December 20, 2023

The Honorable Douglas Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Room S2315
200 Constitution Avenue, NW
Washington, DC 20210

Mr. James Frederick
Deputy Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
Room S2315
200 Constitution Avenue, NW
Washington, DC 20210

VIA ELECTRONIC SUBMISSION: WWW. REGULATIONS.GOV

RE: **Docket No. OSHA-2021-0009 Re: OSHA SBAR/SBREFA Panel on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings**

Dear Assistant Secretary Parker and Deputy Assistant Secretary Frederick:

The Coalition for Workplace Safety (CWS) respectfully submits these comments in response to Docket No. OSHA-2021-0009, regarding Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. Specifically, the CWS directs its comments to the feedback presented through the Small Business Advocacy Review (SBAR) Panel after the Occupational Safety and Health Administration (OSHA) concluded the Small Business Regulatory Enforcement Fairness Act (SBREFA) process on November 3, 2023. These comments also supplement observations presented by the CWS on February 4, 2022, regarding OSHA's Advance Notice of Proposed Rulemaking on Heat Injury and Illness Prevention in Indoor and Outdoor Settings, 86 Fed. Reg. 59309 (October 27, 2021). We appreciate OSHA's consideration of our input, which follows our review of the Report of the SBAR Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (Panel Report).

The CWS is coalition of trade associations and companies, representing many industries with millions of employees in every state in the nation who are focused on establishing

reasonable and responsible workplace safety standards across the country. We are comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

CWS members and employers across the country recognize that heat illness in the workplace is an important concern for workers and employers. Many CWS members have designed effective heat injury and illness prevention programs consistent with OSHA's existing approach to address heat-related illnesses, which has been to provide extensive guidance ("Water. Rest. Shade") that can be flexibly applied to meet a wide range of circumstances. As noted in the Panel Report, OSHA's use of this guidance, coupled with the General Duty Clause in enforcement proceedings, has had positive results, while providing flexibility[1] to employers to implement heat illness prevention programs based on their unique use environments.

The CWS supports recommendations expressed in the Panel Report, and in other comments submitted to the agency, recognizing that flexibility, versus a "one-size-fits-all" standard, is necessary for employers to prevent or mitigate heat-related injuries and illnesses in their workplaces the most effectively. The Panel Report, and our comments below, illustrate several unintended consequences that are likely to result from creating new requirements applicable to only heat illnesses and injuries that are at odds with existing regulations, as in the case of the recordkeeping requirements proposed in the Heat Small Entity Representatives' (SER) Background Document[2], while also creating burdensome and rigid requirements that are not suitable for all workplaces and climates. Rather than addressing all recommendations in the SER Background Document and Panel Report, the CWS has focused its observations below on the overall need for a flexible approach, while flagging the components of the SER Background Document that are the most likely to create undue burdens and unnecessary challenges in both compliance and enforcement.

1. **OSHA should look more closely at whether injury data supports the need for a nationwide heat standard**.

Comments submitted through SERs voiced strong concern regarding whether the underlying data on heat-related injuries and illnesses reported in data from the Bureau of Labor Statistics (BLS) supports the need for a national heat standard[3]. CWS members also have similar concerns. The flexibility needed by employers to effectively tailor heat illness prevention programs to their unique worker populations and use environments is already supported by OSHA's General Duty Clause and OSHA's "Water. Rest. Shade" heat illness prevention materials. Employers already have an obligation under the General Duty Clause to protect workers from recognized hazards, including heat hazards, that are causing or likely to cause death or serious physical harm in the workplace. 29 U.S.C. §654(a). The CWS supports suggestions expressed in the Panel Report that OSHA should "take a step back" and "take a hard look" at the number of heat-related incidents

[1] *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness in Outdoor and Indoor Work* (Nov. 3, 2023), ("Panel Report") at i – ii, 8, 17, 26, 28 – 29, 38, 44, 46 – 50.
[2] *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, Small Entity Representative (SER) Background Document,* OSHA (August 2023), ("SER Background Document"), at 25.
[3] Panel Report at 45.

and reconsider whether the data justifies the need for a standard[4], particularly when the impacts of unintended consequences related to lack of flexibility, and to the confusion created by inconsistencies between requirements in the proposed new heat standard and existing regulations (i.e. recordkeeping), are considered.

