

How Retail Employers Can Comply with OSHA's Heat Rule During the Cold Months

By Laura A. Pierson-Scheinberg &

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Jackson Lewis P.C. · How Retail Employers Can Comply with OSHA's Heat Rule During the Cold Months



Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast, We get work. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact of the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

Employers are apt to focus on OSHA's heat related enforcement rules when temperatures are high, but protecting workers from heat hazard is critical throughout the year when fluctuations in temperature changes are unsafe. On this episode of Week at work, we reinforce why retailers must take proactive action to protect their workers from occupational heat related injury and illness during the fall and winter months. Our host today are Laura Pierson-Scheinberg, a principal in Jackson Lewis's San Francisco and Baltimore offices, a member of the firm's labor group, and leader of the retail industry group. Laura also spearheads the Caffeinated Organizing Service team, which addresses the recent uptick of union activity in the retail and restaurant industries.

She has spoken in front of numerous professional associations, including the Retail Industry Leadership Association's Retail Law Conference, the National Retail Federation, and the National Restaurant Association's

Sixth Annual Law Summit. Our cohost, Kristina Brooks of council in the Albuquerque office is a veteran of the Department of Labor. She focuses her practice on occupational safety and health issues in the workplace. Kristina is an avid believer in the saying, "An ounce of prevention is worth a pound of pure." Laura and Kristina, the question on everyone's mind today is, how do I keep my employees healthy and beat the heat? And how will this impact my business?

Laura A. Pierson-Scheinberg:

Kristina, in April 2022, there was the National Emphasis Program from OSHA where they issued the then new and indoor and outdoor heat enforcement initiative that really was targeting industries. And the point there was they were trying to focus on heat. Well, now we're rolling into the winter months and I'm sitting in California and to me it's cold, but it's not cold to you. So, we're looking at a national place, but what, if anything, should we be thinking about both heat and cold? Because you taught me that this heat initiative not only is about heat, but it's about extreme temperatures, so it includes cold too. Can you tell us about that?

Kristina T. Brooks:

Thanks, Laura. So, you're right. In April of 2022, due to climate change policies and world temperatures changing, OSHA focused on high heat hazards and they focused on 70 industries. And to answer your question, the reason why we need to talk about heat and cold, is going into the holiday seasons, is that both are going to apply to retail employers. Right now, we're looking at the physical stores, warehouse, distribution centers, and how are we going to ensure that workers are not coming into contact and suffering from both potential heat stress hazards and cold stress hazards.

Laura A. Pierson-Scheinberg:

So, I heard from you that the ideal indoor temperature is from 68, to what I believe is really hot, 76 degrees. Can you tell us about how retailers need to think about the temperature in their stores?

Kristina T. Brooks:

I completely agree with you. I think if I had to work in a 76 degree environment all day, it would be difficult. However, different employers have uniforms that their folks wear, and so they may want to lower the temperature for their employees to feel comfortable, or they might want to raise the temperature in the winter, because you're coming in from outside and to inside. And really, there's going to be a difference here of what is considered something for your personal comfort, because that may change. One of our listeners may think, "Wow, 76 sounds great. What are you both talking about?" Versus, what temperature will actually cause a health hazard to your employees. And so, it's important to distinguish between those two facts.

Laura A. Pierson-Scheinberg:

So, when you're talking about the difference between just being uncomfortable because you're a little hot or a little cold, what is the difference between that and being actually exposed to a heat or cold hazard?

Kristina T. Brooks:

Under the National Emphasis Program that came out for heat, and we'll start with the heat hazards, because while we're heading into, for most states, where it's getting colder or at least it's supposed to feel colder, I'm in New Mexico and we already had snow this season. So, in those situations, maybe we're not thinking about that, that we need a heat and illness prevention program in place for our employees. But important for retailers is if your environment can cause heat stress, heat exhaustion, or heat stroke, maybe you're working in a bakery, long hours, you're not taking frequent breaks because you know got to get out the cakes and the cupcakes and the cookies for all your holiday goers, holiday shoppers.

Or you may be out in one of the warehouses or a distribution center and you're working longer hours, and because you're having to fulfill those holiday orders, it's really important to think that it could be hot in those environments or it could be cold, which we could talk about.

Laura A. Pierson-Scheinberg:

Yeah, tell me about that. Most retailers don't think about cold stress applying to them. So, we were actually talking about some incidents where, well, that might not be the case, because there are incidents when your retail and employees are outside helping customers, getting carts. Let's talk about that.

