with a letter carrier while his symptoms progressed to the point of acute renal failure.[149]
- A regional manager in one case testified that he "places the primary responsibility for preventing heat-related illnesses on the carrier." [150] Employers cannot, of course, completely abdicate their responsibility like this, but an employer relying so heavily on workers to protect themselves must at least provide them more information and training than USPS workers reported in these cases. An OSHRC ALJ in an unrelated case in 2014 found that USPS's program for providing information to workers on heat stress "was, at best, informal," with workers receiving information that was "fairly basic." [151]

Evidence that USPS's "standup talks" and other educational efforts are insufficient abounds in these cases: in one case, for example, an apparently inadequately trained worker reported not using a van's air conditioning for fear of shocking his system by switching from hot to cold, [152] while a worker in another case reported having no training at all.[153]

A standard, in comparison to the General Duty Clause, would enable OSHA to specify the means by which an employer is expected to protect employees from hazards such as heat stress. Still, something is lost just the same by OSHRC's refusal to allow enforcement under the General Duty Clause. A standard might not capture all the ways that an employer puts workers at risk from heat stress, and climate change could accelerate past current projections and create hazardous conditions beyond what OSHA might contemplate today.

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[143] *Id.* at 20.
[144] *Id.; USPS Heat V,* at 15.
[145] *USPS Heat II,* at 2; *USPS He*at V, at 12, 14.
[146] *USPS Heat I,* at 13.
[147] *USPS Heat II,* at 2.
[148] *USPS Heat I,* at 13; *USPS Heat II,* at 11; *USPS Heat III,* at 18.
[149] *USPS Heat V,* at 9–11.
[150] *USPS Heat III,* at 21.
[151] Sec'y of Lab. v. U.S. Postal Serv., No. 13–0217 (OSHRC ALJ Oct. 24, 2014), at 8–9.
[152] *USPS Heat I,* at 11.
[153] *USPS Heat II,* at 19.

Slow Pace of Rulemaking

OSHA took a small step in the rulemaking process for a heat standard in October 2021 by publishing an Advance Notice of Proposed Rulemaking (ANPR).[154] It was a welcome development, inasmuch as any step forward is better than no step at all. Waiting for this process to play out under the OSH Act, however, could still mean that workers will not have a heat standard for decades.

The Committee observed back in 1994 that preliminary steps short of a proposed rule achieve little value while adding unnecessary time to the rulemaking process:

> Beginning in 1981, OSHA routinely issued an [ANPR] prior to beginning the regulatory process. This device adds several years to the process, but Agency officials have admitted that they rarely obtain useful information this way and the United States Court of Appeals for the District of Columbia Circuit has concluded that it should not "allow an ANPR to cause undue deferral of already much-delayed action." OSHA rarely used an ANPR before 1981. . . .[155]

Making the same point, a Senate committee added the following:

> More recently, OSHA added yet another pre-regulatory step—the request for information—which has further slowed OSHA's rulemaking efforts, most notably on its indoor air standard.[156]

Even in the best of circumstances, the OSH Act rulemaking process is much too slow. The OSH Act was not even ten years old before Congress had grown concerned about the slow pace of OSHA rulemaking.[157] That concern has persisted through the decades since.[158]

OSHA's standards process is "among the most burdensome and resource intensive of any agency in the federal government,"[159] so much so that standards often take decades from start to finish, assuming they even finish at all. Hurdles in the OSH Act process include the following:

- OSHA must hold a public hearing for a proposed rule if any person requests one during the comment period,[160] and

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[154] Heat ANPRM, *supra* note 14.

[155] H.R. Rep. No. 103–825, Part 1, at 66 (1994) [hereinafter 1994 Committee Report].

[156] S. Rep. No. 102–453 (1992), at 43.

[157] *See, e.g., Performance of the Occupational Safety and Health Administration: Hearing Before the Manpower & Housing Subcomm. of the H. Comm. on Gov't Ops.,* 95th Cong. 87, 155, 160, 162 (1977). *See also, e.g.,* U.S. COMPTR. GEN., HRD–77–71, DELAYS IN SETTING WORKPLACE STANDARDS FOR CANCER-CAUSING AND OTHER DANGEROUS SUBSTANCES (1977).

[158] *See, e.g., Justice Delayed: The Human Cost of Regulatory Paralysis: Hearing Before the Subcomm. on Ovrst., Fed. Rights & Agency Action of the S. Comm. on the Judic.,* 113th Cong. (2013); *Dangerous Dust: Is OSHA Doing Enough to Protect Workers?: Hearing Before the Subcomm. on Emp. & Wrkpl. Safety of the S. Comm. on Health, Educ., Lab. & Pensions,* 110th Cong. (2008); *Time Takes Its Toll: Delays in OSHA's Standard-Setting Process and the Impact on Worker Safety: Hearing Before the S. Comm. on Health, Educ., Lab. & Pensions,* 112th Cong. (2012); *Have OSHA Standards Kept up with Workplace Hazards?: Hearing Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.,* 110th Cong. (2007); *Is OSHA Working for Working People?: Hearing Before the Subcomm. on Emp. & Wrkpl. Safety of the S. Comm. on Health, Educ., Lab. & Pensions,* 110th Cong. (2007); *Workplace Safety and Health: Oversight of MSHA and OSHA Regulation and Enforcement: Hearing Before the Subcomm. on Emp., Safety & Train. of the S. Comm. on Health, Educ., Lab. & Pensions,* 107th Cong. (2002); *One Year Later: Inadequate Progress on America's Leading Cause of Workplace Injury: Hearing Before the Comm. on Health, Educ., Lab. & Pensions,* 107th Cong. (2002).

[159] David Michaels & Jordan Barab, *The Occupational Safety and Health Administration at 50: Protecting Workers in a Changing Economy,* 110 AM. J. PUB. HEALTH 631, 633 (2020).

[160] OSH Act § 6(b)(3) (29 U.S.C. § 655(b)(3)).

employer interests can exploit this requirement to extend the timeline. For example, in the ill-fated OSHA rulemaking on indoor air quality, OSHA scheduled public hearings to take place July 12–26, 1994.[161] After multiple requests for additional time, additional scheduling to accommodate the large number of people wishing to participate, and an ALJ order postponing hearings "to permit time to develop a better record," the public hearings did not actually end for another five months.[162]

- OSHA must also develop a particularly robust record because the standard of review in any court challenge is whether the agency's determinations are based on "substantial evidence,"[163] a more demanding standard[164] than the *Administrative Procedure Act*'s (APA)[165] test of whether a decision is arbitrary and capricious.[166]
- For health standards, the U.S. Supreme Court has interpreted the OSH Act to, in effect, require OSHA to develop quantitative risk assessments.[167] These risk assessments, which must be detailed enough to satisfy this requirement with substantial evidence, can be time- and resource-intensive. In the indoor air quality rulemaking, for example, developing a risk assessment involved methodological issues so complex that OSHA resorted to sponsoring a workshop with the Johns Hopkins University School of Hygiene and Public Health on the topic.[168]
- In the abstract, a feasibility-oriented approach to rulemaking is often considered superior to cost-benefit approaches in forcing agencies to adopt the highest level of protection that can reasonably be considered achievable.[169] In practice under current law, however, it is yet another burden in OSHA's regulatory process. Appeals courts have interpreted the OSH Act to demand detailed findings about the economic and technological feasibility of a proposed standard for *every affected industry*.[170] As with any other analysis under the OSH Act, OSHA must back its findings sufficiently to meet the substantial evidence test mentioned above. Given that most OSHA standards have a broad reach spanning many industries across the economy, that can be a significant hurdle. It was so daunting in the indoor air quality rulemaking that OSHA convened a technical

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[161] Indoor Air Quality, 59 Fed. Reg 15,968 (Apr. 5, 1994).

[162] Notice of Proposed Rulemaking; Schedule Changes and Hearing Locations, 59 Fed. Reg. 49,874 (Sept. 30, 1994); Notice of Proposed Rulemaking; Change of Hearing Location, Extension of Hearing Dates, and Clarification of Hearing Issues, 59 Fed. Reg. 47,570 (Sept. 16, 1994); Extension of Comment Period and Rescheduling of Public Hearing, 59 Fed. Reg. 30,560 (June 14, 1994).

