workplace justice lab

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Northwestern

Comments on the Occupational Safety and Health Administration's Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings
Docket No. OSHA–2021-0009

Workplace Justice Lab (WJL) aims to address economic inequality through supporting, strengthening, and fostering innovations in government and grassroots organizations. We do this by building dynamic communities of learning and practice, carrying out cutting-edge research, and offering specialized training, webinars, and in-depth one-on-one consultations.

WJL is a multi-institutional partnership that is anchored at Rutgers University with sister centers at Northwestern University and the Pilipino Workers Center of Southern California.

WJL submits these comments regarding the Occupational Safety and Health Administration's (OSHA's) notice "Occupational Safety and Health Administration's Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings," (the Proposed Rule or NPRM) which was published in the Federal Register on August 30, 2024 (Docket No. OSHA–2021-0009). The agency is now preparing to promulgate a final standard and is seeking public comment on specific questions for development of the final standard. WJL strongly supports OSHA's plan to issue a final standard to protect workers from heat. We offer the following comments with a lens toward strengthening the standard to ensure robust enforcement by improving: (1) access to heat monitoring data; and (2) improving worker participation, a key element of "co-enforcement"; in employers' Heat Illness Prevention Plans.

1. The Rule's Recordkeeping Retention Period Should Be Extended Past Six Months.

The NPRM proposes that indoor worksites retain monitoring data for 6 months "because this is the maximum time permitted for an OSHA investigation."[1] Section I of the NPRM asks whether "six months is an appropriate and feasible duration of time to maintain records of monitoring data."[2] WJL's position is that six months is not appropriate as it is too short a period to adequately protect workers. WJL proposes that the Paragraph (i) recordkeeping retention requirement should be expanded, in line with other standards. *See e.g.* 29 CFR 1904.33(a) (OSHA 300 and 301 logs – 5 years); 1910.134(m)(2)(ii) (respirator standard – fit test records 1 year or until next fit test); 1910.95(m)(3)(i) (noise exposure monitoring records – 2 years); 1910.1025(n)(1)(iii) (lead exposure records – 40 years). **WJL proposes employers be required to retain heat monitoring data for two years.**

a. Employers Should be Required to Retain Heat Data for Longer Than Six Months

The Proposed Rule notes that "records may facilitate employers identifying trends in indoor temperatures and their effect on employee health and safety. In the event of a heat-related injury or illness, these records can help employers assess the conditions at the time of the injury or illness in

[1] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698, 70799 (Aug. 30, 2024).
[2] I*d.*

order to prevent such an event from recurring."[3] Simply put, six months is not enough time to accomplish either objective.

Because of the climate crisis, outdoor and indoor temperatures are rising year over year. Indeed, August 2024 "was Earth's hottest August in NOAA's 175-year climate record."[4] Florida, where thousands of agricultural workers harvest the nation's food, "had its second-warmest August on record."[5] While outdoor heat temperatures are not a direct proxy for indoor heat temperatures, the Proposed Rule notes that there is "a high but imperfect pass-through of 79% of outdoor ambient temperature to indoor ambient temperature."[6] Because climate data indicates that global temperatures are steadily rising each year, we can expect that indoor temperatures will continue to rise as well.

If one of the Proposed Rule's stated goals regarding the recordkeeping requirement is to help employers identify "trends in indoor temperatures and their effect on employee health and safety," then employers must be able to analyze indoor temperatures longitudinally from one year to the next. As proposed in the NPRM, a six-month requirement does not even give employers a single year of data to analyze and compare. Because ambient temperatures are rising and continuing to rise, employers must be vigilant in assessing the conditions that give rise to heat injury or illness over time.

The NPRM notes that "records can help employers assess the conditions at the time of the injury or illness in order to prevent such an event from recurring." However, six months does not provide sufficient data to do that, especially where an employer has multiple instances of heat illness or injury in a calendar year. While certain establishments (that meet certain size and industry criteria) are required to electronically submit injury and illness data from their OSHA Form 300A, 300, and 301 (or equivalent forms) *annually,* these same employers will not be required to maintain the heat data for the very injuries they are required to report to OSHA.

b. Robust Monitoring Data Will Aid OSHA's Enforcement of the Standard.

A heightened, graduated penalty structure is a key element of a robust enforcement program. OSHA's ability to classify citations as "willful" is an important compliance tool that must be used in litigating heat illness and injury cases. Indeed, willful penalties are an important deterrent to prevent employers from racking up multiple heat citations as the cost of doing business.

