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Committee on Education & the Workforce
Subcommittee on Workforce Protections

Hearing on "Safeguarding Workers and Employers from OSHA Overreach and Skewed Priorities"

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Chairman Kiley, Ranking Member Adams, Members of the Subcommittee:

Good morning and thank you for the opportunity to speak with you today about the important topic of "Safeguarding Workers and Employers from OSHA Overreach and Skewed Priorities."

First, let me begin with a brief overview of my background of and commitment to increasing compliance with the Occupational Safety and Health Act (the "OSH Act"). Currently, I am a senior counsel in the law firm Littler Mendelson, P.C., and am a member of the firm's Occupational Safety and Health Practice Group. In that role, I represent and counsel employers facing a wide range of occupational safety and health law issues.

Prior to joining Littler, I served as an assistant vice president with the National Association of Home Builders of the United States in the Office of Legal Affairs, where I focused on issues affecting the residential construction industry that included construction liability, labor, occupational safety and health, international trade, and privacy. I wish to emphasize that my testimony today is solely on my own behalf, and not on behalf of my firm or any of its members or clients.

I am here today because we all have a common goal: increase compliance with the OSH Act, while safeguarding the ability of employers and employees to work and thrive in their chosen

professions. We all want to ensure that employers protect their workers, while at the same time ensuring that employees are able to work in workplaces that are safe and free from recognized hazards.

As you know, the agency tasked with protecting workers is the Occupational Safety and Health Administration ("OSHA"). Among the many action items on OHSA's regulatory agenda is hazardous heat. Having focused on occupational safety and health for a number of years, first at NAHB and now with Littler, I have three considerations for this Subcommittee related to OSHA's heat rulemaking efforts: (1) there has been no meaningful stakeholder input on certain aspects of this rulemaking process to date; (2) the application of the rule is unworkable for employers; and (3) it is skewed in a way that is not effective to achieve the Agency's goals.

1. The Public Input Process Has Become Perfunctory.

OSHA has been formally working on a proposed standard for heat since 2021. In October 2021, OSHA announced that it was initiating rulemaking to protect indoor and outdoor workers from hazardous heat.[1] At the time, OSHA announced that workers "across hundreds of industries" were at risk for hazardous heat.[2] The Agency accepted comments on its advanced notice of proposed rulemaking over a period of several months. Two years later, in August 2023, OSHA convened a Small Business Advocacy Review (SBAR) Panel to provide comments on OSHA's potential standard. The SBAR issued its Panel Report in December 2023. Then, on April 24, 2024, the Advisory Committee on Construction Safety and Health (ACCSH) met with OSHA to discuss a high-level overview of the proposed rule. After the Agency provided a very summary overview,

[1] Heat Injury and Illness Prevention in Outdoor and Indoor work Settings, Occupational Safety and Health Admin., Advanced Notice of Proposed Rulemaking, 86 Fed. Reg, 59,309 (Oct. 27, 2021).
[2] 86 Fed. Reg. at 59,311.

ACCSH ultimately recommended that OSHA move forward with publishing a notice of proposed rulemaking on heat injury and illness prevention.

While all of this sounds on its face an appropriate approach, it has become a perfunctory process at best, with limited input since ACCSH recommended that OSHA move forward. For example, under Executive Order 12866,[3] the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") is required to meet with any interested party to discuss issues on a rule under review as part of the regulatory process. One of the objectives of Executive Order 12866 is "to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."[4]

Unfortunately, that seems to have been skipped with respect to OIRA's review process for this Proposed Rule. OIRA held just four meetings to discuss the Proposed Rule pursuant to Executive Order 12866, which occurred between the time it received the Proposed Rule on June 11, 2024, and when it sent the Proposed Rule back to OSHA on July 1, 2024. It is hard to imagine that OIRA was able to meet its oversight obligations in that short amount of time as the Proposed Rule includes 1,175 pages of text, including 719 pages comprising the preliminary economic analysis and regulatory flexibility analysis of the Proposed Rule's impact. By truncating the potential to hear from members of the public interested in the rule, the Administration missed an opportunity to collect vital input from stakeholders *before* the regulation was made public. The Administration and OSHA should know that with such a significant rule impacting millions of businesses and workers alike, the more input the Agency receives *in advance of publishing the regulatory text*, the better chance for the Agency to develop a thoughtful and workable standard.

