

Hot on the job: Regulating workplace exposure for a changing climate

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In July, the hottest month ever recorded according to the National Oceanic and Atmospheric Administration, Democratic U.S. Rep. Judy Chu of California introduced the Asuncion Valdivia Heat Illness and Fatality Prevention Act of 2019. The bill, H.R. 3668, seeks to address a gap in employment safety regulation specific to heat-related injuries.

Even as climate change leads to hotter outdoor working conditions, the Occupational Safety and Health Administration does not have a specific set of regulations targeting heat illnesses in the workplace.

More than 100 organizations have endorsed the bill, including the American Public Health Association, United Farm Workers, the International Brotherhood of Teamsters, the Natural Resources Defense Council, the Migrant Clinicians Network, the National Council for Occupational Safety and Health, the Service Employees International Union, the Sierra Club and the Union of Concerned Scientists. In a joint letter of endorsement, the groups cited the “climate crisis” as a key factor in the urgency of their concern.

Extreme heat has a wide impact on the American workforce. The Bureau of Labor Statistics reports that more than 15 million people in the U.S. have jobs that require them to be outdoors. These workers are exposed to unprecedented temperatures, as 17 of the 18 hottest years on record have occurred since 2001, according to NOAA.

Public Citizen, a nonprofit consumer advocacy organization, analyzed weather data for July 2017 and concluded that an average of 1.1 million people in the agriculture or construction industries worked in extreme heat every day that month. OSHA determined that extreme heat was a contributing factor in the death of at least six workers that month.

Heat-related injuries and fatalities have become a pervasive risk in recent years. The BLS reports that exposure to excessive environmental heat stress killed 783 U.S. workers and seriously injured 69,374 from 1992 through 2016.

In 2015 alone, heat exposure contributed to 37 work-related deaths and 2,830 nonfatal occupational injuries and illnesses. 33 of those deaths — nearly 90% — occurred between June and September.

Public Citizen predicts that by 2050, more than 1 million agriculture and construction workers will experience at least 30 days of dangerous heat per year. It also estimates that 600,000 of those workers will work at least one quarter of the year in dangerously hot conditions.

The risks of extreme heat range from heatstroke and heat exhaustion to tool and equipment-related injuries to burn injuries and toxic exposure. In many cases, a combination of extreme heat and other factors creates the greatest risk.

OSHA has reported that 50% to 70% of outdoor fatalities occur in the first few days of work in warm or hot environments. This is because the body needs to gradually build a tolerance to heat over time — also known as heat acclimatization.

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The clothing that a worker wears can also exacerbate the effects of extreme heat, as can the tools used or the presence of multiple heat sources, such as hot tar, ovens or furnaces. Heat exposure can also aggravate existing health problems, such as asthma, kidney failure and heart disease.

R. Jisung Park, an economist at the University of California, Los Angeles, reports that even when there is no direct accident, worker productivity declines by 2% for every degree Celsius above room temperature.

These risks carry additional consequences for employers and businesses. The Environmental Protection Agency predicts that if the effects of climate change continue to worsen, the U.S. will lose 1.8 billion labor hours across the workforce in the year 2100 due to extreme temperatures, adding up to an estimated \$170 billion in lost wages.

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doubling that amount. Accidents also increase liability risks. Though OSHA does not yet have specific heat regulations in place, it does require employers to provide safe working conditions and address any potential hazards that may cause workers harm — including exposure to hot weather and the sun.

The ruling in *Arce v. 1133 Building Corp.*, 257 A.D.2d 515 (N.Y. App. Div., 1st Dep't 1999), illustrates the risk that extreme heat poses for both workers and employers.

In *Arce*, a worker who was injured after falling from a ladder on the job sought to hold a building corporation liable under scaffolding law. In its defense, the corporation called a witness who claimed that the worker fell not because of a bad ladder but due to extreme heat that caused him to faint.

A New York County Supreme Court judge granted the worker's motion for partial summary judgment on liability.

The corporation appealed, and the state Supreme Court's Appellate Division affirmed the decision. The appellate panel found that the nonexpert witness testimony was insufficient to rebut the case of liability under scaffolding law.

Additionally, even if the company could prove that heat caused the fall, it would have remained liable for failing to provide a working environment that was protected from foreseeable heat hazards, as is required by OSHA, the appeals court said.

Specific heat illness prevention legislation, then, would prove useful on two fronts. First, it would help protect workers from heat-related illnesses. Second, it would clearly define employers' responsibilities and liability, making it clear that extreme heat is not an acceptable excuse for injury and that it is an employer's legal responsibility to help minimize the risks of heat in the workplace.

H.R. 3668 is named for Asuncion Valdivia, a California farmworker who died of heatstroke in 2004 after picking grapes for 10 straight hours. After he collapsed near the end of his shift, supervisors were not prepared to manage a heat illness.

Although a call for an ambulance was made, supervisors were unable to provide an exact location and canceled their request when Valdivia woke up. However, regaining consciousness does not indicate recovery from a heat illness — and Valdivia died in a car as his son drove him to the hospital.

The Los Angeles Times reported that after Valdivia's death, the crop company's vice president admitted it was a tragedy but said the company's employees had done everything "according to the books." This was mainly because Valdivia appeared to be feeling better when he first regained consciousness.

Valdivia's case is just one among many. In summer 2018, a worker in Burton, Texas, sustained heat stress while pressure

washing a vehicle and later died. Another person developed heat stress while clearing bricks at a construction site in Providence, Rhode Island, and died soon after.

