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

October 30, 2025

VIA ELECTRONIC SUBMISSION

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

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

Dear Assistant Secretary Keeling:

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, agriculture, and maritime (where OSHA has jurisdiction) whose employees are exposed to heat hazards above OSHA's proposed 80-degree (initial) and 90-degree (high heat) heat index triggers.[2] 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, among other provisions.[3] The proposed rule contains exceptions for certain low-risk activities and for emergency responders.[4]

The proposed rule was the subject of a Small Business Advocacy Review (SBAR) panel in 2023, where potentially regulated small entities reviewed the background materials and provided their advice and recommendations to the panel. Further, the Office of Advocacy filed public comments on the proposed rule on January 13, 2025, recommending that OSHA 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.[5] Following the public comment period,

[1] 89 Fed. Reg. 70,698 (published Aug. 30, 2024).
[2] *Id.*
[3] *Id*. at 71,069.
[4] *Id.*
[5] U.S. Small Bus. Admin., Off. of Advoc., Comments on Proposed Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (Jan. 13, 2025), https://advocacy.sba.gov/2025/01/14/advocacy-files-comments-on-oshas-proposed-heat-injury-and-illness-prevention-rule/.

OSHA held a nearly three-week public hearing on the proposed rule from June 16, 2025, until July 2, 2025. Over one hundred witnesses from trade associations, small business, labor, and the safety and health/medical community testified at the hearing. The Office of Advocacy testified on the first day of the hearing, summarizing its long history of engagement on the issue and its earlier its comments on the proposed rule, recommending that OSHA pursue a more flexible, performance-oriented approach.[6]

This letter recaps Advocacy's position on the issue, outlining themes shared by small businesses across the country, addressing some of the questions raised to witnesses during the hearing, and responding to OSHA's pointed question concerning what a performance standard might look like and how OSHA would enforce it.

I. The 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 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),[7] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[8] 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.[9] Additionally, section 609 of the RFA requires OSHA to conduct special outreach efforts through a review panel.[10] 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.[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,

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[6] U.S. Small Bus. Admin., Off. of Advoc., *Advocacy Testifies at OSHA's Public Hearing on Proposed Heat Injury and Illness Prevention Rule* (June 30, 2025), https://advocacy.sba.gov/2025/06/30/advocacy-testifies-at-oshas-public-hearing-on-proposed-heat-injury-and-illness-prevention-rule/.
[7] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[8] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[9] 5 U.S.C. § 603.
[10] *Id.* § 609.
[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.*

federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[14]

II. Background

According to OSHA, high heat in the workplace can cause a number of adverse safety and health effects if not managed properly.[15] Historically, firms in various fields have addressed heat-related risks and environmental conditions. Small businesses have repeatedly emphasized that their employees are their most important resource. Further, there are several state regulatory frameworks and additional non-governmental standards designed to protect workers from heat hazards. OSHA nonetheless believes a mandatory federal standard specific to heat-related injuries and illnesses is necessary.

In order to regulate, OSHA must demonstrate several key elements:[16]

- that there is a significant risk of material harm in the workplace and that a standard is "reasonably necessary and appropriate" to substantially reduce or eliminate that risk,
- any rule must be both technologically and economically feasible, and
- OSHA safety standards must provide a high degree of employee protection.[17]

OSHA has been developing a Heat IIP rule for a number of years. The resulting proposed rule is intended to be a programmatic and flexible standard. It 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, engineering and implementing work practice control measures at or above the initial and high heat triggers, developing and implementing heat illness and emergency response plans, providing training to employees and supervisors, requiring periodic re-evaluation, 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, agriculture, and maritime sectors, with certain exceptions.[18]

The small business community has long been vocal that such a one-size-fits-all, bureaucracy-focused rule that fails to encompass the complex factors of geography and business operations and will be overly burdensome and be difficult to implement.

III. Advocacy Outreach and Small Entity Concerns

Advocacy has been actively involved in this OSHA Heat IIP rulemaking process for several years. Most importantly, 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

[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. 70,669.
[16] *Id.*
[17] *Id.* at 70,701. OSHA health standards, on the other hand, must reduce or eliminate significant risk to the extent feasible.
[18] *Id.* at 70,700.

Regulatory Affairs of the Office of Management and Budget. Nearly 90 small entity representatives (SERs) from a broad cross section of the regulated community participated in the process by reviewing the background materials and providing their advice and recommendations to the panel. The SERs' primary recommendation was that OSHA should provide maximum flexibility in any final rule and not adopt a "one-size-fits-all" approach. The panel's final report was issued on December 3, 2023.[19]

In addition, Advocacy has discussed this issue at several of its regular small business labor safety roundtables and participated in multiple meetings, calls, and discussions with small entities and their representatives from across the country who would be impacted by the proposed rule. The clear consensus is that the safety and health of employees is already their paramount concern and the proposed rule's one-size-fits-all approach fails to account for the broad diversity of workplaces, employee vulnerabilities, and geographic and regional differences.