[163] *Id*. § 6(f) (29 U.S.C. § 655(f)).

[164] REVAE MORAN, GOV'T ACCOUNTABILITY OFF., GAO–12–602T, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 6 (2012).

[165] 5 U.S.C. § 551 *et seq*.

[166] *Compare* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (explaining "substantial evidence" review) with Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (establishing "arbitrary and capricious" review).

[167] Indus. Union Dep't, AFL–CIO v. Marshall (*Benzene*), 448 U.S. 607 (1980).

[168] Notice of Meeting, 63 Fed. Reg. 34,934 (June 26, 1998).

[169] *See, e.g.,* Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 SO. CAL. LAW REV. 195 (2018); David M. Driesen, Douglas A. Kysar & Amy Sinden, *Cost-Benefit Analysis: New Foundations on Shifting Sand, 3* REG & GOV. 48, 63–56 (2009); David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1 (2005); Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 92–107.

[170] American Iron & Steel Inst. v. OSHA, 939 F.2d 975, 980 (D.C. Cir. 1991); United Steelworkers v. Marshall, 647 F.2d 1189, 1264–66 (D.C. Cir. 1980).

> panel with the American Conference of Governmental Industrial Hygienists to discuss the feasibility of engineering controls in just the hospitality sector.[171]

Incidentally, the indoor air quality rulemaking used as an example above took eight years from its start in January 1993, when the administration of President George H.W. Bush ordered its initiation, to its demise in December 2001, when the administration of President George W. Bush ordered its termination without a rule being issued.[172] Time is not the friend of any OSH Act rulemaking.

The rulemaking process is further burdened by mandates beyond the OSH Act, which have been imposed on OSHA and other agencies in the name of "regulatory reform."[173] *The Paperwork Reduction Act* requires review and approval by the White House's Office of Management and Budget (OMB) of information collections that ask ten or more persons the same question—even in the case of purely voluntary surveys.[174] *The Regulatory Flexibility Act*,[175] *Small Business Regulatory Enforcement Fairness Act* (SBREFA),[176] and *Unfunded Mandates Reform Act of 1995*[177] all add various forms of expensive and time-consuming analysis to the rulemaking process.

Political review at OMB, mandated currently under Executive Order 12,866,[178] is yet another source of rulemaking delay that this Committee took note of in the 1990s:

> OMB review has added several years to a standard's promulgation process. In the case of the ethylene oxide (EtO) standard, OMB delayed the promulgation process by almost seven years. OMB refused to approve promulgation of OSHA's grain dust standard because it objected to the standard's approach and released the standard only after OSHA agreed to water down the substance of its proposal.[179]

These broad regulatory process requirements apply to regulatory agencies across the board, but SBREFA has a particular impact on OSHA standards. SBREFA adds special mandates for business representatives to review and be consulted on draft regulations, and these mandates apply to only three agencies: the Environmental Protection Agency, the Consumer Financial Protection Bureau, and OSHA.[180] The Office of Advocacy, an independent office housed in the Small Business Administration, implements SBREFA and describes itself as the advocate for business interests, not administra-

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[171] Notice of Meeting, 63 Fed. Reg. 29,035 (May 27, 1998).
[172] Indoor Air Quality, 66 Fed. Reg. 64,946 (Dec. 17, 2001) (abandoning rulemaking); Semiannual Agenda of Regulations, 61 Fed. Reg. 62748 (Nov. 29, 1996) (tracking early history of the rulemaking).
[173] MAEVE P. CAREY, CONG. RES. SERV., IF12058, COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING (2022); MAEVE P. CAREY, CONG. RES. SERV., 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW (2013); REVAE MORAN, GOV'T ACCOUNTABILITY OFF., GAO–12–602T, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING (2012).
[174] 44 U.S.C. § 3501 *et seq.*
[175] 5 U.S.C. § 601 *et seq.*
[176] *Id.*
[177] 2 U.S.C. § 1501 *et seq.*
[178] Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
[179] 1994 Committee Report, *supra* note 155, at 66.
[180] 5 U.S.C. §§ 603, 604, 609.

tion policy.[181] It is not entirely clear, however, that this process actually highlights legitimate small business views.[182]

For these reasons and more, OSHA rulemakings take a very long time to move from conception to completion. OSHA's timeline of its rulemaking process suggests that the process takes 56–150 months.[183] In 2012, the Government Accountability Office (GAO) studied the rulemakings OSHA published from 1981 to 2010 and concluded the process took on average more than seven years.[184] This period includes rulemakings initiated long before some of the court decisions and delaying policies noted earlier.

The most recent major OSHA health standard to be successfully promulgated, the Obama Administration's silica standard, exhibits the effects of all those factors. Added to the rulemaking agenda in 1997, the standard was not published until 19 years later. ("Better late than never," then-Secretary of Labor Tom Perez said upon its final release three years after it had been submitted to OMB.[185]) That delay cost an estimated 12,198 workers' lives.[186]

How long it might take OSHA to produce a final heat standard is difficult to predict. What is not difficult to predict is whether OSHA, left to its own devices, will be enforcing a final standard before the end of the current administration. When pressed on timing of a final heat standard during the May 25 Hearing, Assistant Secretary of Labor for Occupational Safety and Health Doug Parker was unable to commit to publishing a final rule by spring 2024.[187]

CURRENT LAW DOES NOT GUARANTEE EFFECTIVE PROTECTION

Even if OSHA found the wherewithal to publish a final standard before the end of this administration, there are still some outstanding concerns about OSHA's capacity under current law to use the standard to protect workers.

A significant challenge is whether OSHRC will undermine OSHA when it undertakes enforcement:

> Employers' challenges to OSHA citations can take many years to resolve and, in the meantime, the employer can delay abatement of the cited hazard. At times, OSHRC has been without its full complement of commissioners because of disputes between the President and the Senate over certain nominees. A partial commission can be responsible for significant delays in the appellate process. OSHA, how-

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[181] Alarmingly, the Office of Advocacy's most recent annual report proudly claims to have weakened OSHA's Emergency Temporary Standard to protect health care workers from COVID–19 exposure, putting at risk workers in health care businesses with fewer than 10 employees. OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., REPORT ON THE REGULATORY FLEXIBILITY ACT, FY2021: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272, at iii–iv (2022).

[182] *See* GOV'T ACCOUNTABILITY OFF., GAO–14–525, SMALL BUSINESS ADMINISTRATION: OFFICE OF ADVOCACY NEEDS TO IMPROVE CONTROLS OVER RESEARCH, REGULATORY, AND WORKFORCE PLANNING ACTIVITIES 17 (July 2014) (finding that the Office of Advocacy's policies do not require staff to demonstrate that they have actually met with relevant small business representatives who would be able to verify that they have sufficient information and data to justify intervening in particular rules).

[183] *The OSHA Rulemaking Process,* OCC. SAFETY & HEALTH ADMIN., https://www.osha.gov/sites/default/files/OSHA__FlowChart.pdf (last visited Aug. 4, 2022).

[184] *Id.*

[185] Tim Devaney, *OSHA Issues Long-Delayed Silica Rules,* THE HILL (Mar. 24, 2016), https://thehill.com/regulation/labor/274187-osha-issues-long-delayed-silica-rules/.

[186] AFL–CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 109 (26th ed. 2017).

[187] *Examining the Policies and Priorities of the Occupational Safety and Health Administration: Hearing Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.,* 117th Cong. (2022) (video at https://www.youtube.com/watch?v=1IqQ-5QViTs (1:10:49–1:11:55)).

ever, has no means of insisting that OSHRC do a more efficient job of resolving claims. Moreover, OSHRC works as a one-way ratchet: employers can challenge OSHA citations, but employees and their representatives have no power to challenge the terms of settlement agreements between employers and OSHA. Unlike settlement agreements negotiated under the *Clean Air Act* and other public health-related statutes, OSHA's settlements are not subject to public review and comment.

