

CONSTRUCTION INDUSTRY SAFETY COALITION

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January 14, 2025

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

Re: Construction Industry Safety Coalition Comments to NPRM on Heat Injury and
Illness Prevention in Outdoor and Indoor Work Settings
Docket No. OSHA-2021-0009

Dear Mr. Parker:

The Construction Industry Safety Coalition (hereinafter “CISC”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA” or the “Agency”) Notice of Proposed Rulemaking concerning the Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70,698 (August 30, 2024) (“NPRM” or the “proposed rule”). In addition to the announced informal public hearing on June 16, 2025,¹ the CISC requests that the Agency schedule a series of in-person hearings on the proposed rule during the comment period and before OSHA issues any final rule.² The CISC believes that in-person hearings would afford the Agency and interested stakeholders a more robust opportunity to have interactive engagement during the hearing process since participants in virtual meetings may experience technology issues such as poor connections and virtual meetings do not lend themselves to easy interactive questions and testimony.

The CISC is comprised of 29 trade associations representing virtually every aspect of the construction industry. The CISC was formed several years ago to provide data and information to OSHA on regulatory, interpretive, and policy initiatives. The CISC has its roots in a long-standing group of construction industry trade associations who for decades have met to discuss safety and health initiatives affecting the construction industry. The CISC speaks for small, medium, and large contractors, general contractors, subcontractors, and union contractors alike. The CISC represents all sectors of the construction industry, including commercial building, heavy industrial production, home building, road repair, specialty trade contractors, construction equipment manufacturers, and material suppliers.

¹ NPRM Extension of Comment Period, 89 Fed. Reg. at 94,631.

² NPRM, 89 Fed. Reg. at 70,698.

CISC members and their employees are directly impacted by this NPRM as they are engaged in all facets of construction occurring in outdoor, indoor, and combined workplaces, and thus CISC members are keenly interested in this NPRM. The CISC appreciates OSHA's consideration of the information presented in these comments. As addressed more fully below, and in prior CISC comments regarding the Agency's engagement on this topic, CISC remains concerned with OSHA's decision not to exclude the construction industry from such a broadly sweeping proposed standard. The construction industry faces unique challenges that differ from those experienced by general industry, as well as maritime and agricultural industries, when combating the impact of hazardous heat.

The CISC shares OSHA's goal of protecting employees from exposure to excess heat and to prevent heat illness from occurring in construction employees. However, the CISC has significant concerns with several components OSHA included in the proposed rule to accomplish its goals. CISC is concerned that OSHA is not affording smaller employers with the flexibility CISC members requested during the Advanced Notice of Proposed Rulemaking for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings³ as well as during testimony from stakeholders during the SBREFA panels. For the reasons set forth more fully below, the CISC requests the Agency to thoroughly review all comments it receives from affected stakeholders and, at a minimum, carve out a separate standard for the construction industry.

I. Overview of the Construction Industry's Engagement on the Proposed Rule.

The CISC has expressed its concerns with OSHA's efforts to regulate the hazards of excessive heat at various points throughout the rulemaking process. In October 2021, OSHA announced that it was initiating rulemaking to protect indoor and outdoor workers from hazardous heat. The CISC provided comments to the Agency in response to the ANPRM.⁴ During that comment period, CISC raised its initial concerns with having an overly broad and prescriptive standard that did not adequately consider the unique challenges small employers would face, as well as the different geographic differences faced by employers across the country. *See, e.g.*, CISC ANPRM Comments at 8. Specifically, in response to OSHA's question asking about how geographic regions contribute to occupational heat hazards and the outcomes workers experience, CISC recommended that any regulatory approach addressing heat injury and illness account for the unique climatic conditions of each geographic region because heat risks will vary based on the location of the work performed. *Id.*

In August 2023, OSHA convened a Small Business Advocacy Review ("SBAR") Panel to provide comments on OSHA's potential standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. Several CISC members had Small Entity Representatives participate in

³ Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 59,309 (Oct. 27, 2021) (hereinafter "ANPRM").

⁴ Construction Industry Safety Coalition comments to OSHA's ANPRM, Docket No. OSHA-2021-009 (available at <https://www.regulations.gov/comment/OSHA-2021-0009-0748>) (hereinafter "CISC ANPRM Comments").

the Panel, providing comments and testimony. The CISC then submitted additional comments following its review of the SBAR Panel materials and the Panel’s final report.⁵

During the SBREFA process, OSHA had discussed that it would be providing some flexibility with respect to compliance. Although OSHA’s current proposal seems to allow employers to customize the plan and controls to their workplace, the Agency’s prescriptive requirements, such as those related to heat exposure levels, do not allow the flexibility needed for small businesses.

CISC members strongly believe that a regulatory approach – if adopted – must be a flexible, performance-based standard. The construction environment is inherently fluid and the CISC has significant concerns with any regulatory approach that imposes prescriptive, complicated requirements on construction industry employers.

II. The Scope of the Proposed Rule Does Not Account for the Complexity of Issues Associated with the Construction Industry.

The CISC was disappointed to see that OSHA ignored requests from construction industry representatives to develop a standard specific to construction, despite repeated requests to do so. This is particularly troubling given that OSHA has precedence for doing this in other significant rulemakings.⁶ For example, OSHA developed a standard for respirable crystalline silica in construction.⁷ In addition, it developed standards for Confined Spaces in Construction,⁸ Cranes and Derricks in Construction,⁹ Concrete and Masonry Construction,¹⁰ Fall Protection for construction workers,¹¹ and Lead,¹² to list just a few. Construction industry work is vastly different from general industries including manufacturing, from shipbuilding, and from agriculture.

There are significant differences in the types of job tasks, the work performed, and even the environmental conditions in which construction industry employees work. The construction environment is inherently fluid and the CISC has significant concerns with any regulatory approach that fails to take this into account and instead imposes prescriptive, complicated requirements on construction industry employers. Most employers in the construction industry are small employers and OSHA’s estimates from the SER Background Document for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (“SER Background Document”)¹³ grossly underestimate the true amount of time it will take for many employers to comply with this

⁵ Construction Industry Safety Coalition Comments to the Small Business Advocacy Review Panel’s materials and final report (available at <https://www.regulations.gov/comment/OSHA-2021-0009-2002>).