Willful violations require heightened awareness, either through proving intentional disregard of or plain indifference to the requirements of the Act or a standard.[7] The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard's requirements, and is on notice that a violative condition exists.[8]

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[3] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698, 70799 (Aug. 30, 2024).
[4] National Oceanic and Atmospheric Administration, *Earth Had Its Hottest August in 175-Year Record*, NOAA (Sept. 12, 2024), https://www.noaa.gov/news/earth-had-its-hottest-august-in-175-year-record#:~:text=June%E2%80%93August%202024%20was%20the,a%20degree%20C)%20above%20average.
[5] National Centers for Environmental Information, *Assessing the U.S. Climate in August 2024*, NOAA (Sept. 2024), https://ncei.noaa.gov/news/national-climate-202408.
[6] Achyuta Adhvaryu, Namrata Kala & Anant Nyshadham, *The Light and the Heat: Productivity Co-Benefits of Energy-Saving Technology*, 102 Rev. Econ. & Stat. 779 (2020), https://direct.mit.edu/rest/article/102/4/779/96796/The-Light-and-the-Heat-Productivity-Co-Benefits-of.
[7] *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).
[8] *See id*; *See also D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).

Monitoring data can be used as evidence in building and litigating willful cases to prove knowledge that a violative condition existed for a prolonged period. The Field Operating Manual (FOM) notes that compliance officers use injury and illness records maintained under 29 CFR 1904.33, specifically OSHA 300 logs and 300A summaries and 301 incident reports, "to observe trends, potential hazards, types of operations and work-related injuries."[9] Similarly, compliance officers must have access to longitudinal heat data to observe "trends in indoor temperatures" giving rise to indoor heat injuries and illnesses. Six months of data is a snapshot, not a complete picture.

For example, monitoring data that is collected and ignored *over time* could be a critical indicator of heightened awareness. The Proposed Rule's truncated recordkeeping retention period could unnecessarily hamper heat investigations. For example, as the Proposed Rule reads, if a covered establishment has a reportable heat illness on January 1, 2025, and another on July 2, 2025, both instances would be reportable on the OSHA 300 log, but the employer would be within its rights to delete the January 1, 2025, data on July 2, 2025 (six months after January 1, 2025). Thus, an inspection opened in response to the July 2, 2025, incident would not have the benefit of the January 1, 2025, data, making it harder for a compliance officer to identify a trend or "assess the conditions at the time of the injury or illness in order to prevent such an event from recurring." Thus, for enforcement purposes, OSHA could and should rely on a larger dataset of monitoring data and should not unnecessarily limit itself to a six-month compliance window due to the statute of limitations issue.

c. The Final Rule Should Permit Employees and Their Third-Party Representatives to Access the Heat Monitoring Data

The Proposed Rule does not contain a requirement that employees or their third-party representatives can request heat monitoring data. Other standards with recordkeeping requirements explicitly state that employees and third-party representatives can request the data and this standard should, too.[10]

Employees and their representatives should have an affirmative right to access indoor heat monitoring data free from retaliation. Put plainly, because workers are the ones exposed to heat hazards, they should know what their level(s) of exposure is as it has a direct impact on their long-term health. Multiple studies have "established the direct human physiological responses and threshold temperature values to indoor heat stress, such as circulatory and respiratory, blood pressure, mental health, and cognition, dizziness, and fatigue."[11] Thus, workers have a right to know whether they are being exposed to indoor heat stress and at what levels over time.

Exposure data in the hands of employees and their representatives is an important and necessary component of co-enforcement because the monitoring data could be the basis of formal, targeted complaints by employees and their representatives. Additionally, worker representatives and worker organizations, like workers centers, could use the data to identify employers with systematic compliance issues and bring those to OSHA for strategic enforcement.

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[9] Occupational Safety and Health Administration, *Field Operations Manual (FOM)*, Directive Number CPL 02-00-163 (Sept. 13, 2019), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf.

[10] *See e.g.* 29 C.F.R. § 1910.1020 (2022) (permitting "employees and their designated representatives a right of access to relevant exposure and medical records.").

[11] Chima Cyril Hampo, Leah H. Schinasi & Simi Hoque, *Surviving Indoor Heat Stress in United States: A Comprehensive Review Exploring the Impact of Overheating on the Thermal Comfort, Health, and Social Economic Factors of Occupants*, 240 Sci. Direct 18322 (2024), https://www.sciencedirect.com/science/article/pii/S2405844024018322.