Another problem with the split-enforcement model is its effect on OSHA's ability to interpret the OSH Act and its regulations to protect workers. For years after Congress passed the OSH Act, OSHRC took the position that Congress, by granting the Commission the power to adjudicate disputes about OSHA citations, gave it the power to make broad policy determinations. OSHA, on the other hand, argued that

OSHRC should accept OSHA's interpretations of the OSH Act and simply engage in case-specific fact-finding to affirm, modify, or vacate individual OSHA citations and penalties. In 1991, in *Martin v. OSHRC*, the Supreme Court sided with OSHA in holding that reviewing courts must defer to OSHA's interpretation of the OSH Act contained in its regulations when confronted with conflicting, but reasonable, interpretations held by OSHA and OSHRC.

Notwithstanding the Supreme Court's unambiguous recognition of OSHA's fundamental supremacy in setting occupational safety and health policy, OSHRC keeps fighting to retain policymaking power by reading the Supreme Court's opinion in a narrow manner. OSHRC's trick is to argue that OSHA's reading of its own standards or the OSH Act are unreasonable, allegedly making *Martin* inapplicable and giving OSHRC the power to decide the case based on its own interpretation. In one case, OSHRC used that approach, was overturned by the Eighth Circuit, and drafted such a narrow follow-up decision that one prominent attorney for large employers suggested OSHRC's interpretation of the relevant law might apply everywhere but the Eighth Circuit.

Until OSHRC is directed to defer to OSHA's policymaking decisions, disputes between the two institutions will continue to arise, sowing seeds of confusion for employers, employees, and OSHA inspectors.[188]

It may be time to revisit altogether the split-enforcement model. Until then, a standard promulgated pursuant to the OSH Act will always be vulnerable to this policymaking tug-of-war between OSHA and OSHRC.

Even without OSHRC as an obstacle, OSHA is still up against enormous odds when enforcing standards. Given the agency's meager budget, OSHA inspectors are each responsible for covering ap-

[188] MCGARITY *et al., supra* note 122, at 20–21.

proximately 81,000 workers.[189] In 2019, the last pre-pandemic year that enforcement capacity was measured, OSHA had enough inspectors to inspect every workplace in its jurisdiction only *once every 162 years*.[190]

These inspectors must move quickly. The statute of limitations for harming or killing a worker is much more circumscribed than that for other federal regulatory violations. In the OSH Act, the limit for an enforcement citation is a mere six months. The default federal statute of limitations for civil enforcement, by contrast, is 10 times longer.[191] Between limited resources and a tight statute of limitations, OSHA is in a race against time to enforce the law. It is too easy for low-road employers to win that race.

The statute of limitations is even tighter for whistleblowers. As the Committee's Subcommittee on Workforce Protections heard in 2010, the OSH Act has particularly weak whistleblower protection provisions:

> The statute of limitations is exceedingly short, only 30 days. There is no right under the OSH Act for workers to get their job back, for preliminary reinstatement while their cases are pending, and they have no right to get a hearing before an administrative law judge or a court. They are completely dependent on the Secretary of Labor bringing their cases forward; and, as we have heard, that rarely happens.
>
> And the burdens on the Department of Labor are significant as well. They can't pursue an administrative process themselves. They need to go to Federal District Court to pursue these whistleblower cases in court.
>
> So the law is extremely weak. There is a saying in the law that rights without remedies are really no rights at all; and, frankly, that is what we are talking about here with the whistleblower protections and the *Occupational Safety and Health Act*. The provisions are so weak as to really be meaningless.[192]

By contrast, all but two of the whistleblower laws that OSHA enforces (in addition to its health and safety role) include private rights of action.[193] The statute of limitations is much longer for whistleblowers under several of those laws, ranging from 60 to 180 days.[194]

Finally, the Supreme Court has created new cause for concern about the viability of continuing to rely on the OSH Act as the source of authority for a heat standard. In *NFIB v. OSHA* [195] and *West Virginia v. EPA*,[196] the Court applied the so-called "Major Questions Doctrine" to invalidate regulations with broad effects on the economy that departed from longstanding past agency practice

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[189] AFL–CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 3 (31st ed. 2022), https://aflcio.org/sites/default/files/2022–04/2214_DOTJ_Final_42622_nobug.pdf.
[190] *Id.* at 63.
[191] 28 U.S.C. § 2462.
[192] *Whistleblower and Victim's Rights Provisions of H.R. 2067, the* Protecting America's Workers Act: *Hearing Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Lab.*, 111th Cong. 43–44 (2010) (statement of Lynn Rhinehart, AFL–CIO General Counsel).
[193] *Id.* at 125.
[194] *Id.* at 120.
[195] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. __, 142 S. Ct. 661 (Jan. 13, 2022).
[196] West Virginia v. Envtl. Prot. Agency, 595 U.S. __, 142 S. Ct. 2587 (June 30, 2022).

in the absence of specific congressional authorization for such departure. A heat stress standard is bound to cover so many employers that it will inevitably trigger the "major" part of this doctrine, inviting the Court's hostile scrutiny. As climate change accelerates, OSHA may in the future encounter a need to update its standard further; in the course of doing so, the agency may have an opportunity to exploit whatever new technology will have evolved by then, in the form of a preventive measure that looks unlike any measure OSHA has required in the past. This potential innovation is similarly likely to run afoul of the Major Questions Doctrine.

Additionally, in NFIB, the Court teased out a new distinction in the OSH Act between occupational hazards and broader public health hazards:

> The question, then, is whether the [OSH Act] plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. *See* 29 U.S.C. § 655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. *See, e.g.*, §§ 651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.[197]

The Court blithely dismissed employers' control over employment and places of employment, the kind of control that can turn an airborne infectious disease such as COVID–19 into an occupational hazard when workers are required to show up in person, work without PPE, or be threatened with loss of pay or termination if they stay at home after contracting the illness. At the right level of abstraction, any hazard can be said to originate outside the workplace; no matter how endogenous or exogenous a hazard is, the core concern is that employers can determine whether the conditions of the job itself will aggravate the risk to workers' lives. The extent to which this new distinction will be applied in the future is uncertain, but it is reasonable to fear that it could be used to put into question any standard promulgated pursuant to the OSH Act that regulates worker exposure to heat, especially ambient environmental heat to which outdoor workers are exposed.

H.R. 2193 MANDATES MEANINGFUL ACTION TO PROTECT WORKERS FROM HEAT STRESS

In light of the pressing need for workplace safeguards against heat stress, the projected increase in even more hazardous conditions for working people in this country as climate change accelerates, and the inadequacy of current policy tools for protecting workers, this Act demands action and gives OSHA the tools it needs to get the job done.

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[197] 142 S. Ct. at 665.

Clear Authority on Occupational Heat Stress

To guard against the risk that the Supreme Court's artificial distinction in NFIB between public and occupational hazards could undermine the Secretary's authority to address heat stress, the Act provides clear and unmistakable authority for the Secretary to protect workers from this hazard.

A Mandate to Act

Workers cannot wait another 50 years for OSHA to develop effective safeguards for workers. The Act requires swift action to produce a standard that provides the highest achievable level of protection and makes it possible for the agency to keep its standards up to date:

- Section 3(a) requires the Secretary to address heat-related illness and injury by developing a worker heat protection standard that is the maximum protective program of measures to protect workers from heat stress to the extent feasible. It demands the highest attainable degree of protection.
- Section 3(a)(3)(B) addresses the Major Questions Doctrine by providing clear congressional authority for the Secretary to use the broad tools at its disposal flexibly and creatively over time, given the volatility of climate change and the prospect that technological or practice innovations could enable new kinds of approaches to protecting workers from heat stress. The Act already includes numerous limits on the Secretary's exercise of the authority delegated by it; there is no need for the prospect of a judicially created limit on creativity or deviation from past practice to hold the Secretary back from doing what is necessary and appropriate in the future to protect workers from heat stress.
- Section 3(b) requires the Secretary to publish an interim final rule to establish a worker heat protection standard within one year of enactment.
- Section 3(c) provides processes for future heat-related rulemakings. When Congress has required OSHA rulemakings in the past, historically the mandate has stopped at some equivalent of this Act's section 3(b): a requirement to produce a standard by a date certain.[198] The climate crisis, however, is progressing, and so there may be a need for the standard to be updated soon. Section 3(c) authorizes additional rulemaking on heat stress in the future under the process established by this Act.