[3] Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 Fed. Reg. 190 (Oct. 4, 1993) (available at: https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf) (last visited July 18, 2024).
[4] *Id.*

Moreover, the Agency has missed, or rather ignored, an opportunity to develop industry-specific standards that would be more effective in achieving the Agency's overall goals of ensuring safe and healthful working conditions.

On July 2, 2024, OHSA released the text of its Proposed Rule. Once published in the Federal Register for public comment, the Proposed Rule will apply to "*all* employers conducting outdoor and indoor work in all general industry, construction, maritime, and agriculture sectors" with limited exceptions. By its own estimates, OSHA anticipates that the rule will apply to at least 36 million workers in the United States, a number representing approximately one-third of all full-time workers in this country.[5]

OSHA's goal is to prevent or reduce the number of occupational injuries, illnesses, and fatalities caused by exposure to hazardous heat by imposing new employer obligations and measures, such as creating a plan to evaluate and control heat hazards in their workplace, and imposing new recordkeeping and training requirements. The agency also intends to include requirements in the standard that set specifications related to heat exposure levels based on temperature triggers. The higher the temperature trigger, the more controls and employer obligations will be imposed. As proposed, the initial heat trigger requires certain protections kicks in when the heat index reaches 80° Fahrenheit. The high heat trigger occurs when the heat index reaches 90° Fahrenheit, and requires all the controls for the initial heat trigger, plus additional controls. There is no apparent recognition of geographic regional differences.

Workers being exposed to heat when working outside or inside is not a new issue. As OSHA itself recognizes, heat has been a part of indoor and outdoor work environments for

[5] This figure is based on data from 2022. *See*, Background, health Effects, Risk Assessment, Explanation of Proposed Requirements (hereafter "Proposed Rule") at p. 177 (but noting that the Bureau of Labor Statistics' "use of a larger denominator likely underestimates risk because it includes workers not exposed to hazardous heat and therefore less likely to experience a heat related illness.")

thousands of years. While I understand OSHA's interest in engaging in a formal rulemaking in this area and I appreciate the hazards associated with working in the heat, any regulatory approach implemented by OSHA must be flexible and offer employers options to best meet the needs of their employees and workplaces.

The breadth and scope of covered industries means that the *same* requirements will apply to all covered employers, regardless of industry type. Many employers I have spoken with have been concerned with the Proposed Rule's broad prescriptive requirements which will be unworkable in application. Small Entity Representatives participating in the SBAR meetings, commenters in the ANPRM, and commenters responding to the SBAR panel report all urged the Agency to develop a flexible approach for employers to use when implementing heat protections. Despite OSHA's statements publicly (at the ACCSH meeting and in the Proposed Rule itself) that it allows flexibility, the contents of the proposal belie OSHA's position.

2. <u>The Application of The Rule Has Consequences for Employers Who Will Face Real Challenges in Meeting the Standard as Currently Proposed</u>.

OSHA is forcing employers to act *in loco parentis*, and the agency has approached this rulemaking as if employees are too childlike to take care of themselves. OSHA ignores the fact that both employers and employees have duties and obligations under the OSH Act. Not only are employers required to provide a safe workplace free from hazards, but each employee has the duty to "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct."[6]

Unlike other OSHA standards such as fall protection, where there is a direct 1:1 consequence if an employee is not provided with the proper equipment to prevent falls, heat injury or heat related illness is much more nuanced. Each worker has individualized unique risk factors

[6] 29 U.S.C. § 654(b).

that impact their susceptibility to heat injury or illness. These risk factors are well outside the employer's control, and are not readily discernable without further and arguably impermissible inquiry.