Kristina T. Brooks:

So, when we talk about cold stress, we're looking at environments where if an employee goes out without some sort of protection, that could be a uniform, such as a puffy coat, gloves, boots, warm socks, whatever it is to keep their extremities from freezing. They might be having to return the shopping carts that are out in the parking lot. Some of the larger box stores have really large parking lots, and I don't even like to walk to my car with my groceries on those days. So, we need to be thinking, what is the weather like outside? And are those folks exposed to potential cold stress hazards? Likewise, you could then have someone in a bakery coming in from the carts, have to go back into the bakery where it's really hot, and potentially being exposed over temperatures that could result in heat stress symptoms such as fatigue, disorientation. And so, those are the types of issues we're talking about, extremes in temperatures that could lead to health hazards.

Laura A. Pierson-Scheinberg:

Okay. So, when a retailer is thinking about, I've never thought about cold

stress before. So, what does a cold stress prevention program look like?

Kristina T. Brooks:

Well, cold stress prevention program would incorporate, number one, an evaluation of your workplace. You would want to say, for example, let's use a big box retailer. Do you have folks who may be exposed to the cold? And if the answer is yes, someone's going out to return those carts, or maybe they help with deliveries and they have to be outside unloading at a loading dock, something along those lines. So, you first want to do a workplace assessment to identify the type of workers you have that may be exposed. Once you do that, then you want to go ahead and have a training program in place for these folks of how to identify what cold stress looks like, what are the symptoms, what do we do if you start exhibiting those symptoms?

Part of the plan also needs to be to recognize, who do you call? Is there a hospital we're going to call? What are your emergency procedures in place to deal with someone who has cold stress? And then really, you need to look at implementing certain procedures. So, if you've got someone who's going out and there's a blizzard-like conditions out in a parking lot, do you use a buddy system to ensure that someone's okay? Do you have warming stations? Should you take breaks? So, it looks similar to some of the recommendations, but on the heat side. You have to look at engineering controls and also you look at is there a way to restructure the work to limit their exposure to these types of hazards.

Laura A. Pierson-Scheinberg:

And what obligations does an employer have to provide uniforms or appropriate clothing for employees that are expected to brave the elements.

Kristina T. Brooks:

So, as a safety and health expert, I look at that in two ways. So, number one, I think it's important to recognize, because people may be asking, so occupational safety and health administration does not have an actual standard that addresses cold or heat hazards. So, in those cases, what we're looking at is what's called a general duty clause violation, and they look to see what do people expose to these type of elements, what are industries doing to protect their employees? So, the first part of that is, let's say if you're out in a parking lot during a blizzard, what typically would you expect employees to be provided with? Here it's probably going to be a uniform. And OSHA would expect the employer to provide this to the employee. The employee shouldn't have to come to work in the right coat, they shouldn't have to bring their own gloves or their own shoes. This is something that they would say should be employer provided.

On the other hand, OSHA does have what's called personal protective equipment standards. So, this would be for gloves, boots, really protection from the elements. And so, here there could be a crossover where they might have a general duty clause violation where they say, you're exposed

to the cold, you fail to do X, Y, and Z for your employees. And then they may also cite you for a failure to provide appropriate personal protective equipment, which in my mind is really your uniforms. What are you providing to your employees to keep their extremities, to keep their core either cooled down or heated up?

Laura A. Pierson-Scheinberg:

And so, when you think about, I think the point here is to remind folks to think about not only your employees on the loading dock, inside the warehouse, on the loading dock, inside the store, out in the parking lot, and so, taking on more global look at that. One of the things that we had talked about is, first of all, number one, what does an incident look like? How does that present to someone? And then after you get that incident, what do you do?

Kristina T. Brooks:

Sure. Let's use as an example, you're baking, or you're in a hot kitchen and you're exposed to heat that may result in heat stress injuries.

Laura A. Pierson-Scheinberg:

What does that look like? How does that manifest?

Kristina T. Brooks:

So, it would manifest first by you're feeling a little lightheaded, you're out of breath, you're having a hard time regulating your temperature. It's kind of like going out for a run on a hot day and it's uncomfortable. You're actually having physical ailments. It's not just a, man, it's hot, I'm sweating a little bit, you're actually in physical distress. And part of a good heat and, or cold injury and illness prevention program, is going to identify what the different symptoms are and to train your employees on them. So, when they recognize and see these symptoms, they then should know that steps need to be taken to cool down, and that should be in a program.

Laura A. Pierson-Scheinberg:

And so, those cool down steps would be, for example, stopping work, what would you say those would be?

