

15, October 2021

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Submitted via email to: [jay.withrow@doli.virginia.gov](mailto:jay.withrow@doli.virginia.gov) and [princy.doss@doli.virginia.gov](mailto:princy.doss@doli.virginia.gov)

**RE: Regulatory Advisory Panel Member Comments Regarding the Proposed Heat Illness Prevention Standards**

Dear Mr. Withrow,

I would like to thank the Department of Labor and Industry and the Safety and Health Codes Board for the opportunity serve on the Regulatory Advisory Panel for the heat stress standards (16 VAC 25-210) and the opportunity to submit these comments. These new proposed standards have the potential to create real and lasting change to help protect not only Virginia's most vulnerable workers, but workers across industries. Heat stress is a pervasive problem that can have fatal results; indeed, heat kills more people than any other weather-related hazard.<sup>1</sup> Workers are at risk of heat stress in both outdoor work *and* indoor work, particularly when engaged in strenuous activities or where there is inadequate air conditioning.<sup>2,3</sup> Even when heat illness is not a problem, productivity can suffer.<sup>4</sup> There is no comprehensive standard to protect workers against heat stress federally or in Virginia, making this proposed rulemaking especially important.

**I. Virginia Cannot Rely on Federal OSHA or Congress to Fill the Gap.**

Virginia must continue its own efforts to enact heat stress standards and cannot wait for OSHA to take possible future action. There was much talk in the regulatory advisory panel suggesting that Virginia no longer needs to enact its own standards because of the new federal interagency

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<sup>1</sup> Georges C. Benjamin, *Killer Climate: More Americans Are Dying From Extreme Heat*, The Hill (Sep. 12, 2019), <https://thehill.com/opinion/energy-environment/461126-killer-climate-extreme-heat-kills-more-americans-than-any-other> (last accessed June 2, 2021).

<sup>2</sup> Brenda Jacklitsch et al., Dept. of Health and Human Serv., Criteria For A Recommend Standard: Occupational Exposure to Heat and Hot Environments 7 (2016), <https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf> (last accessed June 2, 2021);

<sup>3</sup> Letter from Sammy Almashat, M.D., M.P.H., Staff Researcher, Public Citizen's Health Research Group et al., to Hon. Dr. David Michaels, Ph.D, M.P.H., Asst. Sec. of Labor for Occupational Safety and Health, Dept. of Labor 21 (Sep. 1, 2011), <https://www.citizen.org/wp-content/uploads/petition-for-a-heat-standard-090111.pdf> (last accessed June 2, 2021).

<sup>4</sup> International Labour Organization, Working on a Warmer Planet: The Impact of Heat Stress on Labour Productivity and Decent Work 15 (2019), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_711919.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_711919.pdf) (last accessed June 2, 2021).

initiative to address the impacts of heat.<sup>5</sup> This is misguided. As a part of the federal initiative, OSHA will be issuing an Advance Notice of Proposed Rulemaking regarding heat stress standards.<sup>6</sup> Importantly, however, this does not guarantee that standards will ultimately be adopted, and even if they are, OSHA normally takes eight to ten years to complete its rulemaking (and even under the best of circumstances, it takes more than four years).<sup>7</sup> Rather than waiting for OSHA, several states—California, Washington, and Minnesota—have long since enacted their own standards.<sup>8</sup> In 2020, Maryland enacted a law that requires Maryland Occupational Safety and Health to promulgate protections by October 2022.<sup>9</sup> Earlier this year, Oregon enacted emergency temporary standards to protect against heat.<sup>10</sup> Each of these states, state-plan states like Virginia, have shown that waiting for OSHA is not the best way to protect workers. In fact, it is reasons like this that are exactly why a state might choose to be a state-plan state – in recognition that the state *can* and *should* take additional efforts to protect its workers.

Simply put, Virginia must continue to do its own work to protect workers and not rely on a slow federal process that has hardly even begun. By contrast to OSHA’s lengthy remaining process, Virginia is now largely through its process and can have protections in place by next year.

## II. The General Duty Clause Is Insufficient to Protect Workers.

There has also been much chatter in the advisory panel about there being sufficient coverage through the general duty clause. This, however, is misguided, as OSHA’s use of the general duty clause has proven insufficient and illustrated why specific standards are essential.

