

OSHA Turns Up the Heat: Enforcement of Indoor and Outdoor Heat-Related Workplace Hazards Impacts Over 70 Industries

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The Occupational Safety and Health Administration has issued a new indoor and outdoor heat enforcement initiative impacting over 70 high risk industries. With the goal of mitigating employee exposure to heat hazards in the workplace, the agency intends to ramp up its efforts by increasing inspections and enforcement activity across the targeted industries.

Jackson Lewis P.C. · OSHA Turns Up the Heat: Enforcement of Indoor and Outdoor Heat-Related Workplace Hazards Impacts Over 70 Industries



Transcript

Alitia: Welcome to Jackson Lewis's podcast, We get work. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace in its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

OSHA has a new enforcement initiative targeting one of the agency's top priorities after the appearance of COVID-19, indoor and outdoor heat-related workplace hazards. On this episode of We get work, we discuss which of the over 70 industries are affected, why onsite inspections are on the rise, and what employers can expect during a heat inspection.

Our hosts today are Courtney Malveaux and Melanie Paul, principals respectively in the Richmond and Atlanta offices of Jackson Lewis and co-leaders of the Workplace Safety and Health Group. Melanie, a former senior trial attorney with the Department of Labor, who spent 10 years prosecuting OSHA cases including work with the Department of Justice to have matters criminally prosecuted, now defends clients against the types of cases prosecuted by her former self. Courtney, no stranger to regulatory action, enforced federal and state OSHA laws as Virginia's

Labor Commissioner before joining Jackson Lewis.

Melanie and Courtney, the question on everyone's mind today is what do employers need to know about OSHA's heat enforcement initiative and how will that impact my business?

Melanie Paul: Well, first we need to understand what is heat illness and why does it matter? Why is OSHA interested in it all of a sudden? Well, heat illness has a variety of symptoms. It takes different forms. There are different stages of it. There are heat cramps, rashes, heat exhaustion, and, of course, the most severe is heat stroke. And so these are real workplace hazards that exist, particularly in outdoor work environments, but also in certain indoor work environments.

With the world temperatures rising and climate change, this has really been a push from this administration for OSHA to work on a heat initiative and promulgating a standard as part of the administration's climate change agenda. As we saw last year in the Pacific Northwest, there were unprecedented temperatures for an extended period of time that really caught that part of the country off guard. That is a part of the country that typically doesn't have a lot of air conditioning in buildings and relies on just being able to open windows. But because of this big heat wave, we saw a lot of deaths as a result of that. And so this is a topic that's on the forefront of the administration's mind. And OSHA, being a workplace safety and health agency promoting the safety and health of workers, this is the next big thing after COVID.

Courtney Malveaux: Really is.

Melanie Paul: Yeah. And currently, they don't have a standard. Like I said, they rely on the General Duty Clause of the Occupational Safety and Health Act. And so they rely on what industry experts kind of agree on as the hazard and ways to mitigate that hazard. So one of the big initiatives they just announced was that they're going to start enforcing heat illness prevention in both outdoor and indoor environments. Courtney, what have we seen with that lately from the agency?

Courtney Malveaux: Well, first of all, I have to say a lot of interest from the administration. Usually, we've never heard presidents or even presidential candidates talk about OSHA issues, but we're seeing that more now. And so the current administration is so attuned to this issue after COVID that this is something that was announced not just by OSHA but by the Vice President of the United States and by the Secretary of Labor. And so that really kind of highlights how critically important this is to the administration.

And as you know, you and I, we both went to a conference earlier this year and we got to talk directly with the assistant secretary who's in charge of OSHA and a lot of the brass from the agency. And one thing they kept pounding and pounding in their messaging was emphasis on vulnerable workers, people who are lower wage, people who are exposed to hazards, more minority, female workers, you name it, anyone who they perceive to be vulnerable to workplace hazards. And so this heat illness standard kind of was born of that emphasis on the vulnerable worker. And so that's kind of the tone that's leading up to this.