Heat related injuries are not always straightforward and obvious. Rather, the nuanced issues related to an employee's underlying health risks, or personal behavior choices while away from work, have proven connections that will impact their susceptibility to heat. These are factors of which the employer has no knowledge or control over, yet for which they will be held liable if an employee has an issue because of one of these unknown risk factors during a workday where the initial heat trigger of 80° Fahrenheit or the high heat trigger of 90° Fahrenheit are in effect.

While the Proposed Rule contains several prescriptive requirements which are too numerous to cover here, one notable requirement in the Proposed Rule addresses proper hydration. Consuming drinks with alcohol or caffeine can lead to dehydration, yet many individuals start their "day" with a cup of coffee or an energy drink. If employees are not drinking enough water outside of work, and as a result come to work already dehydrated, they could be at greater risk for a heat related illness. Under the Proposed Rule, however, the consequences for these decisions will fall on the employer.

In the Proposed Rule, OSHA says it will not require employers to monitor water consumption but at the same time will require employers to inform employees of the importance of drinking water, provide a specific amount of water per employee, and provide water that is "suitably cool." Yet, the Proposed Rule fails to account for the fact that effective heat protections require employee participation as well. If an employee refuses to drink the water provided or chooses instead to consume an energy drink or another beverage such iced tea or iced coffee, and

as a direct result of those decisions becomes dehydrated, OSHA does not address who will bear responsibility in this scenario.

Employers have limited control over their employees when they are away from work. Everything an employee does outside of work on their personal time impacts how they will be affected by heat, whether it be their personal health or lifestyle choices. Employers cannot monitor the choices all of their employees make outside of work, and have no right to inquire about such information. While employers can and should provide training on recognizing the signs and symptoms of heat illness and injuries, the importance of drinking water, and how personal risk factors can affect an individual's susceptibility to heat, it is unreasonable for OSHA to hold an employer responsible if an employee suffers a heat related injury or illness the cause of which the employer may not be allowed to ascertain. It's a Catch-22 with no discernable remedy.

Furthermore, the signs and symptoms of a heat related illness mirror those of many other non-heat related illnesses, such as the flu (headache, muscle or body aches, fever or feeling feverish/chills, elevated temperature, nausea, vomiting)[7] or even COVID-19.[8] Despite the myriad causes of these symptoms, an employer must assume any symptom is heat-related, and if the employer does not react quickly enough, they face a citation and penalty. This does not change even if, upon further review, the employer learns that the incident was not heat-related at all. OSHA is putting employees and employers into an untenable situation if the result is that employers are required to intrude into the personal lives of their employees to shield themselves from liability under this Proposed Rule but are prohibited from doing so under a host of other state or federal laws (notably, the Americans with Disabilities Act and its state cognates).

[7] U.S. Centers for Centers for Disease Control and Prevention, Flu Symptoms and Complications (available at: https://www.cdc.gov/flu/symptoms/symptoms.htm) (last visited July 19, 2024).
[8] U.S. Centers for Disease Control and Prevention, Similarities and Differences between Flu and COVID-19 (available at: Similarities and Differences between Flu and COVID-19 | CDC) (last visited July 19, 2024).

Multi-employer worksites are particularly problematic. If the subcontractor does not provide enough water, but the controlling employer is not onsite and does not know about the subcontractor's noncompliance, the controlling employer can still be held responsible. Under OSHA's view per its highly suspect multi-employer citation policy, both the subcontractor and the general contractor as the controlling employer can be cited for a violation, even where it is solely the fault on one or the other. The answer is not always going to be clear, and this is a much more nuanced rule than OSHA would have people believe.

3. The Proposed Rule is Skewed in Such a Way That It Will Not Be Effective.

OSHA apparently ignored repeated concerns expressed through written comments and during stakeholder meetings cautioning the Agency against adopting a one-size-fits-all approach to the rulemaking. One size does not fit all. Any effective regulatory approach to addressing heat must be flexible, emphasize training, and incorporate the concepts of water, rest, and shade. Yet under the Proposed Rule, employers and employees alike are regulated by a single standard, even though the workplaces will be vastly different, with some workplaces changing hourly or daily and others remaining the same.