Workers can currently only seek protection from employers’ failure to protect them from heat stress through the general duty clause,<sup>11</sup> which requires employers to “furnish to each of [their]

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<sup>5</sup> The White House, *FACT SHEET: Biden Administration Mobilizes to Protect Workers and Communities from Extreme Heat*, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/20/fact-sheet-biden-administration-mobilizes-to-protect-workers-and-communities-from-extreme-heat/> (last visited October 12, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> Rich Fairfax, *OSHA’S Rulemaking Process: Why Does It Take So Long?*, ORCHSE, <https://www.orchse-strategies.com/orc-hse-blog/oshas-rulemaking-process-why-does-it-take-so-long/#1550099583530-b09200f0-06e8> (last accessed October 12, 2021).

<sup>8</sup> Letter from Sidney Wolfe, M.D., Founder and Senior Advisor, Public Citizen’s Health Research Group, to Loren Sweatt, Acting Asst. Sec. of Labor for Occupational Safety and Health, Dept. of Labor 1 (July 17, 2018), [https://citizenvox.org/wp-content/uploads/2018/07/180717\\_Petition-to-OSHA-on-Heat-Stress-Signed\\_FINAL.pdf](https://citizenvox.org/wp-content/uploads/2018/07/180717_Petition-to-OSHA-on-Heat-Stress-Signed_FINAL.pdf) (last accessed June 2, 2021).

<sup>9</sup> Occupational Health and Safety, *Maryland Enacts AIHA-Support Bill Protecting Workers from Heat Stress* (May 18, 2020), <https://ohsonline.com/articles/2020/05/18/maryland-enacts-aihasupport-bill-protecting-workers-from-heat-stress.aspx> (last accessed June 2, 2021).

<sup>10</sup> Andrew Selksy, *Oregon Adopts most protective heat rules for workers in US*, Associated Press (July 8, 2021), <https://apnews.com/article/business-science-health-government-and-politics-environment-and-nature-ecca3ed406610f352f5e3f64850b32f0> (last accessed October 14, 2021).

<sup>11</sup> Center for Agriculture and Food Systems, *Essentially Unprotected: A Focus on Farmworker Health Laws and Policies Addressing Pesticide Exposure and Heat-Related Illness 10-11* (2021), <https://www.vermontlaw.edu/sites/default/files/2021-04/Essentially-Unprotected-FINAL.pdf> (last accessed June 2, 2021).

employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees.”<sup>12</sup> Though hazards can be “recognized” by common-sense, it is much harder to show the existence of a hazard not covered by regulations.<sup>13</sup> The agency must also show that there was a condition that “exposed employees to a ‘significant risk’ of harm that “was ‘causing or likely to cause death or serious physical harm.’”<sup>14</sup> As such, the general duty clause is rarely used—indeed in 2018, OSHA only used the general duty clause in 1.5% of their citations.<sup>15</sup>

Even when the general duty clause is used, the agency may not be able to enforce a citation; in a series of cases in front of the Occupational Safety and Health Review Commission in 2020, the administrative law judge reviewed citations under the general duty clause issued against the United States Postal Service for failure to provide sufficient protections against heat stress.<sup>16</sup> OSHA had relied on heat index levels created by the National Weather Service.<sup>17</sup> In deciding to give the chart less weight, the judge found that there had been no evidence regarding the scientific basis for the chart’s categorization, even though the reliability of the calculations were not in dispute.<sup>18</sup> The judge also noted that determining when the heat reached the threshold of high heat was not clear, specifically acknowledged that one cause for this difficulty is the lack of a heat stress standard,<sup>19,20</sup> and thereby reversed the citations.<sup>21,22</sup>

### **III. The Board Should Ensure That the Standards Protect Workers to the Maximum Extent Possible.**

Because specific, clear standards will result in better compliance and protections, the Board should include all feasible requirements. The standards the Board should adopt are not burdensome, but common sense, basic decency measures that many employers already provide; the standards would simply ensure that *all* employers are meeting their employees’ basic needs. Furthermore, because

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<sup>12</sup> Va. Code § 40.1-51.1(A); *see also* 29 U.S.C. § 654(a)(1).

