U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

January 13, 2025

VIA ELECTRONIC SUBMISSION

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

Re: Comments on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings [Docket No. OSHA-2021-0009] (RIN 1218-AD39)

Dear Assistant Secretary Parker:

On August 30, 2024, the Occupational Safety and Health Administration (OSHA) published its proposed "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings" (or "Heat IIP") rule in the Federal Register.[1] OSHA's proposed rule would apply to all employers in general industry, construction, maritime, and agriculture where OSHA has jurisdiction[2] and whose employees are exposed to heat hazards above OSHA's proposed 80-degree (initial) and 90-degree (high heat) triggers. The rule would require covered employers to develop heat injury and illness prevention plans, conduct training, designate heat safety coordinators, seek non-managerial employee input and involvement, provide for periodic and episodic review and evaluation, and other requirements.[3] The proposed rule also contains exceptions for certain low-risk activities and for firefighters and emergency responders.[4] The Office of Advocacy (Advocacy) believes OSHA should reassess the proposed rule to address small business concerns and tailor any final rule to high-risk sectors or employees that would benefit most from regulation.

Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the

[1] 89 Fed. Reg. 70698 (published Aug. 30, 2024). OSHA's proposed rule was earlier posted on its website on July 2, 2024, at https://www.osha.gov/heat-exposure/rulemaking.
[2] 89 Fed. Reg. 70698.
[3] *Id*. at 71,069.
[4] *Id.*

federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[5] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[6] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[7] Additionally, section 609 of the RFA requires the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau to conduct special outreach efforts through a review panel.[8] The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.[9] If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.[10] The agency must provide a statement of factual basis that adequately supports its certification.[11]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[12] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[13]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[14]

Background

According to OSHA, excessive heat in the workplace can cause a number of adverse health effects if not treated properly.[15] However, while there are several state regulations and non-governmental standards designed to protect workers from heat hazards, there is currently no federal OSHA standard that regulates heat hazards in the workplace. For this reason, OSHA believes a mandatory federal standard specific to heat-related injuries and illnesses is necessary. In order to regulate, OSHA must demonstrate that a standard is "reasonably necessary and appropriate," and that any final rule would "substantially reduce or eliminate" the risk of

[5] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[6] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[7] 5 U.S.C. § 603.
[8] *Id.* § 609.
[9] *Id.*
[10] *Id.* § 605(b).
[11] *Id.*
[12] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[13] *Id.*
[14] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[15] 89 Fed. Reg. 70669.

material harm posed by the hazard. Further, the rule must be both technologically and economically feasible.[16]

OSHA's proposed rule is intended to be a programmatic and flexible standard that would require employers to create heat injury and illness prevention plans to evaluate and control heat hazards in their workplaces. It would establish requirements for identifying heat hazards, implementing engineering and work practice control measures at or above two heat trigger levels (i.e., the initial and high heat triggers), developing and implementing heat illness and emergency response plans, providing training to employees and supervisors, requiring periodic reevaluation, and retaining records. The proposed rule would apply to all employers conducting outdoor and indoor work above the heat triggers in all general industry, construction, maritime, and agriculture sectors, with certain exceptions.[17]

Advocacy Outreach and Small Entity Concerns

Advocacy has been actively monitoring and involved in this OSHA Heat IIP rulemaking process for several years, including discussing the issue at several of Advocacy's regular small business regulatory roundtables. In addition, on August 25, 2023, in accordance with the requirements of SBREFA, OSHA convened a Small Business Advocacy Review (SBAR) panel (also known as a SBREFA panel) to consider the possible OSHA rule and its impact on small entities. The panel was comprised of representatives from OSHA, Advocacy, and the Office of Information and Regulatory Affairs of the Office of Management and Budget. Nearly 90 small entity representatives (SERs) from a broad cross section of the regulated community reviewed the background materials and provided their advice and recommendations to the panel. The SERs were most concerned that OSHA provide maximum flexibility in any final rule and not adopt a "one-size-fits-all" approach. The panel's final report was submitted to the head of OSHA on December 3, 2023.[18]