And so the administration, like you said, after COVID, this was a

big number two, heat illness. And so they announced this National Emphasis Program for OSHA. And another really interesting thing about it, usually a National Emphasis Program they're not this long. This one is three years long if that gives you any sense as to how critically important this program is to the agency. And so what a National Emphasis Program, the way this one works is they're going to put a whole lot more of resources, a lot more of enforcement officials out there in the field on site and really following up with the employers on heat illness hazards.

And just to give you an idea, you think, okay, how would it end up in OSHA's crosshairs on this one? The agency does give kind of a list of priority, what we're really going to go after first, second, and third. And so the first thing they're really going to go after they have said in this program is we're really going to focus where complaints are coming out of the workplace. Maybe it's employees, unions, whomever. If they're hearing from folks, "Look, it's really hot and people are being exposed to heat illness," they get complaints, OSHA's going to show up. And the employer may not know that a complaint was provided to OSHA. And it's entirely their right to do so.

Also, if you have employees who are admitted into hospitals, or God forbid, if there's a fatality, if they have to report an incident like that, then they have to actively report these to OSHA. And then OSHA's going to show up if there's a sense that this may be heat illness. And so a lot of times it could be that you say, "Well, someone had a heart attack or someone had passed out or whatever and we can't really explain why." OSHA is going to be very attuned to those situations and show up and say, "This is a top priority for us to show up and inspect your workplace for heat exposure."

So the complaints and hospitalizations are the first priority. And then the second priority where OSHA's going to show up are those regularly programmed inspections.

Melanie Paul: Well, let me jump in, Courtney, because I think that with this emphasis program, there is absolutely going to be aggressive enforcement with respect to heat hazards in the workplace. But there is also a component in this National Emphasis Program of compliance outreach and assistance. And we see that in the program where it indicates that on days when it's at least 80 degrees Fahrenheit, the agency, if they are already out conducting regular inspections, they're going to be asking employers for their heat illness prevention program. So there's that expectation that employers have those in place already. And of course, if they don't, OSHA will work with the employer to kind of alert them to what the hazards are and ways in which that they can mitigate those hazards.

And then when the heat index, that is temperature plus humidity, and the what it feels like number, on days when it's 90 degrees, or I'm sorry, not 90 degrees, when there are high heat alert days, and OSHA watches the weather, and they're going to be watching the weather every day in their area offices to know if there's a heat hazard alert that day, they will do targeted inspections under this emphasis program and specifically go to employers who are in one of the 70, 7-0 industry classifications and go and conduct inspections of those from a randomly generated list of employers within that particular NAICS Code or North American

Industry Classification Code.

Courtney Malveaux: That is what I got tripped up on. Thank you.

Melanie Paul: Sorry. That's a mouthful.

Courtney Malveaux: It is, North American Industrial Classification System. So yeah. And so they're going to redefine which of those NAICS codes, they're kind of going to shuffle those and see, okay, which ones are going to deem to be higher hazard. But it's interesting, as you said, the 70 industries that they're targeting and a lot of them are not intuitive. And so we're used to thinking about heat as something it's outdoors. Okay. Construction sites, maybe agricultural, but OSHA saying, no, also couriers who are carrying products, landscapers, anyone who's outdoors and exposed to the heat.

And now, with the new layer that I think many of us are not used to is the indoor component. And so indoor locations, for example manufacturing. And we may not think of manufacturing as a place where people are exposed. But what if people are involved in some type of process that creates heat? You know, I'm thinking glass or dealing with metals or wherever they may have kind of a heat-inducing processes. Warehouses, bakeries are on their radar, sawmills, merchants, retail merchants. And if the HVAC system isn't keeping up and the temperature's rising and it's getting in higher 80s and up into the 90s and the sun is coming in, then that's going to be on OSHA's radar. Automotive stores. And there are so many on that list of 70. We don't have to go through them all. But they are really going to be on OSHA's radar for enforcement.

Melanie Paul: Well, Courtney, I'm really surprised and scratching my head at some of the industries that are on the list. I mean, I just can't even understand why they would be there, such as business support services, office administrative services. But what that tells us is that basically OSHA thinks heat is a problem anywhere and everywhere and they are just making it a priority to target.

As you indicated, I think we're probably going to see a lot of, more employee complaints complaining, "Oh my employer's air conditioning went out. Let me call OSHA and make this a big issue now." When it's really something that probably shouldn't require OSHA to respond to, but they are going to if they get an employee complaint about that.