⁶ See, e.g., Respirable crystalline silica, 29 C.F.R. § 1926.1153.

⁷ *Id.*

⁸ 29 C.F.R. § 1926 Subpart AA.

⁹ 29 C.F.R. § 1926 Subpart CC.

¹⁰ 29 C.F.R. § 1926 Subpart Q.

¹¹ 29 C.F.R. § 1926.500; 29 C.F.R. § 1926.500(a)(1).

¹² 29 C.F.R. § 1926.62 (App. B).

¹³ https://www.osha.gov/sites/default/files/Heat_SER_Background_Document_8-21-2023.pdf.

regulation. The CISC continues to have concerns based on the proposed text in the NPRM discussed more fully in Section III of these comments.

To lump all employers conducting outdoor and indoor work in general industry, construction, maritime, and agriculture sectors into one regulatory approach is misguided and not well thought out. CISC members have urged OSHA to reject a one-size fits all approach, which the Agency has not done. Because there is existing precedent for the Agency to develop a separate standard for the construction industry, CISC once again urges OSHA to develop a construction industry focused standard, as it has done in other rulemakings.

III. OSHA’s Proposed Standard Must Be Flexible, Performance-Based, and Emphasize Training.

One theme reiterated repeatedly in the lead up to this NPRM by the CISC and nearly every SER who participated in the SBAR Panel is that any potential standard addressing heat injury and illness must be flexible and performance based. The construction industry, like many industries who will be impacted by this proposed rule, is comprised of employers of all sizes spread across the country with access to varying economic resources and administrative support. It is imperative that OSHA afford these employers flexibility when developing a programmatic approach that can be tailored to a specific worksite to effectively address heat-related injuries and illnesses. Accordingly, the SBAR Panel recommended that OSHA “allow employers to tailor their heat injury and illness prevention program to their setting and situations.” The CISC fully supported this approach. Unfortunately, OSHA’s proposed rule does not afford smaller employers with the flexibility CISC members had requested during the ANPRM¹⁴ as well as during testimony from CISC stakeholders participating as Small Entity Representatives in the SBREFA panels.

During the ANPRM process, CISC explained that regulations tailored to the issues shared by the scores of construction employers impacted by the proposed rule must be simple and straightforward in order to succeed. Safety programs are only effective if they are implemented correctly. The more complicated a standard is, and the more complicated the compliance obligations are, the greater the chance it will cause confusion or inconsistent implementation across employers. Rather than formulaic requirements (e.g., 15 minutes rest for every 45 minutes of work), the CISC had recommended practical requirements with achievable parameters.¹⁵

The Agency has imposed prescriptive requirements in this NPRM that, upon closer examination, do not in reality allow for appropriate flexibility among construction industry stakeholders, their employees, and trade subcontractors. Not every construction site is the same. Indeed, the very nature of construction means that the worksite will change hourly and daily, demonstrating that one size simply cannot fit all. But OSHA fails to recognize the practical applications needed on construction jobsites.

¹⁴ Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 59,309 (Oct. 27, 2021).

¹⁵ See, CISC ANPRM Comments at 7.

A. The Heat Triggers are Unworkable and Should be Revised.

The initial heat trigger proposed in the NPRM is too low and should be revised upward. In the proposed definitions, OSHA defines the initial heat trigger as a heat index of 80 degrees Fahrenheit (80°F) or a wet bulb globe temperature (“WBGT”) equal to the NIOSH Recommended Alert Limit (RAL).¹⁶ Based on this definition, when the initial heat trigger is reached, OSHA will require employers to implement a number of controls under proposed paragraph (e), that will include drinking water, break area(s) for indoor and outdoor work sites, indoor work area controls, acclimatization of new and returning employees, rest breaks if needed to prevent overheating, effective communication, and maintenance of PPE cooling properties if employers provide PPE.¹⁷

The high heat trigger means a heat index of 90°F or a WBGT equal to the NIOSH Recommended Exposure Limit. Once the high heat trigger occurs, the proposed regulation requires employers to not only implement the controls applicable for the initial heat trigger, but additional controls that include mandatory rest breaks, having a supervisor observe employees for signs and symptoms of heat illness or establishing a “buddy system” among employees, hazard alerts, placing warning signs for excessively high heat areas, and establishing a hazard alert, among others.¹⁸

The CISC remains concerned that the initial and high heat triggers fail to consider the regional differences throughout the United States. What some may consider hot in the northern states may be very pleasant and ideal building weather in the southwest. OSHA appears to completely discount geographic differences and does not appear to have fully addressed these in the NPRM. Although OSHA takes the position that an employer “would only be required to provide the specified protections during the time period when employees are exposed to heat at or above the initial heat trigger..[and] [i]n many cases, employees may only be exposed at or above the initial heat trigger for part of their work shift,”¹⁹ employers with employees working outdoors will need to know when the initial heat trigger applies so they can ensure they have properly implemented each and every requirement.

Additionally, while the heat metrics recommended by OSHA in the proposed rule attempt to account for different ways to measure ambient temperatures, humidity, radiant heat, etc., the Agency fails to properly account for climatic differences among the various regions in the United States. For instance, a humid 80°F in Louisiana feels vastly different from 80°F in an arid climate like New Mexico, and even 80°F in Alaska. Instead, OSHA relies merely on a basic temperature applicable to everyone, regardless of location.

In some regions of the country, the initial heat trigger will apply most of the year even though the population working outdoors may be well acclimated to the temperatures. Furthermore, the types of tasks employees are performing will also impact how they may be affected by the

¹⁶ 89 Fed. Reg. at 70,771.

¹⁷ *Id.*

¹⁸ 89 Fed. Reg. at 70,771.

¹⁹ 89 Fed. Reg. at 70,778.

heat. Employees performing outdoor tasks that are relatively free of exertion, or more sedentary will be less affected than someone who is framing walls or spreading asphalt material for a roadway, when compared with the employees driving the equipment. Accordingly, the CISC requests that OSHA reevaluate these circumstances to determine options available to employers facing these scenarios.