During the SBAR Panel review process, the SERs found little quantifiable support for a national heat illness standard. In response to polling questions about the type of heat-related injuries and illnesses experienced at SER's workplaces, 57.1 percent of respondents indicated "first aid," 42.9 percent selected "none," 21.4 percent chose "required more than first aid, but no lost work time," and no SERs selected the options for "fatal," or "required more than first aid and missed days away from work."[5] The Panel Report also questions whether BLS data justifies a national heat standard.[6] All of these concerns highlight the fact that more study is needed as required by §3(8) of the OSH Act to ensure that the heat standard is "reasonably necessary or appropriate," which the United States Supreme Court has construed to mean that OSHA must find that "significant risks are present and can be eliminated or lessened by a change in practices." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980)[7]. The CWS strongly urges OSHA to consider concerns noted in the Panel Report and in additional comments questioning whether the data reliably supports the creation of a national standard.

2. **Flexibility must be the guidepost for any draft rule**.

The risks for heat-related injury and illness can vary significantly based on individual and environmental factors. Indeed, whether any given employee is susceptible to heat illness, and at what point, is often the product of individual health and fitness factors that are far outside the control the employer. Therefore, establishing "one-size-fits all" requirements via prescriptive rulemaking is likely to lead to problems in implementation, while creating a rule that is cost prohibitive, given the vast differences among individuals, work sites, work responsibilities, and regional variations in temperatures. Employers and workers need flexibility to account for differences among work sites, geographical locations, work responsibilities, and available technology.

The CWS urges against creating a nationwide standard for heat stress that would impose requirements that would likely not be applicable to all types of industries, nor to all regions in the country. Instead, any heat standard should preserve the flexibility to allow employers to complete site specific risk assessments, and tailor their program to their own work environments. Employers must be able to consider individual factors, such as the local climate, and the type of work being performed. High-risk work activities in one region may be low risk in a different region based on the typical climate patters for the region. For example, temperatures of 80

[4] Panel Report at 5.
[5] Panel Report at 4.
[6] Panel Report at 5.
[7] *See also Comments of Utility Line Clearance Safety Partnership*, submitted on January 26, 2022, containing a discussion of case law and regulatory standards requiring that any proposed standard be feasible and useful.

degrees F in Phoenix, Arizona, with average humidity of 36.3 percent[8], will feel vastly different than the same temperature in a humid climate, such as New Orleans, Louisiana, with average humidity of 75.9 percent[9]. The best way to promote protection for workers from heat illness, without creating an unworkably prescriptive rule, is to allow employers to continue to maintain their own individualized safety measures created for their specific operations and environmental conditions.

3. **The agency's suggested recordkeeping requirements are at odds with existing regulations**.

OSHA should reconsider the heat-specific recordkeeping requirement proposed in its August 2023 SER Background Document. The agency is considering requiring employers to maintain records for any of the following: environmental monitoring data; record of any heat-related illness or injury, including those that require only first aid; the environmental and work conditions at the time of the illness or injury; and a record of all heat acclimatization for new and returning employees[10]. This goes far beyond current recordkeeping and recording criteria at 29 C.F.R. §1904.7, which defines the following injuries and illnesses as recordable: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. 29 C.F.R. §1904.7(a). The proposal to require employers to record **any** instances of heat-related illness or injury, including those that require only first-aid, is at odds with decades of OSHA regulations and interpretive guidance on recordability, instructing that only the procedures identified in 29 C.F.R §1904.7(b)(5) and its subparts are considered first aid, and not recordable. 29 C.F.R. §1904.7(b)(5)(iii). Requiring recordkeeping for heat-related first aid injuries, but not for other first-aid-only injuries, serves only to create significant confusion, while creating overly burdensome compliance issues.

Requiring documented recordkeeping for rest breaks and daily temperature monitoring is also infeasible, and overly burdensome. An example of the absurdity created by requiring recordkeeping of any interventions arguably related to heat illness is found in the Panel Report, where an SER noted that asking a worker to take a break and hydrate because they appear hot would need to be captured as a first-aid incident, requiring recording because of the expanded standard.[11]

The CWS strongly urges OSHA to accept the Panel Report recommendation regarding recordkeeping, and not include a requirement for recording first-aid-only heat-related illnesses or injuries where such records are not already required under OSHA's injury and illness recordkeeping regulation[12].

---

[8] *Top 101 cities with lowest average humidity*, https://www.city-data.com/top2/c486.html (last accessed 12/18/2023).
[9] *Most humid cities in the United States*, https://www.currentresults.com/Weather-Extremes/US/most-humid-cities.php (last accessed 12/18/2023).
[10] SER Background Document at 25.
[11] Panel Report at 18.
[12] Panel Report at 46

4. **Applying prescriptive "heat triggers" without considering the workplace setting or local climate defeats the creation of a sustainable standard**.

