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Enforcement of Heat Illness Hazards Without a Federal Standard: What Employers Need to Know Now

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Federal OSHA still has no heat illness prevention standard, but that hasn't slowed enforcement. Between General Duty Clause citations, a revised National Emphasis Program, and a growing list of state rules, employers face real compliance questions today, along with a proposed federal rule that may look different by year's end. Drawing on our work with the Employers Heat Illness Prevention Coalition, here is what we're seeing and what we recommend.

How OSHA Enforces Heat Hazards Today

Without a heat-specific standard, OSHA relies on the General Duty Clause (GDC). Like any other GDC citation, a heat-related citation must be supported by four broad elements:

1. The employer did not keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.

While the GDC gives OSHA broad enforcement authority, it is typically tougher for OSHA to enforce under the GDC than under a specific standard. That distinction matters as the rulemaking moves forward.

What the Proposed Standard Would Change

The proposed standard, as currently drafted, requires employers to implement specific measures, including numerous prescriptive "one-size-fits-all" requirements related to, for example, acclimatization, mandatory rest breaks, and heat monitoring schedules. We anticipate changes in the next few months: OSHA is expected to issue a Supplemental Notice of Proposed Rulemaking (SNPRM) this December.

If employer compliance obligations are more manageable, while still being at least as effective – as we would expect under the type of performance-based, flexible rule our Coalition has been advocating for (and which we hope the SNPRM will reflect) since the Advanced Notice of Proposed Rulemaking (ANPRM) was issued five

years ago, on October 27, 2021 – then it will likely be more feasible for employers to comply, making it tougher for OSHA to affirm citations under that scheme than under the one currently proposed.

Those are the two pathways we see here; the runway for OSHA to keep relying on the GDC for heat illness hazards is not infinite. Employers should advocate now for a more performance-based, flexible rule, rather than sit on the sidelines and ultimately wait for the prescriptive "one-size-fits-all" rule as drafted to be finalized.

The Revised NEP: Enforcement Remains a Priority

If anything, OSHA's revised National Emphasis Program (NEP) affirmed that the agency still takes heat illness hazards very seriously. The revision came a couple of days after the previous NEP expired, so OSHA certainly could have let it lapse in favor of a more compliance-assistance-driven, rather than enforcement-focused, approach.

The NEP has always incorporated both approaches, and there was no shortage of NEP-related activity this summer. We saw numerous:

- Programmed inspections
- Unprogrammed inspections, triggered primarily by employee complaints
- Expansions of existing inspections on heat priority days, when the heat index was 80°F or more

The "Patchwork Problem" for Multistate Employers

Many multistate employers try to adopt companywide heat illness prevention programs, but have difficulty doing so because heat illness prevention requirements, where they exist, vary greatly from state to state. To ensure full compliance, we recommend developing and implementing programs by location.

That gets to the heart of the "patchwork problem." Without a federal heat illness prevention standard, there is nothing to preempt the states from occupying that space, and they are doing so, creating a complex legal and regulatory landscape. States with standards already in place include California, Oregon, Washington, Colorado, Nevada, Minnesota, and Maryland. New Mexico, Virginia, and Illinois are just a few of the states in the midst of proposing heat illness prevention rules.

This is another reason our Coalition, along with many other industry groups, has been urging federal OSHA to change (as described above) and advance its heat illness prevention rulemaking rather than sit on it. With a federal standard, states under federal OSHA jurisdiction would be required to adopt that standard. And although OSH Plan States can adopt something more stringent, experience has shown that many OSH Plan States adopt federal OSHA's standards identically.

We certainly want any federal rule to be reasonable, workable, and of course effective. But at the very least, a federal rule would create greater consistency across the country, streamlining and making it easier for multistate employers to understand the legal and regulatory landscape and adopt companywide heat illness prevention programs.

Where Employers Are Making Changes: Acclimatization

Our clients had, and continue to have, robust heat illness prevention programs. One area where we have been seeing more changes recently is acclimatization. Prescriptive acclimatization protocols are being incorporated into new state standards and are included in the proposed rule as drafted.

While many employers have general procedures for gradually introducing employees to higher temperatures, they are now adding more specificity to those procedures. For example, an employer in a state without heat illness prevention requirements added a threshold number of days away for an employee to be considered a "returning employee" for purposes of acclimatization.

Key Takeaways:

- **Expect continued enforcement.** The revised NEP shows that OSHA is still actively inspecting heat illness hazards, even without a federal standard.
- **Engage in the rulemaking now.** The SNPRM expected this December is another opportunity to continue to advocate for a performance-based, flexible rule.
- **Plan by location.** Until a federal standard brings greater consistency, multistate employers should tailor programs to each state's requirements.
- **Revisit acclimatization procedures.** Adding specificity, such as defining who counts as a returning employee, positions programs for new state and federal requirements.

If you have any questions or are interested in joining our Employers Heat Illness Prevention Coalition, please contact Eric Conn at **econn@connmaciel.com** and Beeta Lashkari at **blashkari@connmaciel.com**.