B. Prescriptive Requirements Imposed by the Heat Triggers are also Problematic.

1. Drinking Water.

The NPRM requires employers to provide drinking water for all employees in a location that is readily accessible and is suitably cool. In addition, there must be a sufficient quantity of water to provide access to 1 quart of drinking water per employee per hour for the entire shift.²⁰ The CISC is requesting further clarification how OSHA refers to “suitably cool” in the preamble to the regulatory text. The CISC is concerned this phrase is too subjective and will lead to inconsistent enforcement. What one person considers “suitably cool” may be too warm, or even too cold, for others. Unless OSHA provides better clarification as to this term, CSHO’s will be permitted to decide based on their own interpretation and perspective that the available water is not “suitably cool” and issue a citation to the employer.

In addition, CISC members have concerns with the phrase “readily accessible” and its practical application. Due to the nature of construction work, providing a sufficient quantity of drinking water within arm’s reach or a short walk from where the work is being performed is infeasible and can create a greater hazard at the worksite. For employees who may be working at heights, such as roofing operations or on utility poles, storing water where the employees are working is infeasible, and could in fact, create a greater struck-by hazard for those employees working below. Further, if these employees have portable water bottles as part of their equipment or hooked to their person, having an object moving around their waist could once again create a hazard, even though the water is “readily accessible,” particularly if they are tied off using personal fall arrest systems that would not allow for additional items that could catch or interfere with that equipment. In those circumstances, available water would need to be located on the ground. Although this would require the worker climb down from a roof, utility pole, transmission tower, etc., having the water on the ground would be the safest option available. Yet, once again, a CSHO has the discretion to determine whether available water placed in such a location, even if it is the safest means to store water, is “readily accessible” unless OSHA provides further clarity regarding this term.

C. Acclimatization Procedures for New or Returning Workers Must be Flexible.

The NPRM proposes regulatory acclimatization schedules for two groups of workers: new workers and those workers returning to the worksite after having been away from the job for more than 14 days (the “returning worker”). Employers must acclimatize these workers either by implementing their high-heat procedures for seven days or imposing a gradual ramp-up schedule

²⁰ 89 Fed. Reg. at 70,800, and 71,070.

limiting the number of hours these individuals can work during a one-week period.²¹ While the CISC does not dispute that acclimatization is critical to employee safety when combating the effects of extreme heat, any acclimatization requirements must allow for flexibility.

Construction workers, unlike workers in other industries, are far more likely to be naturally acclimated to the work environment before starting a job, either because they are from the area and used to the weather or they recently came from a job where they performed similar tasks in similar conditions. For example, it is common for a construction industry employer to hire new workers after the workers have wrapped up a job at the nearby site. Requiring these workers to then undergo a strict acclimatization schedule provides no safety benefit to the worker.

Although the NRPM appears to include an exception to these acclimatization requirements, few, if any, employers will be able to fall within the exception. Employees will not need to be acclimatized if they have “consistently worked under the same or similar conditions as the employer's working conditions within the prior 14 days.”²² Yet, OSHA has set an impossibly high threshold to meet this exception. An employer cannot rely on an employee’s representation that they consistently worked under the same or similar work conditions.²³ Rather, an employer will need to undertake a detailed investigation into the new employee’s previous job to determine whether the employee performed work under the “same or similar conditions.” In making this determination, employers cannot assume that historically hotter climates (e.g., Mexico) are actually hotter and instead must review weather records from the past 14 days from the location where the new employee previously worked.²⁴ Employers must then analyze each and every task the new employee performed at their previous job, including the equipment used to perform the task, to evaluate the level of exertion required of each task. *Id.* Even if a new employee performed work under the “same or similar conditions,” the employer must make a separate determination that this work was performed “consistently” over a two-week period. OSHA intends this term to mean that the employee performed each task “at least two hours per day on a majority of the preceding 14 days.”²⁵ OSHA then provides several examples of when this exception would not apply, *id.*, showing that OSHA anticipates this will be a rarely applied exception despite the transient nature of the construction industry workforce.

OSHA’s proposed acclimatization schedule is administratively burdensome and economically infeasible, particularly for the small businesses who make up a vast majority of the construction industry. The regulatory acclimatization schedules will result in significant financial ramifications for the worker and the employer. A new or returning worker may be forced to forego needed wages because the worker is only permitted to work for a fraction of a day until they are properly acclimatized.²⁶ Likewise, if the employer is located in a jurisdiction that mandates

²¹ 89 Fed. Reg. at 71,071.

²² *Id.*

²³ 89 Fed. Reg. at 70,785.

²⁴ *Id.*

²⁵ *Id.*

²⁶ The CISC disputes OSHA’s assumption that there will be other tasks, such as office work, available for a worker to perform during the acclimatization process. *See* 89 Fed. Reg. at 70,784. Construction workers are often highly

reporting-time pay or has a unionized workforce with a Collective Bargaining Agreement requiring this type of pay, the employer may be required to pay the worker a set minimum amount of wages despite the fact that the worker only worked for a fraction of a day. Moreover, the proposed acclimatization schedule for new workers could prohibit construction industry employers from hiring temporary workers for short-term assignments. OSHA's proposed acclimatization schedule will take a full week for a new worker to complete before he or she is properly acclimatized and permitted to work a full day. By the time the worker has gone through the scheduled acclimatization process, the short-term assignment may have already been completed.

An acclimatization schedule for returning workers will be particularly onerous for construction industry employers. As already mentioned, construction employers will not be able to hire temporary workers to cover the work for an employee who has left the worksite unless these temporary workers are hired weeks in advance and properly acclimatized in time to cover the necessary work. This is not feasible in the construction industry. The construction industry is not immune from the labor shortage affecting much of the country. Moreover, many construction employers are small employers who do not have the financial means to hire a roster of temporary workers ready and able to fill in when needed.