In the SER Background Document, OSHA proposes that the heat standard's control measures would be required when temperature-based "initial heat trigger," and "high-heat triggers are met or exceeded[13]." As discussed in section 2, above, regarding flexibility, this approach ignores the fact that temperature measurements do not provide a useful indication for heat tolerance, no matter which of OSHA's proposed weather-monitoring methods are used. The temperature of 80 degrees F would be experienced much differently in a low humidity environment, versus a high humidity environment.

The complicated approaches for measurement proposed in the SER Background Document also create too much complexity and are not fit-for-purpose in all work settings. The CWS supports the comments in the Panel Report that OSHA's proposed heat triggers are too low, and not appropriate for all regions and use environments. Requiring employers to monitor initial and high heat triggers with complex proposed monitoring methods creates the substantial likelihood of confusion, thus producing barriers for effective implementation. The CWS urges OSHA to continue its study regarding heat measures, and provide a methodology that is simple to apply, and flexible in its application. The expense and confusion that will be created by imposing complex metrics or measurement requirements outweighs any benefit to be conveyed. As noted in feedback from the SERs, there is no "one size fits all" approach to regulating heat[14].

As it relates to temperature monitoring, the CWS also reiterates the concern it presented in its February 4, 2022, comment to OSHA's ANPRM regarding OSHA's proposal to cover both indoor and outdoor work settings in its proposed rule. The approaches to temperature monitoring outlined in the SER Background Document do not provide the flexibility needed by the wide range of industries covered by a possible proposed rule. The CWS urges OSHA to provide flexibility for industry-specific approaches for heat mitigation[15]. Providing flexibility will alleviate concerns noted by SERs in the Panel Report that "SERs with indoor worksites said that the temperature can vary across different parts of their facility. SERs with workers who are mobile and work at many different locations or elevations throughout the day said that temperature monitoring was a challenge for them because of various complicating factors[16]." The CWS, therefore, supports the recommendation in the Panel Report that OSHA allow flexibility in monitoring methods and not mandate a single method for employers to use in measuring heat in their worksites[17].

[13] SER Background Document at 28 – 29.
[14] Heat Illness SBAR/SBREFA Panel Comments (10/3/2023) at 26.
[15] See also *Construction Industry Safety Coalition comment letter*, "[b]ecause the construction environment is ever-changing and fluid, any regulatory approach must be simple and adaptable. For the same reasons, the CISC encourages OSHA to consider a separate regulatory approach for the industry, as OSHA has done in other rulemakings, such as Respirable Crystalline Silica."
[16] Panel Report at 46.
[17] *Id*.

5. **Rest Breaks and Acclimatization requirements should be flexible**.

Flexibility is needed to allow workers to take a rest break whenever they feel it is necessary, and depending on the individual employee's needs, the nature of work, and the specific workplace environmental conditions. As noted in SER comments, requiring regimented rest breaks of 10 – 15 minutes during defined time periods under certain heat triggers with no flexibility can result in lower manpower than necessary to safely conduct an operation, and the loss of a critical co-worker with experience and operational knowledge at the exact "wrong" time to complete a job safely[18]. As SERs in industries working from heights noted, the unintended consequence from the rigid application of rest breaks is that a greater hazard is likely to be created when workers are required to frequently climb up and down a ladder to take prescriptive breaks, exposing them to fall hazards[19]. This concern would be alleviated by a flexible approach, which allows employees and supervisors to work together and coordinate safe approaches for rest breaks.

CONCLUSION

The CWS opposes the creation of a prescriptive "one-size-fits" all approach to heat illness. Without the flexibility to tailor heat illness programs based on an employer's unique use environments, a rigid rule carries the substantial risk of being unduly burdensome and cost prohibitive, while failing to effectively protect workers from the specific hazards which would be identified through a site specific and tailored risk assessment. Including recordkeeping requirements that are at odds with current regulations will create substantial confusion for both the agency in enforcement, and for employers in attempting to understand their compliance obligations. If OSHA does go forward with a new standard, OSHA should eliminate the expanded heat-illness-related recordkeeping requirements, as well as other rigid requirements, such as prescriptive temperate thresholds, that fail to consider the unique workforces and varying climates across the United States. The best approach is to promote OSHA's "Water. Rest. Shade" resources, while continuing to approach heat illness enforcement under OSHA's General Duty Clause, without creating new standards that are confusing for both employers and employees.

The CWS appreciates the opportunity to provide these comments and welcomes the opportunity to continue to engage with the agency as it considers this important issue.

Outside Counsel
Robin Repass
Fisher & Phillips LLP
1401 New York Avenue, N.W.
Washington, DC 20005

[18] General comments from Heat Illness SBAR/SBREFA Panel (10/3/2023), at 33.
[19] *Id*. at 34.