So I think there's also, employers should be concerned and get prepared for these things to happen because we've all been educated now over the last two years with the pandemic about OSHA. I think more people know about the agency. And with the great resignation that exists right now and it's a worker's job market, I think employees are more apt to complain and be vocal about their concerns and take it to federal agencies to do something about.

So I think employers do need to be concerned and get ready to be able to comply and get ready for these types of complaints that I think we're going to see an uptick of just like we did with COVID. And even some of the complaints we've seen during COVID have been just really ridiculous, like my employer doesn't have enough paper towels and soap in the soap dispensers in the bathrooms. Something as

just minor as that is eliciting a response from OSHA and contacting employers and making them investigate and respond to those complaints.

So even though it may seem like it's a big nothing burger, I think the agency's going to be taking these seriously and employers who traditionally may not be in industry codes that are on OSHA's radar are going to be on OSHA's radar.

Courtney Malveaux: You know, the part that feels unfair to a lot of employers is that discretion that area directors have and just kind of yeah, they're given the NAICS codes, they're given the industries, they're given the guidance. They can still in their discretion go after something that pops up on their radar. Maybe they have the morning news on and saw that an employer was having problems or they pick up something in newspaper. And we're seeing area directors who are sending out inspectors just based on what they know in the local news or what they know of employers that are there locally.

Melanie Paul: Oh, I can tell you for certain OSHA definitely trolls media and newspaper articles and they open up inspections based on what they call media referrals. So if a compliance officer reads an article in a newspaper about so and so's employee hospitalized working outside, it was hot, or whatever, OSHA's going to show up. They're going to see that, and they're going to go open up an inspection. Happens all the time.

Courtney Malveaux: Yeah. So especially, yeah, like you mentioned, the National Weather Service on those days when they have a heat warning or heat advisory, they're going to send folks out. And then, as you know, I mean, you've represented on the OSHA side as their attorney and enforced in terms of running an OSHA program. And they will lay in wait. The inspectors will actually sit there across the street and just observe everything they can observe and spend an hour or two and capture everything before they come over and open inspections. So by the time OSHA shows up, everything needs to be in order.

Melanie Paul: Yeah. Well, it's really already hot. It's June 1st. It's really hot in much of the country, particularly the South. I've downloaded, there's a nifty little heat illness app that OSHA in conjunction with NIOSH, the National Institute of Occupational Safety and Health, which is a division of the CDC, have for years had this app and is really great. Every employer should download it. But it tells you what the ambient temperature outdoors is. It tells you what the humidity is. And so it factors those together and comes up with that heat index, with the what it feels like number. And I can tell you, I'm in Atlanta right now, it is 88 degrees, 49% humidity, and feels like 91 degrees. And this app is telling me I'm in the warning zone.

But the cool thing about the app too is that you can click on a precautions bar and it will kind of go through what measures you should take for workers that are exposed to this level of heat. It goes through potential symptoms of heat stress and first aid and what to do and how to respond to the different particular symptoms and signs of heat illness. Some are less serious. Some require immediate calls to 911, immediate medical attention. So it really just depends.

And the tricky thing about heat illness is that two workers can be exposed to the very same elements, but their bodies may react very differently to the

heat hazard because a lot has to do with underlying medical conditions, medications the employee may be on, how physically fit they are, how acclimatized they are to that work environment, to the heat. And so there's all these external and internal personal factors for each individual that really affect how a particular person's body responds to heat. And that makes it all the more difficult for employers to try to mitigate against this hazard when you don't even know what could be a hazard to one person may not be a hazard to the guy next to him.

Courtney Malveaux: Right. That's a great point. So it's just going to be very complicated. And so granted, you can take a look, of course keep an eye open for heat warnings and heat advisories. But the way OSHA's looking at this, and we'll eventually have a heat standard that OSHA's working on right now, and that will provide more particulars and more specifics. But we do know that OSHA... Look, the science is still building and OSHA's kind of moving with it and some of the states are as well. And so they're not just looking at the air temperature. I mean, you really have to... Their calculations, look, maybe someone can tell me the difference between a wet globe bulb temperature and a dry bulb globe temperature, but it involves math. And anything that involves counting that I can't do with my fingers and toes, I'm not doing it. So I welcome the app. But trying to calculate those things, and there are other variables too.