Acclimatization is an important tool to protect workers from hazardous heat, and the economic costs of acclimatization procedures do not outweigh the value of a human life. However, when determining how to best acclimatize workers to hot conditions, employers must be permitted flexibility to implement procedures that best suit their workforce. Acclimatization proposals should focus on heat hazard awareness training and allow employers to develop acclimatization protocols tailored to their worksite. These options will allow employers, who are spread throughout the United States, to develop training and protocols that best address the unique climatic conditions of various geographic regions. These options will also allow construction industry employers to account for the distinct nature of certain indoor and outdoor construction worksites that may affect the amount of heat in the environment, such as working in an indoor confined space or outdoors near heat-generating machinery.

D. Training Requirements Should be Simple, Straightforward, and Focus on “Water, Rest, Shade.”

The CISC supports robust, yet simple, training methods to address the hazards of working in extreme heat. The construction industry has already shown that thoroughly training employees is an effective way to address extreme heat at the workplace. Given that heat illness can progress quickly when unrecognized and untreated, educating employees on how to recognize the signs and symptoms of heat illness to stop the progression of heat illness is the most effective way for employers to protect their employees against the hazard. For this reason, CISC agrees that training is essential.

specialized but have few other transferable skills and are typically hired to perform a specific task. If they are unable to perform that task because of an acclimatization schedule, it is unlikely there will be other work available for the worker to perform within their skillset.

That said, the overly prescriptive training requirements in the proposed standard are unnecessarily complex. All employees must be trained on 16 separate topics before they may perform any work above the initial heat trigger.²⁷ This training must be provided in a language and at a literacy level that each employee understands. This will create compliance challenges for construction industry employers as some construction workers only can read at a basic level. Their limited literacy will likely prevent them from being able to understand the technical nature of the information contained in the heat injury and illness prevention plan (“HIIPP” or “plan”) and other training materials. Moreover, supervisors and heat safety coordinators (HSCs) must undergo additional training. This includes training on the policies and procedures to monitor heat conditions at work site,²⁸ even if they are not the ones performing the monitoring. Such a training requirement is simply unnecessary.

To effectively combat the challenges arising from the broad and varied nature of construction sites (e.g., temporary, remote, etc.), training must incorporate the concepts of “Water, Rest, Shade.” Teaching employees how to recognize the signs and symptoms of heat illness via self-assessment and observation of co-workers, and how to halt the progression of same, will be the most effective way to address the hazard of heat illness confronting employers of all sizes. Accordingly, any training must include the key concepts of “water, rest, and shade.” OSHA must revise the training requirements to be more straightforward and concise.

IV. The Proposed Recordkeeping and Written Plan Requirements Are Unnecessary and Impose Burdensome Compliance Obligations on Construction Employers.

The CISC remains concerned about the impacts of the NPRM on small businesses. The vast majority of construction contractors are small businesses. Out of 942,615 total business establishments in the construction industry, 642,746 have fewer than 5 employees, 136,435 have between five and 9 employees, and 83,378 have between 10 and 19 employees. Only 563 have 500 or more employees.²⁹ Placing needlessly burdensome prescriptive requirements on these small businesses will create unnecessary compliance challenges when the reality is that construction industry employers strive to provide safe working conditions for their employees.

The CISC understands that the hazards presented by heat stress are no greater for small employers than they are for large employers, but compliance with complex regulations can and do create special difficulty for small businesses. Typically, while small employers have specialized knowledge in their field, they do not have the technical expertise or resources at their disposal to comply with numerous and complex regulations.

²⁷ 89 Fed. Reg. at 71,071-71,072.

²⁸ *Id.*

²⁹ U.S. Bureau of Labor Statistics, Number of Business Establishments by Size of Establishment in Selected Private Industries (March 2024) (available at: <https://www.bls.gov/charts/county-employment-and-wages/establishments-by-size.htm>) (last visited Nov. 10, 2024).

A. The Heat Injury and Illness Prevention Plan is Needlessly Complicated

The regulation as proposed requires employers to develop and implement a HIIPP.³⁰ The plan must be tailored to each “work site” which OSHA defines as “a physical location (e.g., fixed, mobile) where the employer’s work or operations are performed. It includes outdoor and indoor areas, individual structures or groups of structures, and all areas where work or any work-related activity occurs A work site may or may not be under the employer’s control.”³¹

The proposed regulation then sets forth numerous requirements that each HIIPP must include. These requirements are not minimal. For instance, employers will be required to identify all work activities covered by the plan, detail all policies and procedures implemented to comply with this standard (including the heat metric used to monitor compliance), and identify the heat safety coordinator(s) (“HSC”) who must have authority to ensure compliance with the HIIPP.³² This is not an inclusive list of requirements. Employers will also be required to create an emergency response plan as part of the HIIPP. The proposed regulation then details six additional required elements simply for the emergency response plan.³³ Should employees wear vapor-impermeable clothing,³⁴ employers will be saddled with even further requirements. Per the proposed regulation, the HIIPP must include a documented heat stress hazard evaluation resulting from this clothing and the policies and procedures that the employer has developed “based on reputable sources” to protect employees while they are wearing this clothing.³⁵

While OSHA appears to provide flexibility to construction industry employers by permitting employers with substantially similar work sites to develop their HIIPP by work site type rather than by individual work sites,³⁶ this “flexibility” cannot be reconciled with the proposed regulation’s requirement that employers include a comprehensive list of the types of work activities covered by the plan.³⁷ That is because, for employers with multiple construction work sites, workers may not necessarily be performing the *same* tasks at each work site on a daily or even hourly basis. It is the nature of construction that job tasks evolve as the construction project progresses.

Another concern the CISC has involves the written HIIPP itself. While OSHA once again appears to allow flexibility for small businesses with ten (10) or fewer employees by allowing these small employers to omit having a written plan, that “flexibility” is illusory. OSHA’s explanation for not requiring a written plan for small employers is that it expects small employers

³⁰ 89 Fed. Reg. at 70,773.

³¹ 89 Fed. Reg. at 70,773 (emphasis in original).

³² 89 Fed. Reg. at 70,773-70,774.

³³ 89 Fed. Reg. at 71,071.