Protection for the Most Vulnerable

In light of the elevated risk for immigrant and agricultural workers, the Act also includes targeted provisions to ensure meaningful protections for those populations:

- Section 3(a)(4)(A) directs the Secretary to require that employees shall be paid at their regular rate during any rest breaks, training, medical removal protection, or other such periods of time required under a worker heat protection stand-

[198] *See, e.g.*, Needlestick Safety and Prevention Act, Pub. L. No. 106–430 (Nov. 6, 2000) (requiring update to 29 C.F.R. § 1910.1030); Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102–550, § 1031 (Oct. 28, 1992) (requiring interim final rule on lead in construction).

ard. This provision is of particular importance for farmworkers, who are typically paid on a piece-rate basis that incentivizes working hard and minimizing breaks.[199]

- Section 3(a)(4)(B) mandates that the Secretary shall require employers to provide any training, hazard alerts, or other information or education pursuant to the Act in the language employees understand, if it is not English, and gear it to their literacy and education level.
- Section 3(a)(4)(C) requires the Secretary to update a standard on temporary labor camps, which regulates the housing provided to migrant farmworkers. Such housing "is often designed to keep workers warm rather than cool. In Washington, [for example,] some cherry growers house their workers in tents that have very limited ventilation,"[200] which could limit workers' ability to recover from work in hot environments.
- Section 6 requires the Secretary to include questions in the National Agricultural Workers Survey related to farmworkers' experience of heat stress and matters relevant to aiding the implementation of the Act for that workforce.

A Duty to Protect Employees

Given that OSHRC has placed in doubt whether the General Duty Clause of the OSH Act applies to heat stress, this Act reestablishes that an employer's general duty to protect workers from recognized serious hazards extends to heat stress:

- Section 2 of the Act establishes that employers have a duty to provide employment and a place of employment free from conditions that may reasonably be anticipated to cause death or serious physical harm from heat stress. As a parallel to the OSH Act's General Duty Clause, this section clarifies an employer's duty with respect to heat stress, thus enabling OSHA to enforce that duty immediately upon enactment while it works on a heat stress rulemaking.
- Although similar to the OSH Act's General Duty Clause, the duty established by section 2 avoids some problems that have limited the utility of the General Duty Clause:
  - The OSH Act's General Duty Clause limits the employer's duty to "each of *his* employees."[201] Increasingly, however, firms create workplaces in which employees work for employers other than the host firm.[202] OSHA in fact has an enforcement policy for what it calls "multi-employer worksites," in which host employers can at times be cited for standards violations by creating worksite conditions that put workers at risk.[203] This Committee observed in 1994 that the multi-employer worksite approach should be extended to General Duty Clause citations as well.[204] Sec-

[199] Michelle Tigchelaar *et al., Work Adaptations Insufficient to Address Growing Heat Risk for U.S. Agricultural Workers*, 15 ENVTL. RES. LETTERS 094035, https://iopscience.iop.org/article/10.1088/1748-9326/ab86f4; Bo Johansson *et al., Piece Rates and Their Effects on Health and Safety*, 41 APP. ERGO. 607 (2010).

[200] Bustillo, *supra* note 71.

[201] 29 U.S.C. § 654 (emphasis added).

[202] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE ABOUT IT (2014).

[203] Occ. Safety & Health Admin., *CPL 02–00–124, Multi-Employer Citation Policy* (Dec. 10, 1999), https://www.osha.gov/enforcement/directives/cpl-02-00-124.

[204] 1994 Committee Report, *supra* note 155, at 63–64.

tion 2 of the Act addresses this problem by omitting the limitation to an employer's own employees, so that the multi-employer approach can apply with respect to an employer's general duty to prevent heat-related illness and injury.

- The General Duty Clause is ambiguous about whether it continues to apply to a hazard if OSHA promulgates a standard related to that hazard. Both OSHA and OSHRC have taken the position that a standard can preempt the General Duty Clause,[205] although two appeals courts have held that this is not necessarily the case if an employer knows about an obviously hazardous condition or knows that hazard persists despite compliance with a standard.[206] Section 2 avoids that ambiguity by clearly stating that an employer has a general duty with respect to heat stress *and* a duty to comply with standards.

Tools to Develop Strong Standards Efficiently and Effectively

Given the insufficiency of the rulemaking pace that seems to be possible under current law, this Act establishes a process independent of the OSH Act and requires and enables OSHA to act with urgency:

- Section 3(b) requires the Secretary to accelerate the rulemaking timeline and promulgate, within one year of enactment, an interim final rule establishing a standard on heat stress. To enable a rulemaking to be completed so quickly, section 3(b) authorizes the Secretary to proceed without regard for some of the rulemaking burdens discussed above.
- Section 3(c) requires the Secretary to act on heat more quickly in any future rulemakings on heat stress. Instead of leaving future rulemakings to the OSH Act process, it points future rulemakings to the APA and additional enforceable timelines so that rulemakings do not languish for decades.
- Section 3(c) also, by invoking the APA for rulemaking and judicial review, unburdens heat-related rulemakings from the substantial evidence test that weighs down OSH Act rulemakings.
- Section 3(a) reduces some of the burdens of rulemaking analysis and considerations in rulemaking design for both the interim final rule required by section 3(b) and future rulemakings allowed by section 3(c):
  - It requires standards to be feasible but eases the burden of feasibility analysis not only by lifting the substantial evidence burden but also by (1) enabling the Secretary to presume that any measure in a heat standard adopted and implemented for at least a year by a state plan is feasible and (2) empowering the Secretary to conduct feasibility analysis and other rulemaking activities without being narrowly bound by industry categories, so that the Secretary can design standards and project their likely im-

[205] *See* 29 C.F.R. § 1910.5(f); Morrison-Knudsen Co./Yonkers Contr. Co., Joint Venture, No. 88–572, 1993 OSAHRC LEXIS 52 (OSHRC Apr. 20, 1993), at *58–*62; Daniel Int'l, Inc., 10 OSH Cases 1556 (OSHRC 1982).

[206] Safeway v. OSHRC, 382 F.3d 1189 (10th Cir. 2004); UAW v. Gen. Dynamics Land Sys. Div., 815 F.2d 1570 (D.C. Cir. 1987).

pacts in ways that are useful and make sense given the inevitable vastness of a standard's scope.

- It requires the Secretary to proceed on the basis of the best available evidence, but it does not require the Secretary to reinvent the wheel. It authorizes the Secretary to accept any relevant findings or recommendations of established authoritative experts, such as NIOSH, the National Academies of Sciences, Engineering, and Medicine, and the American Conference of Governmental Industrial Hygienists.

Capacity for Effective Implementation

The Act sets the stage for effective implementation with the following:

- Section 4 provides that standards and rules promulgated pursuant to this Act have the same legal effect as any standards or rules under the OSH Act, meaning that the OSH Act's provisions for enforcement, replication in the states, and other matters apply except as otherwise provided by this Act. To mitigate some of the challenges under current law for enforcement, at least with respect to standards on heat stress, this section also provides the following:
  - It sets the statute of limitations for enforcing violations of standards or rules promulgated under this Act at four years.
  - It ensures finality for standards. As this Committee observed in 1994, some courts have allowed employers to challenge the validity under the OSH Act of standards promulgated pursuant to section 6(a) of the OSH Act during enforcement proceedings decades after rulemaking comment periods had long since ended.[207] This section requires interested parties to raise their objections during the public comment period, giving the Secretary and the public the opportunity to review them before promulgating a final rule.
  - It requires OSHRC to provide substantial deference to the Secretary's interpretation of the Act and any standards or rules promulgated pursuant to it. The Secretary has primacy in interpreting this Act and any standard, rule, regulation, or order issued pursuant to it.
  - It authorizes rulemaking for recordkeeping and reporting. In order to avoid any unnecessary duplication of forms or logs, it allows the Secretary to consolidate any requirements related to heat stress into existing forms, provided that the Secretary can enforce heat-related violations pursuant to this Act rather than the OSH Act.
  - Finally, it sets a statute of limitations for whistleblowers reporting retaliation at 180 days and provides a private right of action with fee shifting for any claim that the Secretary does not decide to prosecute.
- In parallel with major environmental laws,[208] section 4 also requires that court challenges to rulemakings be filed ex-

[207] 1994 Committee Report, *supra* note 155, at 68, 71.

