



**APRIL 17, 2023**

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Dear Attorneys General:

Thank you for your letter, dated February 9, 2023, petitioning OSHA to develop an emergency temporary standard (ETS) for occupational heat exposure. In your letter, you request that OSHA issue an ETS by May 1, 2023, to protect workers from heat-related injury, illness, and death. Specifically, you request that an ETS take effect when the heat index reaches 80°F and include requirements for employers to provide water, access to shaded or cool areas, rest breaks, acclimatization plans, temperature and workload monitoring, heat alert plans, employee and supervisor training, recordkeeping, and heightened protections for vulnerable workers.

We very much appreciate and share your concern about protecting workers from hazardous heat exposure. On October 27, 2021, OSHA published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPRM) for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. 86 Fed. Reg. 59309. With this publication, OSHA initiated the notice-and-comment rulemaking process to consider a heat-specific workplace standard. In the ANPRM, OSHA asked over 100 questions and requested information on multiple topics to help inform how the Agency proceeds in the rulemaking process. The ANPRM public comment period closed on January 26, 2022, and OSHA received 965 unique public comments, which the Agency is currently analyzing. The next step in the rulemaking process will be to convene a Small Business Advocacy Review (SBAR) Panel, in accordance with the

requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA), to hear comments from small entity representatives on the impacts of a heat-specific standard. Updates on OSHA's progress will be made available on the Agency's Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Rulemaking page (<https://www.osha.gov/heat-exposure/rulemaking>).

OSHA believes that hazardous heat poses a significant risk to workers and is prioritizing development of a permanent standard for heat-related injury and illness. We also recognize the need to act now. In 2021, OSHA revitalized its Heat Illness Prevention campaign ([www.osha.gov/heat](http://www.osha.gov/heat)), and in April 2022 announced a National Heat Emphasis Program (NEP), under which federal OSHA conducted additional outreach and more than 1700 heat-related inspections. The NEP created, for the first time, a nationwide enforcement mechanism for OSHA to proactively inspect indoor and outdoor workplaces for heat-related hazards. This means that OSHA can now launch heat-related inspections on high-risk worksites before workers suffer preventable injuries, illnesses, or fatalities. OSHA's Heat Illness Prevention campaign educates employers and workers on the dangers of working in the heat through training sessions, outreach events, informational sessions, publications in a growing number of languages, social media messaging, and media appearances. OSHA also established a Heat Injury and Illness Prevention Work Group of the National Advisory Committee on Occupational Safety and Health (NACOSH). The Work Group has evaluated and recommended improvements to OSHA's heat illness and prevention guidance materials and is currently developing recommendations on potential elements of a proposed heat injury and illness prevention standard.

While we share your belief that we must act now, with respect to your petition for an ETS, OSHA has significant reservations that a federal effort to promulgate an ETS on indoor and outdoor heat will achieve the outcome you desire and could instead have the counterproductive result of further delays in achieving meaningful protections for workers. Consequently, the Agency must deny your petition for an ETS.

The legal test for issuing an ETS under Section 6(c) of the OSH Act has a high threshold and courts have applied it rigorously, resulting in several successful challenges to ETSs promulgated by OSHA in the past. *See, e.g., National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, 142 S. Ct. 661 (2022) (*per curiam*) (COVID-19); *Asbestos Information Ass'n v. OSHA*, 727 F.2d 415, 422, 426 (5th Cir. 1984) (asbestos); *Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819 (5th Cir. 1976) (diving operations); *Fla. Peach Growers Ass'n v. Department of Labor*, 489 F.2d 120 (5th Cir. 1974) (organophosphorous pesticides). Although your letter points to emergency standards issued by California, Oregon, and Washington as evidence of the feasibility of issuing an ETS on heat, these States have their own legal requirements and processes for promulgating such standards and are not required to satisfy the same administrative requirements and stringent legal standards as Federal OSHA. Due to these stringent requirements, the successful promulgation of an ETS is exceedingly rare. Given these challenges and uncertainties, pursuing an ETS to address heat illness would divert significant time and resources from developing a permanent standard and could very well result in no tangible results for workers.

OSHA believes that notice and comment rulemaking is important for providing an opportunity

for the American public to participate in the rulemaking process and that public participation is key to developing a successful and effective standard. To identify the most effective and feasible federal heat standard, OSHA is seeking public evidence on important questions, including but not limited to: identifying appropriate exposure thresholds for working populations across the nation, implementation of acclimatization protocols across varying work structures and geographies, and the feasibility of exposure monitoring and work-rest schedules. The ANPRM issued in October of 2021 included these and other questions. While OSHA is focused on developing a permanent federal heat-specific standard, any state could promulgate its own ETS for occupational heat exposure through its state rulemaking procedures. *See* 29 U.S.C. § 667(a) (“Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect[.]”).

Thank you again for contacting OSHA regarding this important topic and for your interest in occupational safety and health. We encourage you to participate in the public process for developing a permanent standard as we move forward.

Sincerely,



Douglas L. Parker