And so like you said, there's the employee. Then there's the temperature as calculated in different ways as I mentioned. Then there's airflow. There's radiation. There's cloud cover. There's so many different other factors. And so ultimately, OSHA's going to have a standard that's going to lay out much more specifically what it's looking at. But the time to look at all those factors isn't then, it's now. And I get that the General Duty Clause it's still a little amorphous how OSHA's going to look at this in terms of enforcement actions. But just like your experience, OSHA and it's attorneys in the Solicitor's Office, I think they're going to push the envelope on this. And I think they're going to push in favor of more enforcement and trying to support OSHA getting much more active on this based on all these variables.

Melanie Paul: Well, and one variable, very important variable I left out was physical exertion and based on the specific job task that the employee's performing. And OSHA kind of classifies exertion levels in low, moderate, heavy, and then really heavy workloads and physical exertion. But with that, it is important to note that the science is evolving. We don't really have a complete understanding of why heat might affect one person one way and not affect another person in the same way.

And so OSHA is in the stage where they issued advanced notice and proposed rulemaking earlier this year. They are soliciting data and input from across all industries and all stakeholders in how they handle heat in their work environments and trying to really gather data to come up with a standard as a very early part in the rulemaking process. But with federal agencies, OSHA in particular, their rulemaking process can take years. And I fully expect that at the end of this one, there will probably be some court challenges to it because of the, I don't want to say the changing science, but the evolving science and as we learn more and more. And because there is such a personal aspect to it, about an employee's particular medical conditions, things that are going to affect employees and how heat affects them that employers may not even be aware of because you're getting into ADA issues, with

disability, people's underlying medical conditions, and medications that they're taking.

With that, I would say that it's not really, I mean, we all agree that working outside in excessive heat is a hazard or indoors in excessive heat, but how do we define what is an excessive hazard? And the interesting thing is that through litigation with the Occupational Safety and Health Review Commission, there has been litigation over OSHA's reliance on the National Weather Service chart that they have that has the heat index on one axis, and then on the other axis they have these sections of this chart as to what zone you're in. Are you in the caution zone? Are you in the hazardous zone? You know, the excessive heat zone?

And so there has been litigation over that particular chart and the origins of that chart and whether or not the origins of that chart have any basis in science. And currently, the commission has found, and some ALJs have withdrawn citations based on the fact that they did not believe the secretary in those cases proved that the National Weather Service chart was scientifically based, that they could rely on it to support violations. So that's been a lot. But Courtney, what can employers do now to comply?

Courtney Malveaux: So just to wrap us up real quick, I'll share a few pointers. One is things you can do today to get yourself so that you're ready if an inspection's opened up. And one is to have a written heat stress management program. And if it isn't in writing, OSHA doesn't believe it exists. So having one that's put together. And so OSHA has put out some guidance on that, and we can assist anyone with their program as well. Monitoring the weather, as we mentioned, and monitoring your employees actively. You can't turn a blind eye if someone's dizzy or has a headache or shows symptoms. You can't turn a blind eye. You have to actively have a system of watching your employees, especially on heat advisory days.

Training of both employees and supervisors on prevention of heat illness and on response. And especially on those heat advisory days or if they're exposed, breaks, and really implementing that with water and shade, if necessary. And also developing a system to know and acclimatize your workers and build them into the workplace if necessary, if they are from somewhere else or if they've been on break for a while. Those are things you can do today.

So with that, that's all I have. Melanie, would you have anything to add?

Melanie Paul: Yes, Courtney. So Oregon, they have an OSHA state plan and they just passed an indoor and outdoor heat illness standard. And it's very prescriptive. So it gives blow-by-blow details of what exactly an employer must do to comply. And so employers can look to that, in other parts of the country can look to that standard now for ideas for what they might be able to do to mitigate heat exposures in their workplaces. And I think federal OSHA will likely be looking to that standard as well when drafting its own standard. So there's a lot to unpack here. It's a very complicated issue. So if you need help, please feel free to reach out. And stay tuned for more on this emerging topic.

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