[208] *See, e.g.*, 42 U.S.C. §§300j–7 (Safe Drinking Water Act), 6976 (Resource Conservation and Recovery Act), 7607(b)(1) (Clean Air Act).

clusively in the D.C. Circuit Court. Under current law, by contrast, challenges to standards may be filed in that circuit or in any circuit in which the petitioner resides. The result has been decades of circuit splits creating confusion about the law; in the case of one of the OSHA emergency standards for COVID+19, there was a legal whiplash as a stay entered by one circuit was removed by another.[209] In light of this experience, when Rep. Keller offered an amendment during the markup of this Act to strip the judicial review provision focusing any challenges on heat stress standards to the D.C. Circuit, the Committee rejected it by a vote of 19 Yeas and 27 Nays.

CONCLUSION

By requiring swift and meaningful action by OSHA, this Act will ensure that workers are protected against occupational heat stress and the entirely preventable risk of heat-related illness, injury, and death.

It comes too late for Asunción Valdivia, who died in 2004 after picking grapes for ten hours straight on a day that reached 105 F. Instead of calling an ambulance after Mr. Valdivia fell unconscious, his employer told Mr. Valdivia's son to drive his father home. On the way home, Mr. Valdivia died of heat stroke at the age of 53.[210]

This Act ensures that the last word on Asunción Valdivia's life will not be the tragedy of his death; it will be the lives saved in his name. This Act is named for him.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section establishes that the short title of this bill is the *Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022.*

Section 2. Duties

This section provides that employers have a general duty to furnish employment and a place of employment free from conditions that may reasonably be anticipated to cause death or serious physical harm from heat stress. It also provides that employers have a specific duty to comply with standards and rules promulgated pursuant to this Act.

Section 3. Worker heat protection standards

This section authorizes the Secretary of Labor (Secretary) to develop standards for the prevention of heat-related illness and injury on the job.

Subsection (a) instructs the Secretary on the design of such standards:

- In general, it directs the Secretary to develop, using the best available evidence, worker heat protection standards that provide the maximum protective program of measures to regulate occupational heat stress, prevent heat-related illness and

[209] In re MCP No. 165, 21 F.4th 357 (6th Cir. 2021); BST Holdings, LLC v. Occupational Safety & Health Admin., 17 F.4th. 604 (5th Cir. 2021).

[210] *House, Senate Democrats Introduce Heat Stress Legislation to Protect Farm Workers*, H. COMM. ON EDUC. & LAB. (Mar. 26, 2021), https://edlabor.house.gov/media/press-releases/house-senate-leaders-introduce-heat-stress-legislation-to-protect-farm-workers.

injury, and attain the highest degree of health and safety protection to the extent feasible.

- It provides direction on the factors that the Secretary may consider when designing a standard. The Secretary is charged with prioritizing worker safety, empowered to adopt certain outside expert findings, and encouraged to replicate measures that have been proven to work in the states. The Secretary is also given flexibility when designing a standard or conducting relevant rulemaking analysis to cluster employers in whatever categories (such as standard industrial codes or similar features of heat sources that create risks for employees) the Secretary finds useful.
- It establishes the kinds of measures the Secretary may include in a standard. The Secretary is broadly empowered to adopt a range of protective measures that are reasonable and appropriate to protect workers from heat stress and to respond creatively to changing conditions over time. Specifically, the Secretary is required to establish criteria under which an employer must implement some of the most basic policies to prevent heat-related illness and injury: paid rest breaks, water or other suitable hydration, shaded or cooled spaces to recover from the heat, and a program to help employees get acclimated to hot conditions.
- It spells out some additional specifications for these standards. The Secretary must ensure that workers, including piecerate workers, are fully compensated in any periods required under the standard away from the usual job tasks (such as training and paid rest breaks); that workers can understand training and materials in their own language; and that a standard on temporary labor camps is also updated to the extent necessary to prevent heat illness.
- Finally, it prohibits the Secretary, when updating or revising heat standards in the future, from rolling back existing protections and putting workers at risk of heat-related illness and injury.

Subsection (b) requires the Secretary to promulgate a standard in an interim final rule within one year of enactment, which shall have the same legal effect as though it were an occupational safety and health standard promulgated pursuant to the OSH Act and will remain in effect until superseded by a standard promulgated pursuant to this Act.

Subsection (c) sets out rulemaking procedural requirements for any worker heat protection standard the Secretary may develop in the future, after the interim final rule issued pursuant to subsection (b).

- It authorizes the Secretary to launch a rulemaking on the Secretary's own initiative or in response to a petition for rulemaking.
- It establishes enforceable timelines. The Secretary will be required to offer a substantive and timely decision on any petitions for rulemaking under this Act within 18 months. If the Secretary approves a petition for rulemaking, the Secretary must issue a proposed rule within one year. A proposed rule must then be followed within one year by a final rule.

- It requires the Secretary to maintain a rulemaking docket that is transparent about any changes made in the course of review coordinated by the White House's Office of Management and Budget.
- It spells out requirements for judicial review of any standard. Any party may challenge a rule in the courts only by filing a petition pursuant to the APA within 60 days in the U.S. Court of Appeals for the D.C. Circuit. Petitions for review, rather than enforcement proceedings, are the forum for judicial review of a standard. The timelines for rulemaking are specifically enforceable.

Section 4. Implementation and enforcement

Subsection (a) provides that, except as otherwise provided by this section, any standard, rule, regulation, or order under this Act has the same legal effect as one promulgated under the *Occupational Safety and Health Act of 1970* (OSH Act).

Subsection (b) sets a 4-year statute of limitations for citations and requires the Occupational Safety and Health Review Commission (OSHRC) to grant substantial deference to any reasonable interpretation by the Secretary of this Act or any standard, regulation, or order pursuant to this Act.

Subsection (c) authorizes the Secretary and the Secretary of Health and Human Services to require recordkeeping and reporting to the same extent as under the OSH Act. The Secretary may require recordkeeping and reporting using the same forms and regulations pursuant to the OSH Act, provided that any violation with respect to heat-related information is treated as a separate and distinct violation from any simultaneous OSH Act violation for the underlying log or report.

Subsection (d) provides that employees have 180 days to make a claim of retaliation or discrimination for exercising rights under this Act and empowers them to file a civil action for appropriate remedies and attorney's fees and costs if OSHA fails to make a decision on the claim within 90 days or opts not to pursue the case itself.

Section 5. General provisions

This section provides for severability and authorizes the appropriation of such sums as may be necessary to carry out this Act.

Section 6. Agenda for further review and action

This section directs the Secretary to update the National Agricultural Workers Survey to include questions relevant to measuring the incidence of heat-related illness and injury and assessing the impact of this Act.

Section 7. Definitions

This section defines key terms, including heat stress and heat-related illness and injury.

EXPLANATION OF AMENDMENTS

The amendments, including the Amendment in the Nature of a Substitute, are explained in the descriptive portions of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act of 1995*, Pub. L. No. 104–1, H.R. 2193, as amended, applies to terms and conditions of employment within the legislative branch because the law governing its implementation, the *Occupational Safety and Health Act of 1970*, is included within the list of laws applicable to the legislative branch enumerated in section 102(a) of the *Congressional Accountability Act of 1995*.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104–4), the Committee adopts as its own the estimate of federal mandates regarding H.R. 2193, as amended, prepared by the Director of the Congressional Budget Office.

EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2193 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 2193:

Date: 7-27-2022

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: HR 2193 Amendment Number:

Disposition: Defeated by a roll call vote of 19-27

Sponsor/Amendment: En Bloc #1 (Keller / R_H2193_ANS_2, Steel / R_H2193_ANS, Good R_H2193_ANS_3)

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLAN (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)			X
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)	X		
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)	X		
Ms. LEGER FERNÁNDEZ (NM)		X		Mrs. SPARTZ (IN)			X
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)	X		
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)	X		
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Mr. JACOBS (NY)	X		
Mrs. SHERFILUS-MCCORMICK (FL)		X		*Vacancy*			
Mr. POCAN (WI)		X		*Vacancy*			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)			X				
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)		X					

TOTALS: Ayes: 19 Nos: 27 Not Voting: 5

Total: 53 / Quorum: / Report:

(29 D - 24 R)

^Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 7/27/22

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 2 Bill: 2193 Amendment Number:

Disposition: Adopted by Full Committee Roll Call Vote

Sponsor/Amendment: Adams motion to report H.R. 2193 to the House with an amendment and with the recommendation that the amendment be agreed to,and the bill do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mr. GRIJALVA (AZ)	X			Mr. WILSON (SC)		X	
Mr. COURNTEY (CT)	X			Mr. THOMPSON (PA)			X
Mr. SABLAN (MP)	X			Mr. WALBERG (MI)		X	
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)		X	
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)		X	
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. BANKS (IN)		X	
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)			X
Mr. NORCROSS (NJ)	X			Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)		X	
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)		X	
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)		X	
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)		X	
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)		X	
Ms. OMAR (MN)			X	Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNÁNDEZ (NM)	X			Mrs. SPARTZ (IN)			X
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)		X	
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)		X	
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)		X	
Mr. BOWMAN (NY)	X			Mr. JACOBS (NY)		X	
Mrs. SHERFILUS-MCCORMICK (FL)	X			*Vacancy*			
Mr. POCAN (WI)	X			*Vacancy*			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)			X				
Mr. ESPAILLAT (NY)	X						
Mr. KWEISI MFUME (MD)	X						

TOTALS: Ayes: 27 Nos: 19 Not Voting: 5

Total: 53 / Quorum: / Report:

(29 D - 24 R)

^Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c)(4) of rule XIII of the Rules of the House of Representatives, the goal of H.R. 2193 is to protect workers from heat stress and prevent heat-related occupational illness and injury.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 2193 is known to be duplicative of another federal program, including any program that was included in a report to Congress pursuant to section 21 of Public Law 111–139 or the most recent Catalog of Federal Domestic Assistance.

HEARINGS

Pursuant to clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the Committee's Subcommittee on Workforce Protections held a hearing on May 25, 2022, entitled "Examining the Policies and Priorities of the Occupational Safety and Health Administration," which was used to develop H.R. 2193. Relevant to H.R. 2193, the Committee heard from the following witnesses: Mr. Douglas Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC, and Mr. Thomas Costa, Director of Education, Workforce, and Income Security, Government Accountability Office, Washington, DC. Relevant to developing H.R. 2193, the Subcommittee heard testimony about the need for a heat standard and the slowness of the OSHA rulemaking process.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget and Impoundment Control Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget and Impoundment Control Act of 1974*, the Committee has received the following estimate for H.R. 2193 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 2022.

Hon. ROBERT C. (BOBBY) SCOTT,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2193, the Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Meredith Decker.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 2193, Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022
As ordered reported by the House Committee on Education and Labor on July 27, 2022

By Fiscal Year, Millions of Dollars	2022	2022-2027	2022-2032
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	not estimated

		Mandate Effects	
Statutory pay-as-you-go procedures apply?	No		
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	No	Contains intergovernmental mandate?	Yes, Cannot Determine Costs
		Contains private-sector mandate?	Yes, Cannot Determine Costs

* = between zero and $500,000.

H.R. 2193 would require the Occupational Safety and Health Administration (OSHA) in the Department of Labor (DOL) to issue an occupational safety and health standard related to employees' exposure to heat stress. DOL also would be required to update the National Agricultural Workers Survey to identify heat-related illnesses and injuries and report to the Congress on its implementation.

Under current law, OSHA can issue occupational safety and health standards. In 2021, the agency initiated a rulemaking concerning job-related heat illness and injury. The new OSHA standards established under the bill would apply to federal personnel, but CBO expects that agencies would not have to change their practices significantly to comply with those standards. As a result, CBO estimates that implementing H.R. 2193 would have no significant cost.

H.R. 2193 would impose an intergovernmental and private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by requiring employers, including public employers, to comply with the new standard.

CBO cannot anticipate the details of the standard and thus cannot determine whether the costs would exceed the annual intergovernmental and private-sector thresholds established in UMRA ($92 million and $184 million, respectively, in 2022, adjusted annually for inflation). Because the standard could cover many employers and industries and could require expensive mitigation including engineering controls and acclimatization plans, the costs could be large. However, any costs would be mitigated by voluntary compliance, existing state rules on heat protection, and savings to employers from reduced injury and employee absence.

The CBO staff contacts for this estimate are Meredith Decker (for federal costs) and Andrew Laughlin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 2193. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The bill does not change existing law for purposes of clause 3(e) of rule XIII of the Rules of the House of Representatives.

MINORITY VIEWS

INTRODUCTION

Committee Republicans recognize the importance of keeping workers safe in the workplace, and this includes protecting them from exposure to extreme heat. However, a rushed, burdensome, one-size-fits-all national heat standard, as required by H.R. 2193, is not the best way to address a complex hazard. Unfortunately, instead of holding a hearing on the legislation to hear from experts, Democrats released an entirely new bill as their Amendment in the Nature of a Substitute (ANS) one day before the markup. The Democrats' approach to jam a bill through Committee without gathering appropriate feedback from stakeholders and Members of the Committee is ironically appropriate, considering that H.R. 2193's purpose is to rush the Occupational Safety and Health Administration's (OSHA) rulemaking process.

H.R. 2193 is completely unnecessary because OSHA has existing authority to cite employers for failure to address excessive heat in the workplace and is in the process of writing a heat illness prevention standard. With this legislation, Democrats are attempting to appease Big Labor and environmental activists who contend there is a "climate emergency" necessitating congressional action. Committee Republicans reject the Democrats' belief that more top-down mandates from Washington are the answer and are united in their opposition to H.R. 2193.

OCCUPATIONAL HEAT PROTECTIONS ALREADY EXIST

With this legislation, Democrats fail to acknowledge that occupational exposure to excessive heat is a well-known hazard that has long been recognized by OSHA, employers, and workers. While the agency does not currently have a specific regulatory standard for occupational exposure to excessive heat, it enforces heat stress under the general duty clause of the *Occupational Safety and Health Act* (OSH Act), which requires employers to take affirmative steps to protect their employees and provide a workplace that is free from recognized hazards.[1] Additionally, other federal safety and health standards address the heat hazard: for example, the standards on sanitation, medical services and first aid, record-keeping, safety "training" and education, and personal protective equipment all include consideration of heat hazards.[2] Further, on April 8, 2022, OSHA launched a National Emphasis Program to inspect worksites for outdoor and indoor heat-related hazards, putting employers on notice of their obligation to address heat in the

[1] 29 U.S.C. §654(a)(1).

[2] *See* Letter from David Michaels, Assistant Sec'y for Occupational Safety & Health, to Sydney Wolfe, Dir., Publ. Citizen's Health Research Group (June 7, 2021), https://www.citizen.org/wp-content/uploads/migration/denial-of-heat-stress-petition.pdf.

workplace.[3] Clearly, then, OSHA already both recognizes and enforces workplace exposure to excessive heat.

Beyond its enforcement initiatives, OSHA also engages in educational campaigns and outreach regarding the hazard of heat. This includes on-site consultations with employers explaining heat illness prevention in the workplace.[4] OSHA regional offices also conduct outreach programs, including stand-downs on heat illness prevention.[5] Lastly, OSHA's alliance participants conduct heat-illness prevention outreach activities.[6]

Despite these education programs and active enforcement efforts that already protect workers formulated and enforced by the agency, H.R. 2193 takes a Congress-knows-best-approach and forces OSHA to promulgate an interim final heat standard in only one year, an incredibly rushed timeline.

Democrats also fail to recognize that many employers have designed and implemented effective heat injury and illness prevention programs based on OSHA's existing guidance and tailored to address the hazards at their specific workplace. The Coalition for Workplace Safety (CWS)[7] explained this in a letter to the Committee:

> OSHA's use of [heat] guidance, coupled with the general duty clause in enforcement proceedings in heat illness cases, has had positive results. It gives employers the flexibility to create a program that fits their unique environment while still providing useful information and elevating the concern around heat exposure. Every worksite is different, from construction to manufacturing to retail, and all these workplaces have different factors related to protecting employees from excessive exposure to heat.[8]

Because OSHA already uses existing authority to protect workers from excessive heat, and because employers are on notice and have implemented programs to protect their workforce from this hazard, the rushed timeline required by H.R. 2193 is completely unnecessary.

