

Heat Warning: Summer and OSHA Both Could Scorch Less-Careful Employers in 2024



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It may be hard to believe that spring is here, meaning summer is just around the corner. That annual eventuality generally is welcome news for school children, baseball enthusiasts, and swimmers—but less so for many employers these days. Increasingly, the Occupational Safety and Health Administration (OSHA)—the federal watchdog responsible for ensuring safe and healthful working conditions—has been “raising the heat” on employers when it comes to investigating heat hazards in the workplace during this era of volatile climate change.

OSHA does not currently have a permanent standard regarding heat hazards that applies to indoor or outdoor workplaces in the general industry and construction fields. While the agency is in the beginning of the multiyear rulemaking process to establish a permanent standard, this has not deterred officials from enforcing heat-hazard violations with the Occupational Safety and Health Act’s general duty clause. The general duty clause requires employers to furnish a workplace that is free from recognized hazards that may cause or are likely to cause death or serious physical harm. And as global temperatures rise, employers now have new and real concerns and consequences to consider.

Two years ago, OSHA launched a national emphasis program focused on heat-related illnesses and injuries. The data collected since this initiative started is striking: 18 of 19 summers before 2022 were the hottest on record, and U.S. workers suffered more than 3,500 injuries and illnesses related to heat in each of those 18 years.

As part of this program, which is set to expire in December 2025, OSHA provides policies and procedures for targeted enforcement efforts to protect employees. Make no mistake: these are applicable well beyond construction or outdoor worksites. In fact, OSHA’s emphasis program is directed toward employers in 70

high-risk industries, including warehousing and storage, couriers and express delivery services, support activities for road transportation, waste collection, and nursing care facilities, among others.

Many business leaders are unaware that under the program, OSHA's compliance safety and health officers (CSHO) inspect indoor and outdoor work sites proactively. Unlike more familiar OSHA incidents, CSHOs may deploy to a site without receiving an injury report, complaint, or even a referral. Instead, CSHOs may conduct inspections when the National Weather Service issues a heat advisory or warning for a local area. On days when the heat index is 80°F or higher, OSHA's personnel may conduct direct outreach to stakeholders—such as unions and safety advocacy organizations—in efforts designed to help ensure workers remain safe on the job. Under the program, OSHA also authorizes CSHOs to conduct inspections of nearly any type of outdoor work areas in plain view on especially warm days.

Additionally, OSHA's enforcement guidance requires CSHOs to include specific items in their inspections, such as a review of an employer's work-related injury and illness logs (e.g., OSHA 300, 300A and 301 forms) for heat-related illnesses. CSHOs are directed to interview workers as well as look for symptoms of heat illness, such as headache, dizziness, fainting and dehydration. CSHOs also are to determine if an employer has a heat illness and injury prevention program and evaluate the same.

Unlike years ago, simply providing access to water and instituting rest breaks are not enough to either protect employees during the summer months or employers from OSHA scrutiny. Before those ice cream truck chimes blend into the daily soundscape, business operations leaders should consider drafting and implementing a written heat injury and illness program within company policies and procedures, a move that could protect workers and bottom lines alike.

As a matter of course, OSHA encourages employers to implement a flexible approach that includes a variety of controls and measures, and leading the list is evaluating both indoor and outdoor workplaces for heat-hazards. Among other items and actions employers should consider incorporating:

- Designating a program administrator for implementing an employer's heat-stress measures based on wet bulb globe temperatures or dry-bulb temperatures.
- Acclimatizing employees beginning work in a hot environment or those returning from an absence period of three or more days.
- Establishing defined procedures for returning employees working where they were exposed to increased heat load.
- Encouraging employees to drink a cup of cool water every 15-20 minutes rather than relying on thirst alone.
- Establishing specific-break schedules during high-temperature conditions that are more frequent than regular break schedules. And allowing employees to take breaks when needed due to heat in the work environment.
- Establishing a buddy system and monitoring workers for signs and symptoms of heat-related illnesses to better identify when workers need to be removed from the work area.
- Establishing and providing an effective training program, for all employees, which includes the health effects associated with heat stress, symptoms of heat-induced illness, methods of preventing such illnesses and actions that should be taken in the event of a heat-induced illness.
- Conducting in-person evaluations of employees complaining of heat-related illness symptoms and ensuring supervisors know the physical and psychological indicators that would determine when it is

appropriate to remove an employee from work, arrange for immediate medical attention or provide other assistance.

Employers who fail to implement at least some of these recommended mitigation measures do so at their own peril, especially during hot summer days when CSHOs are on the march. Not only do heat hazards put employees at risk, but they could result in an OSHA citation under the general duty clause.

OSHA violations are no slap on the wrist or “just the cost of doing business,” either. The maximum penalty for serious and other-than-serious violations exceeds \$16,000 each, and the maximum penalty for willful or repeat violations is more than \$161,000. Worse yet, OSHA violations could negatively impact a business’ reputation or hamper a company’s ability to obtain business or construction work. And in the case of heat hazard and injury issues, they are avoidable with enough forethought.

But let’s say a citation related to a heat hazard does land on an employer’s desk. Before deciding whether to accept or contest and litigate, it is worth noting that the U.S. Secretary of Labor’s record of successfully sustaining heat-hazard violations before administrative law judges and the Occupational Safety and Health Review Commission, the three-commissioner appellate panel that reviews decisions issued by administrative law judges, is decidedly mixed, at best.

At a hearing before an administrative law judge, the secretary has the burden to prove all four elements of a general duty clause violation:

- A condition or activity in the workplace presented a hazard.
- The employer or its industry recognized the hazard.
- The hazard was causing or likely to cause death or serious physical harm.
- And a feasible and effective means existed to eliminate or materially reduce the hazard.

The review commission has found that excessive heat can constitute a workplace hazard, thus satisfying the first element. But on the fourth element, both the review commission and administrative law judges have vacated heat-hazard citations when the Secretary failed to identify the particular steps or abatement an employer should have taken to avoid a citation and show the feasibility and likely utility of those abatement measures. In fact, last February, the review commission vacated citations issued to five U.S. Postal Service facilities because the secretary failed to establish a feasible and effective means of abating the heat hazard. USPS successfully argued the secretary failed to show that any of its proposed measures were economically or technically feasible or effective, or that a reasonable employer would have done more than what it was already doing to protect employees from heat hazards.

Wise employers likely take little comfort that the review commission has vacated heat-hazard general duty clause violations, though. Litigating this type of violation is expensive, time consuming, and presents a reputational and financial risk. So, as the summer months move in, smart employers should spend energy on establishing and enacting effective heat prevention measures to help mitigate exposure to heat hazards—and a lot of OSHA headaches.

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