For these reasons, the recordkeeping retention period should be expanded under the final rule, and employees and their representatives should have a right to request the data.

2. Effective Worker Involvement Is Necessary for a Functional Heat Illness Prevention Program

a. The Final Rule Should Define Employee "Input."

The Proposed Rule recommends that employers "seek the input and involvement of non-managerial employees *and their representatives*, if any, in the development and implementation" of the Heat Illness Prevention Program (HIPP). WJL acknowledges that there must be a level of flexibility in seeking employees' "input and involvement" and that a rigid formula may not be workable for all workplaces. Even still, to avoid in-name-only "input and involvement," **WJL suggests that employers be required to seek written input and involvement from a representative sample of employees and/or their representatives as part of the HIPP development process.**

WJL further suggests that OSHA create compliance assistance tools, including a model HIPP, a HIPP self-audit for employers to evaluate the HIPP, as well as a tool to seek workers' input and involvement in the development of the HIPP.

b. The Final Rule Should Define Employee "Representatives."

Next, WJL suggests that the Final Rule track the walk around inspection rule, 29 CFR 1903.8(c) in so much as it explicitly states that employee "representatives" "may be an employee of the employer or a third party." Additionally, OSHA should define "employee representative" within the rule to *specifically and unambiguously* include a union representative and/or a non-employee third party, such as a safety and health specialist, a worker advocacy group, or a community organization. Additionally, WJL recommends that the language of the final rule specifically identify workers centers and worker membership organizations as "representatives." Because union membership nationally hovers around 6.1% nationally, workers centers are critically important community-based institutions that provide support to low-wage workers.[12] Moreover, at the end of 2021, there were at least 246 worker centers in the United States, many of which are focused on Black workers and are multisectoral.[13]

c. Language Access is an Essential Element of a HIPP

It is reasonable and necessary to require an employer's HIPP to be made available in a language that each employee, supervisor, and health and safety coordinator understands. Language access and safety are inextricably linked. Stated plainly – a written HIPP that employees cannot read or otherwise understand is not worth the time it took to draft it. Workers do not need mechanical compliance where an employer passes around a sign-in sheet once a year to maintain

[12] Thomas A. Kochan, Janice Fine, Kate Bronfenbrenner, Suresh Naidu, Jake Barnes, Yaminette Diaz-Linhart, John Kallas, Jeonghun Kim, Arrow Minster, Di Tong, Phella Townsend, and Danielle Twiss, "US Workers Organizing Efforts and Collective Actions: A Review of the Current Landscape," Worker Empowerment Research Network (WERN), 2022.
[13] *Id.*

"compliance" with the standard. Workers need lifesaving training in a language that they can understand.

The United States' workforce is made up of workers who speak many different languages. Nearly one in 10 working-age U.S. adults (19.2 million people aged 16 to 64) is limited English proficient (LEP).[14] Additionally, a 2019 Census Report found that approximately 68 million people spoke a language other than English at home, and the top five languages spoken in descending order include: Spanish, Chinese, Tagalog, Vietnamese, and Arabic.[15] Across the five language groups, less than 4% were unemployed in 2019."[16] For example, among migrant and seasonal agricultural workers in North Carolina in the 2023 growing season, 98% reported speaking Spanish and 6% reported speaking English.[17]

OSHA recognizes "language access as a safety issue," and has cited Bureau of Labor Statistics data which found that "Hispanic or Latino workers continue to have the highest fatality rate of all demographic groups at 4.6 fatalities per 100,000 full-time workers."[18] Deaths among foreign-born Hispanic or Latino workers are on the rise, increasing from 42.0 percent from 512 in 2011 to 727 in 2021, the highest level on record.[19] During the same period, the Hispanic or Latino foreign-born working population increased by 16.7 percent; and non-Hispanic Asians experienced a 40.2 percent increase in deaths but a 30.8 percent increase in the employed population.[20] A 2021 Bureau of Labor Statistics (BLS) publication reported that "Hispanic or Latino workers made up 47.5 percent of foreign-born employees, with around 12.5 million workers in 2021. Non-Hispanic Asian foreign-born workers made up the next largest group with about 6.7 million workers." [21] Thus, meaningful language access is a necessary component of the rule and the HIPP should be made available in a language that each employee, supervisor, and heat and safety coordinator understand. **Additionally, a comprehension requirement is consistent with other OSHA standards.** Numerous OSHA standards contain specific requirements for employee training comprehension, the same requirements should apply to this standard. For example, the Lockout/Tagout Standard states that employers must verify that employees have "acquired" the knowledge and skills they were taught. The Bloodborne Pathogen Standard states that employers are required to provide "an opportunity for interactive questions and answers with the person conducting the training session."[22]

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[14] Jill H. Wilson, *Six Questions about the Limited English Proficient (LEP) Workforce*, Brookings (Sept. 24, 2014), https://www.brookings.edu/articles/six-questions-about-the-limited-english-proficient-lep-workforce/#:~:text=How%20many%20LEP%20workers%20are,are%20aged%2065%20or%20older.