H.R. 2193 IS UNNECESSARY BECAUSE OSHA IS ALREADY WRITING A HEAT STANDARD

Advancing legislation to force OSHA to issue such a standard covering occupational exposure to excessive heat is unnecessary considering that OSHA has the authority under current law to

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[3] OSHA, NATIONAL EMPHASIS PROGRAM—OUTDOOR AND INDOOR HEAT-RELATED HAZARDS (Apr. 8, 2022), https://www.osha.gov/sites/default/files/enforcement/directives/CPL-03–00–024.pdf.

[4] KURT PETERMEYER, U.S. DEP'T OF LAB., HOW OSHA'S ON-SITE CONSULTATION PROGRAM IS HELPING SMALL BUSINESSES PROTECT WORKERS FROM EXTREME HEAT (May 26, 2022), https://blog.dol.gov/2022/05/26/how-oshas-on-site-consultation-program-is-helping-small-businesses-protect-workers-from-extreme-heat.

[5] News Release, OSHA announces Safety Stand-Down at worksites throughout Southeast to emphasize response to, prevention of heat-related illnesses, injuries (June 23, 2016), https://www.osha.gov/news/newsreleases/region4/06232016.

[6] OSHA, ALLIANCE PROGRAM PARTICIPANTS DEVELOPED PRODUCTS, https://www.osha.gov/alliances/products.

[7] CWS is comprised of associations and employers that believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. *See* CWS, ABOUT THE COALITION, https://workingforsafety.com/about-cws/.

[8] Letter from CWS to Reps. Bobby Scott & Virginia Foxx (July 27, 2022), https://workingforsafety.com/wp-content/uploads/sites/4/Letter-to-House-Ed-Labor-Committee-HR-2193-heat-standard.pdf.

issue a heat standard and that the Biden OSHA is already in the process of writing such a standard. The agency issued an Advanced Notice of Proposed Rulemaking (ANPRM) in October 2021 requesting public comment on hazardous heat in the workplace and on the nature and effectiveness of interventions and controls to prevent heat-related injury and illness, and it is following the proper regulatory process allowing OSHA to determine a workable policy.[9] The normal regulatory process allows OSHA to determine what policy is best—both to protect workers and to provide employers with the necessary support and flexibility to ensure employees are safe on the job.

Committee Democrats are advancing H.R. 2193 with a prescriptive timeline for issuing regulations because they believe the agency's rulemaking process takes too long. However, even the Biden OSHA has acknowledged that responsible rulemaking takes time and that OSHA has already received thousands of comments from stakeholders and employers which will help ensure the heat standard is based on the most recent science and data.[10] Democrats are seeking to appease their activist base that contends the rushed timeline is necessary due to the "climate crisis." However, the agency could have moved much quicker on a heat standard if President Biden did not order it to waste so much time promulgating an illegal vaccine-and-testing mandate in 2021.[11]

H.R. 2193 WILL LEAD TO A ONE-SIZE-FITS-ALL

Standard H.R. 2193 requires OSHA to issue a one-size-fits-all national heat standard mandating prescriptive measures to address a complex hazard. The bill's approach is ill-advised because climate varies from region to region and therefore what may be considered extreme temperatures in one part of the country could be the norm in another. For example, a construction worker in Florida will be more acclimated to working in temperatures above 80 degrees than a construction worker in Wisconsin.

In a letter to the Committee, the American Farm Bureau Federation (AFBF) said that a one-size-fits-all heat standard would be unworkable for agricultural production in many regions of the United States:

> Considering the variances in agricultural work and climate, AFBF questions whether the department, especially under the conditions outlined in either H.R. 2193 or the amended version, can develop additional heat illness regulations without imposing new, onerous burdens on farmers and ranchers that will lead to economic losses.[12]

Further, the legislation's one-size-fits-all approach does not account for the existing employer protocols already in place to meet the characteristics of a particular workplace. The National Association of Manufacturers points out that workplaces have "many vari-

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[9] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,309 (Oct. 27, 2021).

[10] Paige Smith, *Worker Heat Protection Measure to Get House Panel Attention,* BLOOMBERG GOV'T, July 21, 2022, https://www.bgov.com/next/news/RFDZG0T1UM0W.

[11] NFIB v. OSHA, 142 S. Ct. 661 (2022).

[12] Letter from Zippy Duvall, President, Am. Farm Bur. Fed'n, to Reps. Bobby Scott & Virginia Foxx (July 27, 2022) (on file).

ations in indoor temperature settings, different ventilation strategies, certain temperature requirements for product specifications, and a diverse range of other operational controls within the manufacturing sector dependent on the facility and the products being made."[13] Employers are in the best position to assess potential heat hazards in specific workplaces, and one-size-fits-all diktats handed down from Congress should be rejected.

H.R. 2193 DEPRIVES STAKEHOLDERS OF MEANINGFUL INPUT

H.R. 2193 allows OSHA to bypass important laws governing the regulatory process, which will mean depriving stakeholders of the opportunity to offer meaningful input. The bill includes a provision requiring OSHA to issue an interim final standard within one year establishing a heat protection standard and related recordkeeping and reporting requirements, allowing the agency to disregard rulemaking requirements under the OSH Act, important regulatory laws such as the *Administrative Procedure Act* which typically require public notice-and-comment before a rule goes into effect, and requirements under the *National Environmental Policy Act*. The timeline requiring OSHA to issue an enforceable interim final standard within one year without soliciting public notice and comment will lead to a rushed interim final standard that does not allow for due diligence, careful analysis, and essential research on the most workable and feasible approach to addressing heat illness prevention.

H.R. 2193 first requires OSHA to issue an interim final rule and subsequently accept comments from the public. According to the Construction Industry Safety Coalition (CISC),[14] "this turns the process completely on its head and deprives regulated entities of the ability to provide meaningful input at a critical time in the regulatory process."[15] While Democrats will claim the public will have the opportunity to comment during the development of a final standard, they completely ignore the fact that, historically, few interim final rules are ever modified due to public feedback, making it all the more likely that the interim final standard will remain in place as a final standard.

In addition, H.R. 2193 could force OSHA to bypass the Small Business Advocacy Review Panel and ignore small business concerns to meet the arbitrary deadline required in the legislation. Under OSHA's normal rulemaking process, the *Small Business Regulatory Enforcement Fairness Act* (SBREFA) requires the agency to convene this important panel to solicit their feedback before proposing rules that would have a significant economic impact on

[13] Letter from Brian Walsh, Dir., Nat'l Ass'n of Mfr., to Reps. Bobby Scott & Virginia Foxx (Aug. 2, 2022) (on file).

[14] CISC is made up of 30 trade associations, representing associations from all sectors of the construction industry, committed to helping create safer construction jobsites for workers. Its members include the Associated Builders and Contractors, the Associated General Contractors, and the National Association of Home Builders. ABOUT CISC, https://www.buildingsafely.org/about-cisc/.

[15] Letter from CISC to Reps. Bobby Scott & Virginia Foxx (July 27, 2022), https://www.buildingsafely.org/wp-content/uploads/2022/07/CISC-HR-2193-Mark-Up-on-Amendment-Letter-7.27.2022.pdf.

a substantial number of small entities.[16] Bypassing the SBREFA panel would be detrimental to the regulatory process, as convening this panel is an important part of crafting any safety regulation. It also allows small businesses to comment on regulatory text.

Bypassing the SBREFA panel is especially concerning considering the National Federation of Independent Business (NFIB) has said H.R. 2193 will have a disproportionate impact on small businesses:

> Unlike large businesses that have entire compliance departments, small business owners themselves will have to decipher and implement new regulations that result from this legislation. Formulating a detailed new plan, training employees, monitoring exposure, implementing new record-keeping procedures, and additional mandates will require a significant amount of time and money, both of which are in short supply for small business owners.[17]

Small businesses are already getting crushed by inflation and overregulation in the Biden economy. The last thing Congress should do is deprive small businesses of their input on an OSHA rule and further harm them with burdensome, ineffective regulations.