Following publication of the proposed rule on August 30, 2024, Advocacy has discussed the proposed rule with small business representatives at Advocacy's labor safety regulatory roundtables and participated in several meetings, calls, and discussions with small entities and their representatives from across the country who would be impacted by the proposed rule. Advocacy's roundtable meetings were held via the web on July 12, 2024 (which included an initial overview of the proposed rule), September 20, 2024 (which included a summary of the proposed rule by OSHA), and December 13, 2024 (which included a panel discussion of the proposed rule by small business representatives from the manufacturing, construction, and agriculture sectors). Advocacy also hosted two web meetings, on December 4, 2024, and December 10, 2024, respectively, with SERs from the SBREFA panel to discuss the proposed rule and whether it comports with the advice and recommendations they provided to the panel. The clear consensus among those who participated in these meetings is that while the safety and health of their

[16] *Id.*
[17] *Id. at 70,700.*
[18] OCCUPATIONAL HEALTH & SAFETY ADMIN., REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON OSHA'S POTENTIAL HEAT INJURY AND ILLNESS PREVENTION IN OUTDOOR AND INDOOR WORK SETTINGS (Dec. 3, 2023), https://www.osha.gov/sites/default/files/Heat-SBREFA-Panel-Report-Full.pdf.

employees are their paramount concern, the proposed rule is a one-size-fits-all approach that fails to account for their broad diversity of workplaces, employees, and regional differences.

Accordingly, Advocacy offers the following comments informed by its conversations and discussions with small entities and their representatives.

A. The Regulatory Flexibility Act Requires Agencies to Consider Significant Regulatory Alternatives that Achieve Their Statutory Objectives.

As an initial matter, it must be stated that small entity representatives have emphasized that the safety and health of their employees is their highest priority. Indeed, many have stated that they already have heat IIP plans and controls in place and conduct training for their employees. Most have stated that they have experienced very few if any, heat-related injuries or illnesses at their workplaces. Their concerns, however, much like those the SERs expressed to the SBREFA panel, stem mainly with one-size-fits-all nature of the proposed rule and the failure of OSHA to account for the broad diversity of workplaces, sectors, and regions where they operate.

Advocacy notes that under the RFA, federal agencies like OSHA must consider "significant regulatory alternatives," which are defined as those that (1) achieve the agency's statutory objectives, (2) are feasible, and (3) minimize the impacts on small entities. As such, meeting OSHA's safety and health objectives are a priority under the RFA. However, OSHA has rejected the more flexible approaches recommended by the small entities and proposed a single, uniform standard for every situation regardless of industry, sector, geographic region, and acclimatization and susceptibility of employee. Advocacy recommends that OSHA reassess the proposed rule and consider alternative approaches that will achieve its statutory objectives while minimizing the impacts on small entities.

Advocacy understands from the SBREFA panel discussion and subsequent feedback from small entities that the one-size-fits-all heat triggers are inappropriate and ill-fitted to meet the rule's objectives. Namely, the universal heat triggers do not account for regional weather conditions, variability, and humidity and fundamentally affect the costs and impact of the rule. OSHA has not provided an adequate response to these concerns raised by small businesses. Further, the one-size-fits-all heat triggers, rest breaks, acclimatization, and the structure of a heat injury and illness prevention plans are too rigid to apply to firms and employees across all sectors, particularly firms with mobile or individual project workers. Based on the substantial feedback from small entities, Advocacy is concerned that these types of broad policies create economic inefficiencies in pursuit of a uniform rule and unnecessarily impose extra costs on small businesses.

B. OSHA Should Provide Greater Flexibility for Small Entities.

Small business representatives have stated that notwithstanding OSHA's claim that the proposed rule is a programmatic standard intended to be flexible, it is in fact a one-size-fits-all standard that fails to account for the broad diversity of workplaces, employees, and regional differences.

Here are some of the most common concerns that small business representatives have raised:

- The proposed rule fails to recognize the broad diversity of workplaces and regional differences. Small business representatives have complained that OSHA has not accounted for regional and climatic differences across the nation, but rather mandates a single program for all employers. As several representatives have stated, every workplace and every employee are different, and the rules should reflect these differences. Small entities have repeatedly requested that OSHA incorporate industry/sector and geographically specific flexibilities into any rule.

- OSHA has not provided exceptions to the mandatory (high heat trigger) rest break provisions (i.e., 15 minutes every two hours) where materials like asphalt and concrete are time-sensitive and must be applied upon delivery. Further, requiring inflexible break schedules can create a greater hazard in industries like tree care and telecommunications tower erection and maintenance, where climbing up and down from heights is the primary safety concern and can introduce a greater hazard to employee safety. Finally, requiring artificial shade and temporary structures may be infeasible in operations such as road construction, where vehicular traffic and the rapidly changing work environment can introduce greater hazards. OSHA should recognize these circumstances and provide variances from the standard as appropriate.