<sup>13</sup> Center for Agriculture and Food Systems, *supra* note 11, at 11-12.

<sup>14</sup> Secretary of Labor v. A.H. Sturgill Roofing, No. 13-0224, slip op. at 3 (O.S.H.R.C. Feb 23, 2015), [https://www.oshrc.gov/assets/1/18/A.H. Sturgill Roofing Inc.%5E13-0224%5EComplete\\_Decision\\_signed%5E022819%5EFINAL.pdf?8324](https://www.oshrc.gov/assets/1/18/A.H._Sturgill_Roofing_Inc.%5E13-0224%5EComplete_Decision_signed%5E022819%5EFINAL.pdf?8324) (internal citations omitted) (last accessed June 2, 2021).

<sup>15</sup> Center for Agriculture and Food Systems, *supra* note 11, at 12.

<sup>16</sup> Bruce Rolfsen, *Judge Rejects Five OSHA Heat Danger Cases Against Postal Service*, Bloomberg Law (July 20, 2020), <https://news.bloomberglaw.com/safety/judge-rejects-5-osha-heat-danger-cases-against-postal-service> (last accessed June 2, 2021).

<sup>17</sup> Secretary of Labor v. USPS, No. 16-1813, slip op. at 53 (O.S.H.R.C. July 29, 2020), [https://www.oshrc.gov/assets/1/6/16-1813\\_Decision\\_and\\_Order\\_-\\_dated.pdf](https://www.oshrc.gov/assets/1/6/16-1813_Decision_and_Order_-_dated.pdf) (last accessed June 2, 2021).

<sup>18</sup> *Id.* at 56.

<sup>19</sup> *Id.* at 64-65.

<sup>20</sup> A.H. Sturgill Roofing, slip op. at 8 (judge made a similar observation).

<sup>21</sup> USPS, slip op. at 65.

<sup>22</sup> *Id.* at 70 (The judge also discussed how OSHA had an obligation to show economic feasibility, but OSHA produced no witnesses as to feasibility. By engaging in a rulemaking process to *create* standards, the Board will be able to ensure feasibility for the requirements under the new standard.)

heat illness reduces productivity,<sup>23</sup> these standards help employers, too. What is more, though some employers may argue the standard is not necessary because they are already taking precautions, it should be noted that first, if they are indeed already taking these measures, the standard has no real impact on them, and second, the standard is essential to protect workers with employers who are *not* taking these precautions, a costly shortcut not only to workers' safety, but also to those employers who are taking the precautions and being undercut.

Although the following is **not** an exhaustive list, the Board should consider the following regarding the proposed standard as presented to the Regulatory Advisory Panel:

a. Definitions

- i. Drinking water – the definition should be re-written to note that water should be cool *or* cold in temperature.
- ii. Heat index – there was some discussion by industry representatives that heat index was an unnecessary and/or overly complicated metric. This fails to account for the incredible impact humidity has on how hot it is, and any determination of heat without heat index is grossly inadequate *unless* either the base line temperatures are substantially lowered, or employers use Wet Bulb Globe Temperature measurements instead.
- iii. Heat stroke – the definition should be corrected to note that heat stroke occurs at 104 degrees Fahrenheit (40 degrees Celsius), not 106 degrees Fahrenheit (41.1 degrees Celsius).<sup>24</sup>
- iv. High heat – the definition should be expanded to include instances when workers are exposed to additional factors such as radiant heat, heavy work, and clothing that restricts heat removal, as these factors increase risk to workers beyond the risks from the heat index. Such a definition is seen in the draft indoor heat illness prevention standards for California in Sections (a)(2)(C) and (D).<sup>25</sup>
- v. Personal risk factors – the definition should be expanded to include not having air conditioning at home as a risk factor.<sup>26</sup>

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<sup>23</sup> Jacklitsch, *supra* note 2, at 1.

<sup>24</sup> “Heatstroke,” Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/heat-stroke/symptoms-causes/syc-20353581> (last accessed October 14, 2021).

<sup>25</sup> California Permanent Standard on Heat Illness Prevention in Indoor Places of Employment, § \_\_\_\_\_, Draft April 19, 2019, 1, <https://dir.ca.gov/dosh/doshreg/Heat-Illness-Prevention-Indoors/Draft-revisions-Apr-22-2019.pdf> (last accessed October 12, 2021).