H.R. 2193 also ignores the fact that OSHA has already received hundreds of public comments on the development of a heat standard that is already under way at the agency. In response to OSHA's October 2021 ANPRM, many stakeholders expressed concerns about the workability of a national heat standard. H.R. 2193 would allow OSHA to ignore the valuable input it has already collected through the ANPRM and would instead force the agency to adopt a prescriptive standard as outlined in the bill. Our nation's job creators and workers deserve a voice in the regulatory process, as they have long had under current law, but this legislation deprives them of that right.

H.R. 2193 GIVES UNDUE POWER TO OSHA

At the Committee markup, Democrats amended H.R. 2193 to add provisions intended to embolden OSHA by limiting judicial oversight. It is clear that, after the authoritarian vaccination-and-testing mandate was rebuked by the Supreme Court,[18] Democrats are seeking to change OSHA's longstanding judicial review process. H.R. 2193 tilts the scales against employers challenging any of the heat standards under the bill to ensure OSHA prevails in court.

Specifically, the provision adopted in the Democrat ANS requires that any challenges to the rules issued under the bill must be filed in the U.S. Court of Appeals for the D.C. Circuit.[19] Under current law, challenges to OSHA rules are filed in the circuit court of appeals where the challenger is located.[20] This makes sense in light

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[16] OSHA, SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996 (SBREFA), https://www.osha.gov/smallbusiness/sbrefa.

[17] Letter from Kevin Kuhlman, Vice President, Federal Government Relations, National Federation of Independent Business, to Reps. Bobby Scott & Virginia Foxx (July 27, 2022) (on file).

[18] NFIB v. OSHA, 142 S. Ct. 661 (2022).

[19] ANS to H.R. 2193 (117th Cong.) §3(c)(5)(a), https://docs.house.gov/meetings/ED/ED00/20220727/115072/BILLS-117-2193-A000370-Amdt-1.pdf.

[20] 29 U.S.C. § 655(f).

of the regional impact of OSHA rules. The new provision is intended to reduce judicial oversight by limiting challenges to one Democrat-leaning circuit, which Democrats hope will uphold the hastily drafted heat regulations under the legislation. In addition, Committee Democrats also added a provision to the bill that subverts the judicial process by eliminating the ability of litigants to seek injunctive relief.[21] According to CISC, these provisions are a "clear violation of the Separation of Powers Clause enumerated in the U.S. Constitution."[22]

Incredibly, H.R. 2193 also creates a new deference standard to require the Occupational Safety and Health Review Commission (OSHRC), an independent agency tasked with reviewing OSHA enforcement actions, to give "substantial deference" to OSHA in its review of heat citations.[23] This provision would force OSHRC to accept OSHA's interpretation of H.R. 2193. As CWS explains, the whole point of OSHRC is to have an independent special issue tribunal to adjudicate OSHA citations, not to have OSHRC rubberstamp OSHA's conclusions.[24] Taken together, it is clear these provisions were added to H.R. 2193 to empower OSHA and to limit judicial and administrative oversight because Democrats have no confidence OSHA can write a legally defensible rule.

H.R. 2193 UNFAIRLY PUNISHES JOB CREATORS

H.R. 2193 continues Committee Democrats' assault on job creators by emboldening OSHA inspectors to issue gotcha citations that primarily seek to punish employers rather than to keep workers safe. Already faced with the struggling Biden economy, our nation's job creators do not need more burdensome requirements that target employers instead of improving workplace safety.

The ANS to H.R. 2193 expands the statute of limitations for citations under the heat standards issued under this bill from six months under current law to four years following the occurrence of a violation.[25] Committee Republicans believe every worker deserves safe and healthy work conditions and support OSHA's authority to hold bad actors accountable. However, issuing more and more citations against employers for minor infractions and mere paperwork errors that allegedly took place up to four years ago is not the most effective way to keep workplaces safe. Unfortunately, Democrats continue to focus on punishing employers with this provision rather than on collaborating with them to adopt proactive policies and prevent workplace hazards before they develop.

H.R. 2193 UPENDS OSHA'S WHISTLEBLOWER PROTECTIONS

Committee Democrats added a provision in their ANS that inappropriately subverts the longstanding OSHA whistleblower process relating to workplace safety. Specifically, the provision creates a private right of action for an employee to sue an employer in fed-

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[21] ANS to H.R. 2193 (117th Cong.) § 3(c)(5)(a).
[22] Letter from CISC to Reps. Bobby Scott & Virginia Foxx, *supra* note 15.
[23] ANS to H.R. 2193 (117th Cong.) § 4(b)(2).
[24] Letter from CWS to Reps. Bobby Scott & Virginia Foxx, *supra* note 8.
[25] ANS to H.R. 2193 (117th Cong.) § 4(b)(1); 29 U.S.C. § 658(c).

eral court if OSHA decides a whistleblower claim is without merit.[26]

Current law already protects employees from unlawful retaliation, and OSHA takes these claims very seriously. Section 11(c) of the OSH Act prohibits employers from retaliating against employees for exercising a variety of rights guaranteed under the OSH Act, such as filing a safety or health complaint with OSHA, raising a health and safety concern with their employers, participating in an OSHA inspection, or reporting a work-related injury or illness.[27] Through its Whistleblower Protection Program, OSHA is tasked with investigating retaliation claims and either dismissing the complaint if the agency finds no merit to the retaliation claim or seeking restitution for an individual found to have been retaliated against by his or her employer for informing authorities of unsafe working conditions.[28]

If OSHA decides that a claim does not warrant relief, the matter should end there. Congress should not encourage more frivolous lawsuits. This provision added to H.R. 2193 is not about protecting whistleblowers—who are already protected under current law. Instead, it is a handout to trial lawyers, one of the Democrats' favorite constituencies.

REJECTED AMENDMENTS THAT WOULD HAVE IMPROVED THE BILL

During consideration of H.R. 2193, Committee Republicans offered amendments to improve the bill that were rejected by Committee Democrats. Rep. Fred Keller (R–PA) offered an amendment striking the provision requiring that challenges to heat standards under the bill can only be filed in the U.S. Court of Appeals for the D.C. Circuit. This harmful provision included in the Democrat ANS is a blatant attempt to tilt the scale so that OSHA has a better chance to prevail in court. Rep. Keller's amendment would have allowed circuit courts around the country to rule on OSHA rules on heat hazards, as they have always done. Unfortunately, Democrats rejected this sensible amendment that would have maintained judicial oversight.

Rep. Bob Good (R–VA) offered an amendment striking the provision that would expand the statute of limitations for OSHA citations against employers for violations of heat standards from six months under current law to four years. This harmful provision included in the Democrat ANS seeks to add punitive requirements that embolden bureaucrats to go after employers rather than to improve workplace safety. Rejecting the amendment on party-lines, Committee Democrats continued their crusade against job creators.

Rep. Michelle Steel (R–CA) offered an amendment requiring that OSHA convene a Small Business Advocacy Review Panel before publishing an interim final rule. OSHA's normal rulemaking process requires the agency to convene this important panel before proposing rules that would have a significant economic impact on a substantial number of small entities in order to solicit their feedback. H.R. 2193 allows OSHA to ignore small business concerns to meet the arbitrary deadline required in the legislation. Rep. Steel's

[26] ANS to H.R. 2193 (117th Cong.) § 4(d)(2).
[27] 29 U.S.C. § 660(c).
[28] OSHA, Whistleblower Protections, https://www.whistleblowers.gov/.

amendment would have ensured that small businesses have a voice in the regulatory process for the heat standard. Committee Democrats chose to deprive small businesses of their input and rejected this amendment.

CONCLUSION

OSHA is already in the process of soliciting data and public feedback on the development of a heat standard, and it is baffling that Democrats are advancing H.R. 2193. Not only does this bill ignore the ongoing rulemaking process, but it also gives more power to OSHA, harms job creators and workers, and limits judicial oversight. Occupational exposure to excessive heat is a well-known hazard that has long been recognized by OSHA, employers, and workers. There are current protections under the OSH Act to ensure workers are protected while OSHA develops a workable and feasible heat standard. The agency does not need additional enforcement authority from Congress. Rather than ensuring workplace safety, the purpose of advancing H.R. 2193 is to appease Democrats' activist base that contends the rushed timeline required in the bill is necessary due to the "climate crisis." Congress should reject this unnecessary legislation.

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