- Small business representatives have also suggested that OSHA provide separate standards for outdoor and indoor work environments or operationally distinct sectors such as construction and agriculture. OSHA should also provide clarification on hybrid work environments, such as foundries, warehousing, and transportation, where work is performed in both outdoor and indoor environments.

- Small business representatives have stated that the proposed heat triggers are too low and should be increased. Many have suggested that 90- and 100-degree triggers might be more appropriate, but nearly all believe the proposed triggers are too low. Small business representatives have also complained that the acclimatization requirements are too rigid and should be based on regional variations and employer observations. The mandatory acclimatization rules are another example of a one-size-fits-all approach that small entities have repeatedly cautioned against.

- Small business representatives have also raised concerns about the complex training provisions discussed in the preamble, which appear to require employers to conduct training on complex medical concepts.[19] One roundtable speaker noted that the training requirements are too technical and should be simplified for a typical small business employer to comprehend. The speaker also raised concerns about potential enforcement actions for deficient training on overly complex concepts.

- Small business representatives have also questioned the need for annual program reevaluations if workplace conditions have not changed. Additionally, they question the decision to set the written program exemption at ten or fewer employees rather than a higher number (such as 20, 50, or more), since an oral program is presumably safe for some certain-sized firms.

[19] *See* discussion at 89 Fed. Reg. 70795-99.

- Small business representatives also raised concerns about adopting universal rules for buildings and workplaces of unlimited variation and design, failing to adequately consider associated mechanical shops, supply and storage locations, and loading facilities, and not recognizing diverse workplace characteristics such as commodity variations in agricultural settings.

Based on the foregoing, Advocacy recommends that OSHA reassess the proposed rule and provide greater flexibility and potentially different standards for entities of different sizes, sectors, and regions.

C. OSHA Should Consider Significant Regulatory Alternatives, Such as Limiting the Rule to High-Risk Sectors or Adopting a Training-Only Rule.

As mentioned above, the Regulatory Flexibility Act requires federal agencies to consider significant regulatory alternatives that achieve the agency's stated objectives and minimize the impact to small entities. Advocacy believes that two alternatives OSHA should consider would be for OSHA to limit any final rule to high-risk sectors, and a second would be for OSHA to consider a training-only rule based on model OSHA guidelines.

With respect to limiting the rule to high-risk sectors, OSHA could identify sectors with the highest heat injury and illness rates and limit any initial rule to those sectors. It would be reasonable and efficient for OSHA to first focus on the most affected industries, employee characteristics, and geographic locations before imposing a nationwide standard (or determining that a nationwide standard was needed). To analyze this, OSHA should outline the distribution of annual heat illnesses and deaths by geography, employee characteristics, and industry and provide industry-specific guidance on managing heat injuries and illnesses. OSHA and employers should test control methods on how best to address heat hazards before imposing a national mandate.

Advocacy is also concerned that the one-size-fits-all approach may not necessarily help OSHA meet its objectives and will place high costs and time burdens on many small firms. OSHA has assumed that individuals with heat illnesses are representative of the larger population, but OSHA does not show that individuals prone to heat illnesses are evenly distributed across the population. This would highlight whether the affected individuals should be restricted from heat-intensive work environments for their own health. Similarly, it is likely that pregnant women are more susceptible to heat impacts and would require a different approach than other employees to be effective. In both instances, OSHA has not demonstrated who the individuals most affected by heat are and how many breaks they would need relative to the average worker to avoid injury or illness relative to the average worker. More specifically, OSHA should describe how many of the annual fatalities cited fall on the tail end of the distribution for needing extreme caution in the workplace. This would inform OSHA and employers on how many breaks the most vulnerable class of workers need to prevent heat injuries and illness, not the average. The proposed rule is not tailored to address the needs of the most vulnerable employees specifically and could be

underserving their needs and overserving the average worker by imposing a one-size-fits-all policy on all employees.

Similarly, a training-only rule based on model OSHA guidance would provide maximum flexibility and allow employers to assess and train their employees to the actual hazards they are expected to experience in their actual workplaces. This would avoid small entities' biggest concern that OSHA does not adopt a one-size-fits-all regulation, but rather provides for a sector specific, employee-focused, and regionally variable approach. A training-only standard would also provide OSHA State Plan states from diverse regions with a baseline for their mandatory conforming regulations from which they could tailor additional state rules incorporating high-risk workplaces, regional variations, and sector-specific considerations.