OSHA missed a significant opportunity to address the most vulnerable industries while at the same time providing industry-specific standards that could benefit all covered employers. By proposing one all-encompassing rule, employers in the maritime industry (for example) will be required to comply with the same set of prescriptive rules as those in the construction industry. Yet, what may work in the maritime industry will not necessarily work in the construction industry, or agriculture, or farming, or manufacturing. It is unfathomable why OSHA ignored requests from different industry groups to have industry-specific standards when it proposed such a broad rule.

OSHA has done it for other standards in the past, including COVID-19 standards for healthcare workers, a crystalline silica standard for construction, and Beryllium, to name a few.

The only limited distinction for different businesses falls under the prescriptive requirement for having a written Heat Injury and Illness Prevention Plan ("HIIPP"). For employers with less than 10 employees, the plan does not need to be in writing, while employers with 10 or more must have a written HIIPP. And regardless of employer size, OSHA will require all employers to have a heat safety coordinator. The Proposed Rule fails to address however, what happens when, for example, the heat safety coordinator is out on vacation or otherwise fails to be at work on a particular day. Employers must have flexibility to be able to meet OSHA's goals of protecting workers, and the agency must allow employers to implement workable solutions and effective procedures.

Regarding the requirement for a written HIIPP, OSHA discusses the possibility of needing multiple plans across different work locations. While it is possible that factors common to the multiple locations could be addressed the same in the HIIPP, the variations between worksites will need to be in writing and specifically addressed. Furthermore, if an employer is operating multiple work locations, it will need to have multiple heat safety coordinators. For larger worksites, employers may actually need multiple heat safety coordinators at a single worksite depending on the number of employees at each work location. OSHA did not account for these administrative burdens in the Proposed Rule. Rather than keeping the Proposed Rule simple and straightforward, OSHA has needlessly complicated it to the detriment of all involved.

Also identified in the Proposed Rule are requirements for an emergency response plan, acclimatization for new and returning workers, rest break requirements (including mandatory paid rest breaks of 15 minutes every two hours when the high heat trigger of 90° Fahrenheit is reached),

training requirements including providing the training in a language and literacy level each employee, supervisor, and heat safety coordinator understands, along with an opportunity for questions and answers about the training materials, and employee involvement in the development of the plan and the training. Additionally, supervisors and heat safety coordinators will need supplemental training on top of the training required for all employees in the proposed rule.

Many employers have had effective procedures in place to protect their workers from the hazards of heat for many years. These efforts have proven effective because they are simple, easy to understand, and most importantly, provide the necessary tools and information to determine how to best combat the effects of extreme heat at each worksite. Given that heat illness can progress quickly when unrecognized and untreated, educating employees on how to recognize the signs and symptoms of heat illness in themselves and in their co-workers is an effective way to protect employees against the hazard of extreme heat.

There are numerous concerns with the Proposed Rule. I have only touched the surface of these concerns in this testimony. As written now, it is clear that the Proposed Rule will quickly become an administrative nightmare for smaller employers with less financial wherewithal to meet all the obligations found in the Proposed Rule. Ultimately OSHA has developed a prescriptive rule that takes a one-size-fits all approach, and despite its assurances to the contrary, allows little flexibility for employers moving forward.

One final thought here is the issue of the cumulative effect of ever-changing regulatory requirements, coupled with new regulations going into effect at least annually. This is not confined to OSHA, but it can be an issue for regulated entities. One look at the federal government's regulatory agenda should cause someone to pause to think about the unrecognized administrative

burdens that will result when all those identified, and as yet to be unidentified regulations go into effect.

CONCLUSION

Thank you again for the opportunity to appear before you today to discuss agency overreach and the impacts that agency actions have on the regulated community, large and small businesses, employees, and downstream consumers. I welcome any questions you may have.