<sup>26</sup> Univ. of Washington School of Public Health, Heat Education and Awareness Tools 15 (June 2020), <https://deohs.washington.edu/pnash/sites/deohs.washington.edu.pnash/files/2020-06/HeatTrainingBook-English.pdf> (last accessed June 2, 2021).

- vi. *Additional notes* – in addition to the above, the definitions should also include a definition for “extreme heat,” defined as when the ambient heat index equals or exceeds 100 degrees Fahrenheit or when the ambient heat index equals or exceeds 90 degrees Fahrenheit, and the worker is exposed to additional factors.

- b. Drinking water

Water—provided by the employer—is essential to mitigate heat stress; one should drink 8 ounces of water every 15 to 20 minutes.<sup>27</sup> If a worker has been working for more than 2 hours, she should be provided water *and* electrolytes.<sup>28</sup> Because, as discussed *infra* in III.j.ii, workers may have incentives to not stop for water, the Board should consider how to ensure workers take advantage of water breaks, such as insuring no dock in pay or other penalty.<sup>29</sup> Finally, as with in the definitions, the language should be modified to note that water should be “cool” or “cold.”

- c. Access to cool down areas

Breaks in cool, shady areas are necessary.<sup>30</sup> Taking breaks helps slow down the accumulation of heat.<sup>31</sup> For the base-level category at 80 degrees Fahrenheit, the Board should consider a paid 10-minute break every 2 hours. For the “high heat” category, the Board should consider a paid 15-minute break every hour to allow workers to rest and recuperate. For the “extreme heat” category, the Board should strongly consider mandating no work during that time period as it is simply too hot to safely work.

Breaks should occur every one to two hours, as applicable, regardless of if the worker feels it necessary, but workers should be entitled to *additional* breaks if they feel they need one. One important consideration is that some workers may feel it makes them seem weak to take a break, and thus breaks should be mandatory.

Of note, fire departments around the country are encouraged to adopt procedures that would call for 10-minute breaks every 30 minutes;<sup>32</sup> the heat firefighters encounter is of course extraordinarily high, but the stakes are also extraordinarily high, and the recommendations to still take such frequent breaks shows the importance of breaks to maintain health.

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<sup>27</sup> Wolfe, *supra* note 8, at 3, 28.

<sup>28</sup> *Id.* at 28.

<sup>29</sup> *Rising Temperatures Intensify Risks for Florida Farmworkers*, Cleo Institute (May 28, 2021), <https://cleoinstitute.org/rising-temperatures-intensify-risks-for-florida-farmworkers/> (last accessed June 2, 2021).

<sup>30</sup> Wolfe, *supra* note 8, at 28.

<sup>31</sup> Jacklitsch, *supra* note 2, at 75.

<sup>32</sup> Hamilton Lempert, “NFPA 1584: Recommended Practice on the Rehabilitation of Members Operating at Incident Scene Operations and Training Exercises,” p. 38, PowerPoint file accessible at <https://media.cdn.lexipol.com/rehabilitation%20nfpa%201584.ppt> (last accessed October 12, 2021).

Additionally, it may be useful to provide examples of alternative cooling measures. Finally, as with water, how to ensure workers take advantage of breaks should be considered (*see* III.b and III.j.ii for more).<sup>33</sup>

d. Acclimatization

Acclimatization—the gradual adaptation to high temperatures—is necessary to help tolerating exposure to high heat.<sup>34</sup> NIOSH recommends limiting heat exposure for unacclimatized workers, and for acclimatized workers if the temperatures are higher than those for which they are acclimatized.<sup>35</sup> Additionally, employers should have an acclimatization plan.<sup>36</sup>

e. High heat procedures

In addition to the notes *supra* regarding frequency and length of breaks, employers should ensure workers have sufficient information at hand to call emergency services if needed.