³⁴ The proposed rule defines “vapor-impermeable clothing” as “full-body clothing that significantly inhibits or completely prevents sweat produced by the body from evaporating into the outside air.” Examples include encapsulating suits, various forms of chemical resistant suits, and other forms of non-breathable PPE. *See* 89 Fed. Reg. at 71,069.

³⁵ 89 Fed. Reg. at 71,070.

³⁶ 89 Fed. Reg. at 70,773.

³⁷ 89 Fed. Reg. at 71,070.

“are likely to have less complicated HIIPPs and will communicate with employees verbally.”³⁸ OSHA’s proposed requirements for the HIIPP, training requirements, employee involvement, emergency procedures, and the components that go into each of these elements is not a simple, straightforward, or “less complicated” approach to heat safety. Having a verbal plan that meets all of these requirements, including making the HIIPP readily available *at the worksite* and in a language each employee, supervisor, and heat safety coordinator understands will create significant compliance challenges when small employers eventually have to demonstrate they have fully complied with the regulation.

The complex multi-layered approach that employers must navigate to develop and implement the requirements of the HIIPP means employers—large or small—will not be able to demonstrate they have met all the proposed rule’s requirements unless they actually have a *written* HIIPP. The CISC contends that the proposed rule goes so far beyond the well-recognized concepts of “water, rest, shade” and training, that anything less than an extremely detailed written plan which incorporates the myriad requirements in the proposed regulation, will fail to satisfy a CSHO conducting an inspection.

Regardless of size, each employer falling under the requirements of the proposed rule will need to conduct continued regular evaluations on the effectiveness of their HIIPPs.³⁹ Again, demonstrating compliance with this requirement means employers will have to document their reviews to be able to prove they actually looked at their plans, and the policies and procedures within those plans including responding to heat related illnesses or injuries or emergency situations involving possible heat stroke. None of this is straightforward for small businesses.

The bottom line is that the proposed rule’s requirements result in a *de facto* requirement that all employers with 10 or fewer employees need to develop a written plan, simply to protect themselves from a citation. At a minimum, OSHA should provide additional guidance or frequently asked questions with answers on this component when any final rule is issued, as well as direction to the Agency’s CSHOs so that they understand OSHA’s position. Otherwise, small businesses who believe they do not need a written plan, based on OSHA’s statements in the preamble to the proposed rule, could be caught unaware following an inspection.

B. OSHA Must Clarify Who Can Serve as a Heat Safety Coordinator

OSHA proposes requiring employers to have a heat safety coordinator (“HSC”) at each worksite as one of the many requirements in the proposed rule. CISC members are concerned with the vague use of the “identity” of the HSC⁴⁰ and believes use of either the name of the person or

³⁸ 89 Fed. Reg. at 70,774.

³⁹ *Id.* at 70,775.

⁴⁰ The NPRM suggests that OSHA does not favor using a competent or qualified person in the role of HSC. Specifically, OSHA rejected the suggestion in the ANSI/ASSP A10.50 when the Agency stated its proposed regulation “does not have a requirement for a qualified person[.]” and that “OSHA does not believe that it would be feasible to require all covered employers to hire a qualified person as contemplated by the ANSI/ASSP standard.” *See* 89 Fed. Reg. at 71,041. Instead, employers will be required to designate one or more heat safety coordinators who are trained

the job title of the person satisfies the intent of the proposed rule. The CISC seeks clarification as to whom may serve in the role of HSC. As currently proposed, OSHA requires HSCs to have the training to implement the HIIPP, control the work site and have the authority to ensure compliance with all aspects of the HIIPP,⁴¹ including authority to stop work and take action for heat related issues. Those duties and obligations essentially mirror the definition of a competent person. For smaller businesses, who may have limited staffing abilities, but already have a designated competent person on their team, it appears that OSHA would require these employers to designate someone else to serve as the HSC. CISC requests OSHA clarify that employers can designate their competent person to also be the HSC. This is an important clarification because small employers would likely have to hire a new employee to manage the HSC function if existing employees do not have the ability to take on the additional responsibilities required of the HSC.

Further, the proposed rule requires employers to implement at least one of two methods of observing employees for signs and symptoms of heat-related illness when the high heat trigger is met or exceeded. This can include either a mandatory buddy system or observation by a supervisor or HSC.⁴² Not all small employers necessarily have the ability to use a mandatory buddy system. CISC appreciates that OSHA provides a second option which allows employers to choose a supervisor or HSC to observe employees. But if employers choose this option, no more than 20 employees can be observed per supervisor or HSC.⁴³ There is no industry standard for limiting the number of employees that one supervisor can observe to only 20 employees. Such a requirement is unnecessarily restrictive. It is not uncommon on larger construction worksites to have contractual provisions requiring one safety person be responsible for up to 40 employees on a jobsite. This proposal cuts that ratio in half and limits the supervisor's responsibility strictly to heat-related issues.

In addition, CISC members have concerns regarding what liability a co-worker or the employer could face if a "mandatory buddy" misses something happening with the other employee. Even with the training outlined in the proposed rule, employees are not medical professionals and may not be able to recognize the signs and symptoms of heat related illness, particularly since these symptoms could be symptoms of other non-heat related problems. If faced with potential liability, employers and employees may be reluctant to participate in the buddy system, forcing employers to use an HSC or a supervisor to observe employees despite the restrictive ratio proposed by the regulation.

Employers may be required to designate multiple employees to serve as HSCs to ensure there is sufficient coverage as the work site changes, tasks shift, HSCs take breaks, or employees move to other work sites. Regardless of which option employers elect, they should retain authority to designate who they choose to serve in this role, and the ability to select HSCs should remain

in and responsible for ensuring compliance with all requirements of the employer's HIIPP." *Id.* The CISC agrees with OSHA's decision not to incorporate the ANSI/ASSP standard into this proposed rule.

⁴¹ 89 Fed. Reg. at 71,070.

⁴² 89 Fed. Reg. at 70,791 and 71,071.

⁴³ *Id.* at 70,791.

firmly with the employer as it is the employer who will ultimately bear responsibility for compliance with the proposed rule.