[15] Sandy Dietrich & Erik Hernandez, *What Languages Do We Speak in the United States?*, U.S. Census Bureau (Dec. 6, 2022), https://www.census.gov/library/stories/2022/12/languages-we-speak-in-united-states.html.

[16] *Id.*

[17] Lee, J. G. L., M. Roby, L. E. Cofie, C. E. LePrevost, E. L. Harwell, E. C. Reed, J. Nieuwsma*, et al.* "Internet Devices and Internet Access among Migrant and Seasonal Farmworkers, North Carolina, 2023." *Public Health Reports* Published advance access, doi: 10.1177/00333549241295632 (2024). https://doi.org/10.1177/00333549241295632.

[18] Frank Meilinger, *Why Language Matters for Workplace Safety and Health*, U.S. Dep't of Labor Blog (Aug. 26, 2024), https://blog.dol.gov/2024/08/26/why-language-matters-for-workplace-safety-and-health#:~:text='The%20data%20also%20points%20to,per%20100%2C000%20full%2Dtime%20workers

[19] Jason Castillo, *Fatal Injuries to Foreign-Born Hispanic or Latino Workers*, U.S. Bureau of Labor Statistics (Oct. 2023), https://www.bls.gov/spotlight/2023/workplace-fatalities-among-foreign-born-hispanic-workers/home.htm.

[20] *Id.*

[21] U.S. Bureau of Labor Statistics. "Fatal Injuries to Foreign-Born Hispanic or Latino Workers." *Spotlight on Statistics*, October 2023. https://www.bls.gov/spotlight/2023/workplace-fatalities-among-foreign-born-hispanic-workers/.

[22] 29 C.F.R. § 1910.1030(g)(2)(vii)(N) (2025).

d. Methods and Programs to Support Language Access

An employer should be required to either: (1) ensure that its written HIPP is translated by a qualified translator or (2) be required to use a translated model plan that is developed by OSHA. If an employer cannot independently hire a third party to provide a professional or qualified translation of the HIPP, then the employer should adopt and use a model HIIPP developed and provided by OSHA. OSHA should draft a model HIIPP and provide translated copies in the most common languages spoken by workers in the United States and should provide model HIPPs in additional languages upon request.

Employers should be required to make individuals available at workplaces to provide verbal translations of the HIPP, as well as training on the HIPP, for employees who are not literate or do not speak English. Hispanics accounted for nearly one-half (47.6 percent) of the foreign-born labor force in 2023,[23] however, research shows that close to 90% of Hispanic immigrants were not proficient in English literacy.[24] Lack of English proficiency inhibits "comprehension of complex medical and health-related information," and immigrants with low literacy levels were nearly three times more likely to say their health was poor or fair than those with higher literacy levels.[25]

WJL suggests that OSHA implement the following methods and programs to ensure language access:

- OSHA should also create model training materials aimed at employees that are culturally competent and are written in multiple languages.
- OSHA should create videos for both employers and employees regarding the new standard. The videos should include voice-overs in multiple languages and should not just include translated subtitles due to varying literacy levels among workers.

WJL thanks OSHA for bringing this timely rule to the forefront of its regulatory agenda. A comprehensive heat standard is urgently needed to prevent heat illness and death among workers, including low-wage, vulnerable workers who are exposed to indoor and outdoor heat.

Sincerely,

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[23] U.S. Bureau of Labor Statistics, *Labor Force Characteristics of Foreign-Born Workers Summary*, USDL-24-1008 (May 21, 2024), https://www.bls.gov/news.release/forbrn.nr0.htm.
[24] Jeanne Batalova & Michael Fix, *Through an Immigrant Lens: PIAAC Assessment of the Competencies of Adults in the United States*, Migration Policy Institute (2024), https://www.migrationpolicy.org/sites/default/files/publications/PIAAC-Immigrant-Adult-Profile.pdf.
[25] *Id.*