Extreme heat procedures should also be implemented, maintaining those for high heat, but adding additional medical monitoring and stopping work until it is cooler.

f. Emergency response procedures

Employers must have an emergency plan—that is known to workers—to use in the event of heat illness.<sup>37</sup> This includes *how* to communicate an emergency and *what* to do (e.g., where to take the worker, who to call, how to cool the worker down, etc.).<sup>38</sup>

g. Heat illness prevention plans

As with emergency response procedures, heat illness response plans are a necessity to ensure workers know what to do in the event of heat illness. Translation, however, should be provided no matter the size of the employer, as employers may have small workforces made up entirely of non-English speaking employees.

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<sup>33</sup> Cleo Institute, *supra* note 29.

<sup>34</sup> Wolfe, *supra* note 8, at 5.

<sup>35</sup> Jacklitsch, *supra* note 2, at 2.

<sup>36</sup> Wolfe, *supra* note 8, at 29.

<sup>37</sup> *Id.* at 31.

<sup>38</sup> *Id.*

#### h. Training

Workers can best protect themselves and their coworkers when properly trained about risks and prevention measures.<sup>39</sup> Train-the-trainer programs are useful because they reinforce the material through teaching workers how to teach their coworkers.<sup>40</sup>

#### i. Discrimination

Ensuring protection for workers who speak up against violations is essential to making sure workers feel safe in protecting themselves and their coworkers.

#### j. Additional considerations

##### i. Provision of air conditioning in employer provided housing

It is important for workers to have a cool environment at home;<sup>41</sup> To allow workers to recover from the heat adequately, employers who provide housing should also provide air conditioners. Oregon has already adopted similar considerations in their emergency temporary standards, wherein when the rooms where people sleep cannot be kept below 78 degrees Fahrenheit and the heat index is above 80 degrees Fahrenheit, employers must provide cooling areas and take additional measures to keep the rooms where workers sleep as cool as possible.<sup>42</sup>

##### ii. Implementing considerations for piece rates and points systems

Other considerations may impact an employee stopping to get water or take a break; for example, many farmworkers are paid on a piece-rate system, being paid more for picking more.<sup>43</sup> If they take a break, they get paid less. There are reports of workers wearing diapers to not have to stop for bathroom breaks.<sup>44</sup> To combat this, California requires employers to calculate the piece rate excluding the break time and then use that rate to calculate the rest time rate.<sup>45</sup> Similarly, many workers in factories are subject to a system wherein they receive points or warnings for so-called

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<sup>39</sup> See *id.* at 31.

<sup>40</sup> *Trend Watch: Top 6 Benefits of Train-the-Trainer Programs*, Powers Research Center (Apr. 18, 2019), <https://www.powersresourcecenter.com/trend-watch-top-6-benefits-of-train-the-trainer-programs/> (last accessed June 2, 2021).

<sup>41</sup> Univ. of Washington School of Public Health, *supra* note 26, at 15.

<sup>42</sup> Oregon OSHA's Temporary Amendment OAR 437-004-1120 to Address High Ambient Temperatures in Labor Housing, <https://osha.oregon.gov/OSHArules/adopted/2021/temp-amendment-437-004-1120-high-temp-alh.pdf> (last accessed October 12, 2021).

<sup>43</sup> Cleo Institute, *supra* note 29.

<sup>44</sup> *Id.*

<sup>45</sup> California Dep't of Indus. Rel., *Frequently Asked Questions: Piece Rate Compensation - Labor Code § 226.2 (AB 1513)*, [https://www.dir.ca.gov/pieceratebackpayelection/AB\\_1513\\_FAQs.html](https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.html) (last accessed June 2, 2021).

infractions, which can include break times.<sup>46</sup> These workers may be wary of taking breaks. The Board should keep these countervailing interests in mind and create ways to ensure workers receive the benefits of the standards.

Thank you for the opportunity to submit comments. Please do not hesitate to contact me at [rmcfarland@justice4all.org](mailto:rmcfarland@justice4all.org) for further information.

Sincerely,



Rachel C. McFarland  
Senior Litigation Attorney

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<sup>46</sup> See Annie Palmer, *Amazon Has Resumed Policies That Penalize Workers for Taking Too Many Breaks, Just in Time for Prime Day*, CNBC (Oct. 14, 2020), <https://www.cnbc.com/2020/10/14/amazon-resumes-policy-that-dings-workers-for-taking-too-many-breaks.html> (last accessed June 2, 2021).