C. The Requirement to Maintain Indoor Heat Temperatures for Six Months is Unnecessary.

Per the proposed regulation, employers that have indoor work areas where there is a reasonable expectation that employees are or may be exposed to heat at or above the initial heat trigger must conduct on-site temperature measurements and maintain records of these temperature measurements for six months.⁴⁴ Such a requirement will be of limited utility on a construction worksite.

The temperature in indoor areas on a construction site where there is a reasonable expectation that employees are or may be exposed to heat at or above the initial heat trigger are often inextricably linked to the temperature outdoors. This is because these areas typically have minimal ventilation, limited natural airflow, minimal insulation, or lack HVAC systems. Accordingly, the outdoor temperature will have a direct impact on the temperature in these work areas. Records of outdoor temperature measurements are readily available through numerous resources, thus requiring construction employers to then keep records of indoor temperature measurements redundant and unnecessary. Furthermore, many contractors complete their work on a construction site in less than six months. If there are no reported heat-related injuries or illnesses during their time on site, it seems unnecessary to continue to maintain records for a worksite where an employer no longer has any employees performing work.

D. CISC Responses to OSHA's Requests for Comments on the Following Items Related to the HIIPP.

In the NPRM, OSHA specifically seeks comments in response to several questions regarding the HIIPP. While the CISC generally supports OSHA's efforts to include non-managerial employees in the implementation and development of the plan, it remains concerned that demonstrating what "input and involvement" means may be too subjective absent further guidance on OSHA's intent.

1. Whether the proposed requirement to seek input and involvement from non-managerial employees and their representatives under paragraph (c)(6) is adequate, or whether the explanation should be expanded or otherwise amended (and if so, how and why)[.]⁴⁵

In the NPRM, OSHA proposes requiring employers to seek the input and involvement of non-managerial employees and their representatives, if any, in the development and implementation of the HIIPP.⁴⁶ OSHA suggests employers could achieve this involvement through safety meetings, participation of a safety committee, conversations between supervisors

⁴⁴ 89 Fed. Reg. at 70,799.

⁴⁵ 89 Fed. Reg. at 70,775.

⁴⁶ 89 Fed. Reg. at 70,774.

and non-managerial employees, a process negotiated with the exclusive bargaining agent (if any), or any other similarly interactive process.⁴⁷

The CISC agrees that having discussions with employees (at all levels) about heat safety is an important component of an effective safety plan that could ensure employees understand and follow any safety plans established by the employer to protect workers. That said, if by the above question OSHA is *only* seeking to ensure that non-managerial employees are able to participate in the development and implementation of a plan, the CISC believes the Agency’s goal has been achieved through the current proposed provision and the Agency has no sound basis to further expand or amend that provision.

As the proposed rule requires that each HIIPP be specific to an individual worksite, gaining employee input can be challenging for each site-specific HIIPP if employees are working in different locations across different or multiple worksite locations, or even at a large worksite but in different areas of that site. Larger employers may find it challenging to collect input and involvement from their non-managerial employees, unless the employer is able to rely on safety committee meetings, toolbox talks, or other pre-shift briefings and trainings. CISC appreciates that OSHA has offered these options as potential ways to comply with this requirement. For smaller employers, with fewer non-managerial employees, this is likely to be easier to coordinate and result in a more robust discussion. These options provide reasonable opportunities to work with non-managerial employees on participation and involvement.

Therefore, CISC members oppose OSHA expanding or otherwise amending its initial proposal beyond what the Agency has already set forth in this NPRM. To do otherwise would deprive stakeholders of a meaningful opportunity to participate in and evaluate any OSHA-proposed expansion or amendment since by the time OSHA formally proposes a new action, the comment period will have closed, leaving the regulated community with no further opportunity for public comment or participation.

2. Whether OSHA should define “Employee Representative” and, if so, whether the agency should specify that non-union employees can designate a non-employee third-party (e.g., a safety and health specialist, a worker advocacy group, or a community organization) to provide expertise and input on their behalf[.]⁴⁸

OSHA should not define “employee representative” because it has no authority to do so and the CISC strongly objects to any attempts by OSHA to further define this term. Congress did not grant OSHA authority under the Occupational Safety and Health Act (“OSH Act”)⁴⁹ to dictate to employers who they must include when developing internal company policies and procedures, nor does OSHA have the authority to direct employers that non-employees are able to engage in such functions. This is not a question of ambiguous language in the OSH Act upon which OSHA

⁴⁷ *Id.*

⁴⁸ 89 Fed. Reg. at 70,775.

⁴⁹ 29 U.S.C. § 655.

is attempting to bootstrap its effort to define this term. Rather, the OSH Act is completely silent with respect to developing safety plans, which is the context in which OSHA is asking this question – the development of the Agency’s proposed HIIPP.

Moreover, the term “employee representative” has traditionally been understood to mean an employee representative for a unionized workplace when that representative has been selected or authorized by an employer’s employees. However, for non-union workplaces, it is up to the employer and employees to designate who the employee representative will be, and OSHA has no legal authority to interject itself into that interaction.

OSHA has no authority to tell employers whom to use in managing their day-to-day business operations that include workplace safety, policies and procedures, and other business operations. For OSHA to suggest that it can define an “employee representative” outside the context of a workplace inspection is exceedingly troubling. The CISC maintains OSHA lacks *any* authority to define “employee representative” in the context of this proposed heat standard, and its attempt to do so in this proposed rulemaking runs afoul of the OSH Act and must be rejected. The CISC strongly objects to any further efforts by OSHA to define that term here.

3. Whether it is reasonable to require the HIIPP be made available in a language that each employee, supervisor, and heat and safety coordinator understands[.]⁵⁰

The CISC agrees that this is a reasonable approach to ensure that the requirements in the employer’s HIIPP are available to employees and that they understand the requirements in the HIIPP. That said, the CISC cautions OSHA that it should not mandate a specific method to meet the requirement in the proposed regulation⁵¹ because the methodology used may differ depending on the size and resources available to the respective employer.