Kristina T. Brooks:

Right. So, the practical things to immediately do is to allow your folks to take frequent breaks when they're in a very hot environment. Also, employers have a duty to provide water and an adequate supply of water. And it needs to be cool, not overly cold, but enough and sufficient to help that person cool down. And so, those are two of the biggest things that you can do, is let them take breaks and let them have water and see if that brings their body temperature down and they feel better.

Laura A. Pierson-Scheinberg:

Okay, so that's heat. Now let's talk about cold. What do the cold manifestations look like?

Kristina T. Brooks:

So, the cold manifestations are, you can start feeling numbness maybe in your fingers or your toes. You can't actually warm up. There's different types of cold stress that you can feel. So, for example, if someone comes in and they can't feel their feet because there's snow on the ground, maybe their boots aren't sufficient, it's not keeping the warmth in, then we have to look at, okay, can we do foot immersion to make sure that they can warm up their extremities? Do they sit under a heat lamp or just in a warmer place trying to warm up their core, have some warm liquids. So, it's just one of those things where you have to look at what the situation is, have different appropriate remediation measures in place for that employee to go ahead and have a spot to either warm up or cool down.

Laura A. Pierson-Scheinberg:

Okay. And say that that didn't happen well, and there is an incident, what does an employer do when there is a heat or cold incident? I assume it's the same on the recordables.

Kristina T. Brooks:

We would then be looking at whether or not it's a recordable injury or illness. And OSHA requires an employer who has an injury or illness that's caused by work during work, to record it on what's called an OSHA 300 log. And so, what they need to do is look at what exactly is the incident. If it's just something that you can sit there and your fingers warm up, your toes warm up, or you're fine, it didn't really result in an actual injury or illness, those don't need to be recorded. So, let's say someone's outside and they have frostbite on a finger, or you're working and it gets really hot and you become unconscious, those are types of situations where we're looking at an injury.

Then we have to determine whether or not it's a recordable and how many days away from work, or was it a one time thing and they revive. So, there's many steps that you have to take once you identify a workplace injury or an illness to decide if that's a recordable. But it's something to keep in mind because I think employers forget. We're rightfully so worried about addressing what the employee's going through that we forget sometimes that there's a requirement on the other side to record any kind of injury and illness that results from a heat or cold related hazard.

Laura A. Pierson-Scheinberg:

So, if you were to say, 'Hey, I want our clients to walk away with some key takeaways here,' let's do the heat side first, because I know that it's still coming into the winter months, but you've explained to us today how heat still needs to be at top of mind in a mindset. So, what recommendations do you have for the heat piece?

Kristina T. Brooks:

Right. So, the key takeaways is to remember that even though we're going into the cold months, that if you have an environment that employees are working in, that exposes them to potential heat stress hazards, that you must implement a heat illness and injury prevention program. OSHA as part of this National Emphasis Program, that is one of the questions that they're asking employers when they're coming out on inspections. So, they might be out there for some completely different reason, and then they're starting to ask you, "So you have a heat injury and illness prevention program?" And you're like, "What does that have to do with anything?" They're asking these questions, they want to make sure that you have the plan in place.

So, that's number one, look at the hazards in your workplace and determine whether or not a heat injury and illness prevention program is something that you should have in place. That's something we can help you with. We've been helping folks across the nation ensure that they have a plan and that they have training in place. The second main thing is really to ensure that your folks can recognize the symptoms and signs of heat stress, heat exhaustion, and really any type of heat related hazard and what to do if they start experiencing those symptoms.

Laura A. Pierson-Scheinberg:

And on the cold side, what, if any, tweaks would you have to that an employer should be thinking about? Is the heat and cold in the same plan? Is it two different plans? What does that look like?

Kristina T. Brooks:

Right. So, I would recommend that they're separate plans, because how you're going to address a cold stress related hazard is going to be different than a heat related, but it's in the same vein. You want to do an assessment. You want to look at what types of employees would be exposed to a cold stress hazard, and then to ensure that you have an illness and prevention program in place for that particular hazard. I don't think it's a far stretch that because OSHA has focused on heat as the weather changes, as we're having more extreme weather patterns, that they're also going to take a look at cold related hazards. Certain states do already look at and ensure that employers are protecting their employees from cold stress. I don't think it's something that most people think about. "Oh, this is our business model. Most of our folks work inside." But you have to be mindful that you have to protect all of your employees. So, if they are exposed to any of these hazards, a plan must be in place.

Laura A. Pierson-Scheinberg:

Well, thank you so much for giving us these tips. It's really useful. I always enjoy talking to you and spending time. And thank you for giving us these tidbits.

Kristina T. Brooks:

It's a pleasure, Laura. Thank you.

Alitia Faccone:

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