The proposed rule would come at a considerable cost to small entities. OSHA estimated that small entities overall would incur annualized costs of approximately $8.2 billion due to the proposed rule.[20] But the real impact would be much larger. In June 2025, Advocacy testified that OSHA understated the expected compliance costs, including in the areas of rule familiarization and program development, and these are precisely the types of costs that are so impactful to small entities and put them at a competitive disadvantage. Further, OSHA includes unreasonable cost savings assumptions for things like productivity gains for rest breaks and other mandates.

Advocacy offers the following comments to supplement its earlier public comments and testimony, urging OSHA to take a different, less burdensome, and more reality-based approach. Advocacy's comments are informed by years of conversations and discussions with small entities and their representatives. The comments address some of the questions Advocacy asked various witnesses during the hearing and responds to a question OSHA raised concerning what a performance standard might look like and how OSHA would enforce it.

1. *OSHA should avoid a one-size-fits-all rule and consider a more flexible and performance-oriented approach.*

While OSHA says the proposed rule is a programmatic standard designed to be flexible, it is in fact a one-size-fits-all approach that mandates the same provisions for every workplace, sector, region, and employee. It was clear from the SBREFA panel's discussions that small employers' main concern was ensuring that OSHA does not impose a uniform and inflexible approach and accounts for regional, sector, and workplace differences. OSHA's proposed rule appears to disregard the direct feedback that it spent years soliciting.

OSHA should avoid a specification or prescriptive standard and allow each employer and sector to assess the workplace hazards they encounter to develop appropriate and effective programs to

[19] OCCUPATIONAL SAFETY & HEALTH 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.

[20] 89 Fed. Reg. 70,975. Advocacy calculated annualized compliance costs using information in Table VIII.F.2 excluding OSHA's cost saving estimate which small entities dispute. A 10-year window and a 7 percent discount rate are used in the annualization.

address them. For example, rather than specify a uniform heat trigger, rest-break schedules, training, and acclimatization protocols, OSHA should allow employers to develop effective programs for their individual workplaces based on the time-tested practices of water, rest, shade, and training.

During Advocacy's outreach, small businesses raised several feasible and more flexible approaches to OSHA's proposed rule. One model presented is the new Nevada state Heat Illness Prevention regulation, which Victoria Carreón, the Administrator of Nevada's Department of Business and Industry's Division of Industrial Relations, discussed at Advocacy's heat roundtable on August 18, 2025. Nevada's approach is simpler and less prescriptive than OSHA's proposed rule, which small businesses say makes it easier for themselves and employees to understand and follow.

Under the new Nevada rule, employers must conduct a one-time heat hazard assessment (for jobs where the majority of employees have heat hazard exposures for thirty minutes in any sixty-minute period), establish a written heat safety program, designate a person to carry out the program, train employees, and ensure that protection measures reasonably mitigate the risk of heat illness. Many small businesses expressed support for such a simple, more flexible approach, particularly one that does not mandate specific heat triggers and specification standards.

Another approach was a possible "Table 1" (or "Appendix 1") type approach borrowed from OSHA's silica in construction rule.[21] Under such an approach, OSHA would adopt a basic requirement that employers develop a heat program and train employees to that program. However, all of the mandatory provisions currently included in the proposed rule (such as a uniform heat program, mandatory heat triggers, rest breaks, training provisions, acclimatization protocols, etc.) would be removed and put into a voluntary, non-mandatory table (or appendix) of tasks, which would serve as a safe harbor for compliance purposes. While this type of approach has theoretical merit, many small business representatives are concerned that the purportedly "voluntary" provisions would become "de facto mandatory" standards, which would defeat the purpose of adopting a flexible, performance-oriented approach. In considering this approach, OSHA would need to safeguard that any such standard would be truly voluntary and not devolve into a mandatory specification standard over time.

A third suggestion was that OSHA adopt separate heat standards for different sectors, such as general industry, construction, and agriculture. Advocacy agrees that workplaces in these sectors are so different that a uniform approach covering all of them would be highly problematic to implement. Advocacy notes that small business representatives have encouraged OSHA to consider separate sector standards in the past, and OSHA has adopted separate standards for some regulations. Given the wide variation in workplaces subject to a possible heat regulation, Advocacy believes OSHA should consider such a sector-specific approach in this rulemaking.

Advocacy notes that OSHA expressed concern and asked multiple witnesses at the hearing how it would enforce a flexible, performance-oriented approach (without mandatory procedures and

[21] OCCUPATIONAL SAFETY & HEALTH ADMIN., 1926.1153 TABLE 1—SPECIFIED EXPOSURE CONTROL METHODS WHEN WORKING WITH MATERIALS CONTAINING CRYSTALLINE SILICA, https://www.osha.gov/sites/default/files/2018-12/fy16_sh-29650-sh6_ExposureTable.pdf (last visited Oct. 27, 2025).

triggers). Advocacy understands that relinquishing regulatory control to individual employers is a disconcerting proposition for regulators. However, Advocacy believes that an effective OSHA rule would be one that is simple, is easily developed and implemented, and ensures employee protection, instead of a rule designed for ease of OSHA enforcement.