4. What methods and programs are available to provide employees documents and information in multiple languages, whether there are languages for which these resources are not available, and how employers can provide adequate quality control to ensure that the translations are done properly[.]⁵²

There are various methods that could be used to translate an employer’s HIIPP and safety-related documents into languages for employees if English is not their primary language. Employers may utilize a translation service or a bilingual employee versed in the language being translated. Employers could also use artificial intelligence (“AI”) translation programs. Many AI programs are available that may be cost effective for employers, especially small businesses, to use. The CISC is concerned, however, that OSHA would still find an employer liable for violating this section if the translation is not a perfect translation.

⁵⁰ 89 Fed. Reg. at 70,775.

⁵¹ 89 Fed. Reg. at 71,070.

⁵² 89 Fed. Reg. at 70,775.

Therefore, OSHA needs to specify what translation methods would be deemed compliant with this section. The CISC requests that OSHA clarify that using an AI translation program would be considered as an acceptable method of compliance with this section. Language translation companies and/or services that confirm translations using an actual person will require additional costs or fees to further verify or certify the accuracy of a computer-generated translation. Because of that, the CISC is not clear whether this cost impact has adequately been considered by OSHA, particularly since employers would need to constantly update or revise their HIIPP and training materials as jobs or the work sites change.

Therefore, in the event OSHA determines that a translated HIIPP or training program requires independent verification of accuracy by a live person, the CISC recommends that the employer be able to rely on a manager or supervisor who speaks and reads the translated language, and that this person would be deemed acceptable to ensure the translation accurately reflects the translated materials. This would allow greater flexibility for employers to ensure they can better manage costs imposed by this requirement, particularly if they have to translate the HIIPP or training materials into multiple languages for the covered employees.

V. A Construction Worksite Is Not Purely An “Indoor” or “Outdoor” Work Environment.

In its proposal, OSHA is attempting to regulate both indoor and outdoor work environments via heat-specific standards. However, a construction worksite cannot be defined as simply an “indoor” or “outdoor” worksite. A construction worksite will go through distinct phases over the course of the project. While the worksite may initially be a purely outdoor work environment, the worksite will evolve as buildings are framed out, drywall and insulation are installed, and doors, windows, and other infrastructure is put in. During the evolution, the worksite will slowly transition from an outdoor work environment to an indoor work environment. This dynamic that is unique to the construction industry further highlights the need for a simple but effective approach when attempting to regulate both indoor and outdoor work environments, or a separate rulemaking for the construction industry altogether.

VI. OSHA Should Implement a Phased-in Compliance Date Similar to Other OSHA Rulemakings.

Finally, OSHA requests stakeholder comment on the proposed dates in the NPRM. OSHA indicates the standard will be effective sixty (60) days after the standard is published in the Federal Register. 89 Fed. Reg. 71,072. Next, employers will be required to comply with all requirements of the standard by “150 days after date of publication of the final rule in the Federal Register.” *Id.* Essentially, once the rule is final, and the initial sixty days have passed, employers will have an additional 90 days to come into compliance with the final rule.

CISC members are concerned that the 150-day period does not allow enough flexibility for compliance. Once this rule becomes final, construction industry employers may have projects that have already been bid on, are under contract, or are in various stages of performance, and they will not be able to alter the contract terms to account for the additional requirements imposed by this

new standard. Rather than having a 150-day period for full compliance, CISC members recommend OSHA use a phased-in compliance approach similar to what the Agency adopted in other rulemakings. For example, when it published the final crystalline silica rule in 2016, OSHA identified a phased-in compliance approach.⁵³ In the final silica standard, OSHA set the effective date as 90 days after publication in the Federal Register.⁵⁴ The Agency then allowed two years after the effective date for all compliance obligations for general industry and maritime. For the construction industry, OSHA allowed one year after the effective date for all compliance obligations to be in place, with certain laboratory analysis requirements commencing two years after the effective date.⁵⁵

Likewise, in the most recent amendments to Hazard Communication Standard, OSHA established a phase-in compliance timeline.⁵⁶ For the 2012 final rule, OSHA required all employees be trained on the new label elements and safety data sheet format (“SDS”) by December 1, 2013, while full compliance with the final rule began in 2015. When OSHA issued updates to the Hazard Communication Standard in 2024, it again developed a tiered approach for establishments to comply with the Hazard Communication Standard. For example, under the 2024 amendments, 60 days after publication (the effective date), employers will have to update workplace labels, hazard communication programs and training as necessary for newly identified hazards no later than 24 months after publication in the Federal Register. For mixtures, employers will have 42 months following the effective date.⁵⁷

Accordingly, for any final heat standard, CISC requests OSHA implement a phased in approach that gives the construction industry additional time to successfully implement all of the requirements as OSHA is proposing them. CISC suggests an effective date of 90 days after the final rule is published in the Federal Register, and a compliance date of 18 months after the effective date following final publication of the rule.

VII. OSHA Fails to Address How the Multi-Employer Citation Policy Will Apply Once Enforcement Begins.

The CISC is concerned that the NPRM is completely silent regarding how OSHA will treat multi-employer worksites once the final rule is implemented. As CISC noted in its ANPRM comments,⁵⁸ multi-employer worksites are particularly common in the construction industry. In the ANPRM, OSHA stated, “multi-employer contexts may impact the health and safety of workers due to the need for and challenges associated with close coordination across employers on health and safety issues such as training and monitoring safe work practices. [internal reference omitted] OSHA recognizes that any rulemaking will need to consider the challenges for employers and

⁵³ See, Occupational Exposure to Respirable Crystalline Silica, Occupational Safety & Health Admin., [81 Fed. Reg. 16,286](#) (Friday, March 25, 2016).

⁵⁴ *Id.* at 16,288.

⁵⁵ 81 Fed. Reg. at 16,288.

⁵⁶ Hazard Communication Standard, Occupational Safety & Health Admin., 89 Fed. Reg. 44,144, 44203 (May 20, 2024) (Note 29 discussing the various compliance dates). Manufacturers have different compliance dates.

⁵⁷ 89 Fed. Reg. at 44,303.

⁵⁸ CISC ANPRM Comments at 7.

employees related to protecting those in ... multi-employer work arrangements.”⁵⁹ OSHA then specifically requested comments on this question in the ANPRM.