Activists for heat illness prevention regulation emphasize that illnesses and deaths from work in extreme heat are entirely preventable. In each of these cases, the heat-related safety precautions taken by employers were insufficient to protect their workers. The deaths in Burton and Providence both took place in states without their own heat protection regulation.

In a July hearing before the House Committee on Education and Labor, a warehouse worker from California, a professor of public health from University of South Florida, and representatives from the Associated General Contractors of America, the California Farm Bureau Federation and the United Farm Workers each testified to the urgent need for heat stress regulation. Elaborating additional cases and scenarios to illustrate the hazards facing workers every day, they called upon the house to pass H.R. 3668 and prioritize worker safety.

Specific heat illness prevention legislation will help protect workers from heat-related illnesses and clearly define employers' responsibilities and liability.

H.R. 3668 aims to implement a national standard in response to the real and deadly risk of excessive heat in the workplace, as well as steadily rising global temperatures. The bill would require OSHA to introduce a proposed standard on the prevention of occupational exposure to excessive heat within two years from the date of enactment of the legislation. If OSHA missed the deadline, the U.S. labor secretary would be required to establish an interim final standard.

The new standard would provide the same if not more protection for employees than the most protective heat prevention standard adopted by a state and approved by the U.S. labor secretary. It would also incorporate four central requirements as a minimum for its final standard.

First, employers would be required to develop a heat illness prevention plan. The plan would have to be developed with meaningful participation from employees and address the specific conditions and hazards of the workplace in question.

Second, employers would be required to provide annual training and education to employees and supervisors on several relevant topics, including heat hazards, the symptoms of heat illnesses, emergency response procedures and employee rights.

Third, employers would need to maintain records and data related to their heat illness prevention plans and the broader

issue. This requirement would allow for uniform oversight and ensure that employers are equipped with current and accurate information.

Finally, employers would have to implement a policy protecting employees from discrimination should an employee take action under the program or report violations.

Additionally, the bill seeks to require OSHA to take into consideration the National Institute for Occupational Safety and Health's 2016 "Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments." OSHA would also have to establish exposure limits that trigger mandatory action to protect covered employees from heat-related illness. This might entail, for example, giving more frequent breaks when temperatures rise above 80 degrees.

For a better sense of what OSHA's comprehensive standard might entail, consider the Heat Illness Prevention Standard already in place in California. Shaped in part by Rep. Chu when she was a member of California Assembly, the standard encompasses all outdoor places of employment, California's regulation requires four main actions on the part of employers.

First, employers must train all employees and supervisors about heat illness prevention. Second, they are required to provide enough fresh water so that each employee can drink at least a quart per hour and must encourage employees to drink.

Third, employers are required to provide access to shade and encourage workers to take a cool-down for at least five minutes.

Finally, California's program requires employers to develop and implement written procedures for complying with the Cal/OSHA Heat Illness Prevention Standard, including developing procedures for high heat and emergency situations that meet the program's standards.

California employers can also join the Heat Illness Prevention Network, a voluntary public-private partnership established to increase awareness of the heat illness and prevention measures among employees and workers. The network shares timely information and tools to help further prevent accidents and risks.

As H.R. 3668 would require OSHA to meet or exceed the strictest standard already adopted by a state, it is likely that the final regulation would be closer to California's model than to that of Washington or Minnesota, the other two states with independent programs targeting work in extreme heat.

Washington's Outdoor Heat Exposure Rule applies to outdoor employees from May 1 through Sept. 30, and only when temperatures rise to set thresholds corresponding to the breathability of the employees' required clothing. When these thresholds are met, employers must encourage

employees to stay hydrated, train employees and supervisors in heat illness prevention and include a heat exposure safety program in their written accident prevention program.

Minnesota's heat-specific regulations apply only to indoor workers, requiring proper ventilation, temperature control matching the strenuousness of the work and employee training.

Until a specific, nationally recognized program is established, the recommendations in H.R. 3668 provide a strong selection of best practices that employers can use today to confront the hazards of extreme heat. Workers whose employers do not have specific protocols in place should also take proactive measures to stay safe.

Workers should pace themselves, understand their limits and take frequent breaks in the shade or indoors. They should also wear sun protection such as hats or sunscreen to prevent sunburn and wear light-colored clothing and proper personal protective equipment when handling tools and machinery.

In addition to staying hydrated, workers should also avoid dehydrating drinks such as coffee, alcohol, tea and caffeinated sodas. Small meals eaten before and during work — especially those with fruits high in fiber and natural juice — help sustain energy and hydration.

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If workers suffer a heat-related injury on the job, the options available to them depend on the nature of the injury. After seeking appropriate medical help, they should inform their supervisor of the injury and discuss the next steps based on the employer's protocols. These may include an internal investigation into the cause of the injury and a decision by the employer's insurance carrier about qualification for workers' compensation benefits.

OSHA requires employers to provide safe working conditions for their employees. Employers are obligated to report serious injuries, and employees are also able to report their injury directly. After a report has been filed, OSHA may initiate an inspection of the workplace and subsequently issue fines to the employer.

If a worker's injury is the result of mismanagement of heat-related risks, workers have the right to explore their options for recovering needed compensation. In this case, it is critical they consult an experienced workplace injury lawyer to determine whether the claim is valid and what legal pathways may be available in their state.

H.R. 3668 or legislation like it represents an important opportunity to clarify and strengthen national regulations regarding excessive heat in the workplace. With risks ranging from decreased productivity to injury or death, extreme heat is an issue that must be tackled head-on. Targeted regulation will help create an environment that is safer for both workers and employers.

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