2. ***OSHA should consider and provide for hybrid (or mixed outdoor and indoor) work environments.***

OSHA's proposed rule only considers outdoor or indoor work environments and does not contemplate hybrid or mixed workplaces where employees are moving between outdoor and indoor work environments on a regular basis (e.g., transportation and warehousing), which is a common reality. Several small business representatives noted this oversight during the panel and Advocacy's roundtable discussions, including those representing general industry, construction, and agricultural sectors. They also stated that temperatures can swing widely in a single workplace, and that conditions such as shade and wind can dramatically alter temperatures.

However, OSHA does not appear to have contemplated this modern workplace reality, and views the workplace as a static environment where an employee performs the same repetitive task all day. But this relic from a bygone industrial era does not reflect many modern, dynamic workplaces where employees are performing varied tasks in diverse and changing environments and interacting with new technologies that are transforming the work environment. This also demonstrates how difficult it is to fashion an inflexible, one-size-fits-all heat regulation for all workplaces. For this reason, Advocacy recommends that, if OSHA decides to set a federal standard on top of state, industry, and other voluntary standards, it should provide a flexible regulation that can be adapted for myriad work environments, including mixed and hybrid outdoor/indoor work settings, as well as being adaptable for the future.

3. ***OSHA should provide variances where compliance would be impracticable, infeasible, or would create a greater hazard.***

Another key issue that small business representatives have raised, and one that Advocacy questioned multiple witnesses about during OSHA's public hearing, is the omission in the proposed rule of regulatory variances when compliance would be impracticable, infeasible, or would create a greater hazard. Real world examples include:

- asphalt or concrete arrives at a construction site and must be applied immediately,
- artificial rest and shade structures are impractical to use or would create a hazard,
- a tree care employee needs to complete a final cut before taking a break,
- descending a communications tower would be fatiguing and dangerous, and
- introducing water near industrial processes or chemical reactions could create an explosion hazard.

None of these activities are provided for in OSHA's conceived regulatory environment, but they are real world instances where the proposed rule would not function as contemplated. As such, Advocacy recommends that OSHA consider the diversity of work environments and tasks and provide variances where compliance would be impracticable, infeasible, or would create a greater hazard.

4. *OSHA should address employee vulnerabilities, susceptibilities or confounding factors.*

Another area where small business representatives have expressed concern is OSHA's failure to consider employee vulnerabilities, susceptibilities, or confounding factors that could make them particularly vulnerable to heat hazards that the employer may not be aware of. For example, an employee could have been engaged in outside work or recreation activities in high heat, might be taking drugs or medication, or have health conditions that make them vulnerable to heat exposure. However, as small business representatives noted, a variety of labor and privacy laws and regulations prevent the employer from inquiring about these conditions. Because OSHA has not adequately provided for circumstances like these, the employer is put in a precarious position where it does not know and cannot ask about such non-workplace conditions. Advocacy recommends that OSHA consider and provide for regulatory protection so an employer can inquire about employee needs and tailor their work activities to accommodate an employee's circumstances. OSHA should also consult with and consider joint rulemaking with other agencies that enforce labor and privacy laws and regulations.

5. *OSHA should revisit its definition of economic feasibility and adopt a more appropriate definition.*

In order to regulate, OSHA must demonstrate that there is a significant risk of material harm in the workplace and that a standard is "reasonably necessary and appropriate" to substantially reduce or eliminate that risk. Further, the rule must be both technologically and economically feasible.[22] OSHA's definition of economic feasibility is that the rule *"will not threaten the existence or competitive structure of an industry"* and would "*not cause massive economic dislocation within a particular industry or imperil the very existence of the industry*."[23] Advocacy understands that this definition arises from OSHA's statute and earlier court cases,[24] but believes the definition is outdated and inappropriate, especially for small entities. It is difficult to believe that Congress envisioned "reasonably appropriate" and "feasible" to allow any regulation short of destroying the regulated sector. Advocacy believes OSHA should reconsider and defend a new and more realistic definition of economic feasibility (as well as "reasonably necessary and appropriate"), and in particular one that ties feasibility to a more suitable cost-benefit analysis as provided in Executive Order 12866.[25] Advocacy also believes that the Supreme Court's recent decision in *Loper Bright*[26] provides a timely opportunity for OSHA to revisit these important definitions as well as the scope of it its delegated authority.

IV. Conclusion

Thank you for the opportunity to comment on OSHA's proposed Heat Injury and Illness Prevention 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,

[22] 89 Fed. Reg. 70,701.
[23] *Id.*
[24] 89 Fed. Reg. 70,700.
[25] Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
[26] Loper Bright Enter. v. Raimondo, 603 U.S. 369 (2024); Relentless, Inc. v. Dep't of Commerce, No. 22-1219, slip op. at 26 and 29 (June 28, 2024).

Advocacy hopes these 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,

//s//

Dr. Casey B. Mulligan
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//s//

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