The Agency’s silence now is completely at odds with its approach during the ANPRM comment period. However, just because the NPRM is silent does not mean OSHA will forego using its multi-employer citation policy as an enforcement tool, and the lack of discussion concerning multi-employer worksites in the NPRM raises numerous questions. CISC maintains that the legality of OSHA’s multi-employer citation policy, as applied in enforcement actions, has been called into question on many occasions. OSHA’s multi-employer citation policy is not established in any regulation or statute. Rather than go through formal rulemaking, OSHA adopted its own interpretation of 29 U.S.C. 654(a)(2), which generally requires that employers are to follow all of OSHA’s workplace safety rules, in order to place liability on non-employers also present at a worksite.⁶⁰ Due to the ambiguity which already surrounds OSHA’s expectations of any given employer under its multi-employer worksite doctrine, application of this policy to the now proposed heat standard will only increase confusion under a final rule. Furthermore, this policy has not been proven to improve workplace safety and health, but instead, can serve as a detriment to worker safety.

Generally stated, under the multi-employer citation policy, a controlling employer is liable for a subcontractor’s violations if it fails to take reasonable measures to prevent, detect, and/or abate violations.⁶¹ OSHA asserts that a controlling employer’s duty to exercise reasonable care is less than an employer with respect to its own employees.⁶² However, OSHA fails to otherwise provide definitive guidelines. Instead, the Agency imposes a self-fulfilling trap—the more a general contractor supervises and engages in the management of subcontractor safety, the more responsibility (and potential liability) is imposed.⁶³

OSHA’s policy generally places the onus of supervision on the general contractor, based on the assumption that the general contractor is in a better position to enforce safety hazards for all employees on the jobsite. This is a false assumption. For example, a construction worksite often features a complex web of relationships consisting of various firms working together, side by side. A general contractor may engage a number of specialty trades subcontractors for their expertise and experience to perform particular tasks. Because of their expertise and experience, these specialty trades subcontractors are often better equipped to perform their tasks safely and in compliance with OSHA standards. Take, for example, roofing subcontractors on a housing project or asphalt layers on a commercial project. The general contractor may not be familiar with the

⁵⁹ 86 Fed. Reg. at 59,312.

⁶⁰ Given the U.S. Supreme Court’s recent decision overruling *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837 (1984), OSHA’s multi-employer citation policy is not entitled to deference and is indefensible. See, *Loper Bright Ent. v. Raimondo*, ___ U.S. ___, 144 S. Ct. 2244 (2024).

⁶¹ *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 OSAHRC LEXIS 31, 84, 2019 O.S.H. Dec. (CCH) ¶ 33705 (O.S.H.R.C., Feb. 1, 2009).

⁶² *Id.*

⁶³ *Id.*; see also, *Summit Contractors, Inc.*, No. 05-0839, 2010 OSAHRC LEXIS 61, 31, 23 OSHC (BNA) 1196, 2010 OSHD (CCH) P33,079 (O.S.H.R.C., Aug. 19, 2010) (A “general contractor’s duty to detect violations depends on what measures are commensurate with its degree of supervisory capacity.”)

specific hazards of heat presented by the unique and highly skilled work performed by these firms. The roofers and asphalt layers, however, know the specific mitigation and abatement measures appropriate for their work due to their extensive experience with this work.

With all the prescriptive requirements OSHA has proposed in the NPRM, CISC is concerned with how OSHA's multi-employer citation policy would apply given the extensive individual employer-focused compliance obligations. CISC maintains it is not appropriate to put a general contractor in charge of heat safety for skilled tradesmen, simply because the tradesmen have a better understanding of the hazards their own employees may face.

For these reasons, OSHA should keep multi-employer obligations out of any final heat rule. More importantly, OSHA should refrain from imposing multi-employer obligations on construction industry contractors or subcontractors in any subsequent enforcement actions following implementation of a final heat standard.

VIII. Conclusion.

OSHA's one-size-fits-all approach to a far-reaching heat illness and injury prevention standard illustrates why the proposed standard does not fit all the industries that will be subject to its requirements. What works in general industry, agricultural, maritime, or construction does not translate equally across each of these industries in the same, or even similar ways. Jobsites will be different, work tasks will be vastly different, and geographic differences are different, to point out just a few of the challenges. CISC requests that OSHA develop a separate standard for construction.

While CISC appreciates OSHA's efforts to develop a standard to protect workers from exposures to heat injuries and illnesses, the CISC remains concerned that OSHA cavalierly dismissed repeated concerns that a one-size fits all approach is not appropriate given the myriad industries covered by this proposal. OSHA missed an opportunity to take an industry-specific targeted approach among the industries whose employees have different exposures and potential risks. The CISC urges OSHA to reconsider such a broadly sweeping proposed standard and reengage with stakeholders to focus on industry-specific options.

The CISC also requests OSHA hold in-person informal public hearings to ensure robust and effective public engagement in this rulemaking. Finally, a phased-in compliance period will ensure employers have the best opportunity to implement effective procedures to meet their obligations. The CISC appreciates the opportunity to comment on this proposal and looks forward to continued engagement with OSHA on this important issue in the future.

Sincerely,

American Road and Transportation Builders Association

American Society of Concrete Contractors

American Subcontractors Association

Associated Builders and Contractors

Associated General Contractors

Association of the Wall and Ceiling Industry

Concrete Masonry & Hardscapes Association

Concrete Sawing & Drilling Association

Construction & Demolition Recycling Association

Distribution Contractors Association

Independent Electrical Contractors

International Council of Employers of Bricklayers & Allied Craftworkers

Leading Builders of America

Mason Contractors Association of America

Mechanical Contractors Association of America

National Asphalt Pavement Association

National Association of Home Builders

National Electrical Contractors Association

National Framers Council

National Roofing Contractors Association

National Utility Contractors Association

Natural Stone Institute

Signatory Wall and Ceiling Contractors Alliance

Specialized Carriers & Rigging Association

The Association of Union Constructors

Tile Roofing Industry Alliance