D. OSHA Should Clarify the Exception for Emergency Responders.

OSHA's proposed rule purports to exempt organizations whose primary function is the performance of firefighting and emergency response covered by OSHA's recently proposed Emergency Response standard.[20] However, this exemption from the Heat IIP rule seems to be premised on OSHA issuing a final Emergency Response rule, which is not a certainty. Firefighters and emergency responders have not been engaged in this Heat IIP rule because they believe they are exempt. Accordingly, Advocacy recommends that OSHA clarify whether this exemption is based on OSHA issuing a final Emergency Response standard and reopen the Heat IIP rulemaking record with respect to firefighters and emergency responders if OSHA decides to include them in a final Heat IIP rule, as the emergency response community has not been afforded the opportunity to meaningfully participate in the proposed Heat IIP rulemaking because they have been told they are exempt.

E. Specific Concerns with OSHA's Initial Regulatory Flexibility Analysis.

There are several fundamental concerns with OSHA's initial regulatory flexibility analysis (IRFA)[21] that Advocacy believes should be addressed to help inform the agency's decision making with respect to small entities:

- OSHA uses incorrect small business size standards in analyzing the effects of the rule in the IRFA. While OSHA notes that applicable SBA size standards were used in the formulation of the number of affected small firms, OSHA applies an employee-based size standard (i.e., less than 20 employees) to show the distributional impact of the rule. However, this size standard is inconsistent with the revenue-based standard for a large number of industries. Using an incorrect size standard to analyze the distributional effects of the rule will not show its true impact because it omits the population of small firms that have greater than 20 employees.

- Several tables in the IRFA report figures on an aggregated basis, making it difficult for small businesses to understand their per firm costs and impact. Further, the average effect

[20] 89 Fed. Reg. 7774 (published Feb. 5, 2024).
[21] *See* analysis at 89 Fed. Reg. 70971-93.

reported will be weighed down by the higher revenues of certain firms.[22] Showing the distributional effect of different-sized small firms is crucial because most small firms are very small. Omitting this key point in the analysis will understate the impact of the rule on small entities.

- OSHA considers some potential flexibility for very small entities in Alternative 2. OSHA explains that Alternative 2 could effectively omit the written plan requirement for entities with less than 20 employees because these sized entities can implement their heat program without the need to have it in writing. However, OSHA dismissed this on the basis that there are too many firms with 10-20 employees. Advocacy is confused with this reasoning because if OSHA assumes that very small firms can implement a non-written plan, then the number of firms should not matter. The outcome should be the same, that very small firms are exempt from this requirement because they can do what OSHA is trying to enforce without burdensome requirements. Advocacy recommends that OSHA consider an exemption for written plans for entities with up to 20 employees.

F. Advocacy Recommends That OSHA Reassess the Proposed Rule and Further Engage Small Entities Before Proceeding.

Based on the input from small entities, Advocacy is concerned that the proposed rule is inflexible, overly rigid, and fails to account for sector-specific and regional differences for many small entities. Small entities raised these concerns during the SBREFA panel and Advocacy's roundtables, and they remain concerned that OSHA has proposed a one-size-fits-all rule that lacks needed flexibility and is unduly burdensome as proposed. To summarize, Advocacy recommends OSHA give serious consideration to these alternatives to the proposed rule:

- Consider an exemption for written plans for entities with up to 20 (or more) employees.
- Limit the rule to high-risk sectors, with flexibilities by sector, type of worker, and location.
- Consider adopting a training-only rule.

Accordingly, Advocacy recommends that OSHA re-engage with affected small entities before proceeding. Advocacy would welcome the opportunity to participate in any effort to further engage small entities and obtain their input before OSHA proceeds.

Conclusion

Thank you for the opportunity to comment on OSHA's proposed "Heat IIP" rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. To that end, Advocacy hopes these

[22] In its RFA training for federal agencies conducted pursuant to Executive Order 13272, Advocacy recommends that agencies not use average costs because using average costs tends to understate the impact on the small and smallest firms.

comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov if you have any questions or require additional information.

Sincerely,

//signed//

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

//signed//

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Copy to: The Honorable Richard L. Revesz, Administrator
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Office of Management and Budget