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Occupational Safety and Health Administration
U.S. Department of Labor

Submitted via regulations.gov

RE: Docket No. OSHA-2021-0009 Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (RIN 1218-AD39)

I. Introduction

We, the undersigned organizations representing farmworkers and other worker populations disproportionately impacted by heat, submit this comment in response to the Department of Labor Occupational Health and Safety Administration's (OSHA) Notice of Proposed Rulemaking (NPRM) entitled "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings." The agriculture and construction industries have the highest rates for heat-related injury and illness. It is estimated that agriculture has 35 times the risk of heat-related death and construction has 13 times the risk in comparison to other industries.¹ The circumstances and stories of workers in these industries inform our comments below.

Farmworker Justice (FJ) is a national organization that works to empower farmworkers and their families to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. Migrant Clinicians Network (MCN) is a national nonprofit organization that creates practical solutions at the intersection of vulnerability, migration, and health. The clinicians that MCN serves and supports provide safety-net primary care and widespread outreach to the most vulnerable in our communities, including farmworkers. The additional signers of these comments include farmworker-serving organizations and unions, as well as other organizations whose staff have assisted and advocated for farmworkers across the nation. We seek to center the law, science, and farmworkers' experiences in our evaluation of the NPRM.

We appreciate the steps that OSHA is taking in this NPRM to strengthen heat protections for workers. According to NASA, the ten most recent years are the warmest on record,² and the number of high heat days continues to increase. An analysis by Climate Central shows that since 1979 the annual frequency of

¹ Diane M. Gubernot et al., *Characterizing Occupational Heat-Related Mortality in the United States, 2000–2010: An Analysis Using the Census of Fatal Occupational Injuries Database*, 58(2) *Am. J. Indep. Med.* 203 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4657558/pdf/nihms738528.pdf>.

² *Global Temperature*, NASA, <https://climate.nasa.gov/vital-signs/global-temperature/?intent=111> (last visited Jan. 6, 2025).

days with a heat index of at least 90 degrees Fahrenheit has increased in 201 U.S. locations by 10 days on average.³

Workers have little control over their working conditions. The majority of farmworkers and other low-wage workers are undocumented or are part of a mixed-status family and are limited English proficient. They are more vulnerable to exploitation due to fear of employer retaliation. We have witnessed firsthand the experiences of workers laboring in extreme heat. In July 2024, Juan José Ceballos, a 32-year-old migrant farmworker in North Carolina died working during a day when the maximum temperature was 101 degrees Fahrenheit.⁴ In 2022, when 24-year-old Gabriel Infante exhibited signs of disorientation after a day of digging trenches in 100-degree heat in San Antonio, Texas, his supervisor mistakenly suspected drug use and contacted the police. The supervisor failed to recognize Infante's delirium as a symptom of heat-related illness. Infante's body temperature was recorded at 109.8 degrees Fahrenheit. Infante died only five days into the job.⁵

For these reasons, it is important that a strong, enforceable standard be adopted to protect the lives and health of U.S. farmworkers and other workers exposed to excessive heat. We strongly support OSHA's proposed rulemaking, and offer recommendations to further strengthen the standard to ensure its maximum impact.

II. Background

A. Health impact of extreme heat

Extreme heat poses both acute and long-term health risks for workers. Farmworkers, landscapers, construction workers and other outdoor workers as well as workers laboring in unconditioned indoor spaces are at significant risk for heat stress. Heat stress results when the body cannot get rid of excess heat and its core temperature rises. Heat stress may lead to more severe heat-related illness including heat exhaustion, heat cramps, heat stroke, and even death if left untreated.⁶

Lower levels of heat stress have multiple health effects, including worsening kidney disease and triggering cardiovascular incidents in individuals with pre-existing kidney conditions. Additionally, heat stress increases the risk of kidney stone formation and contributes to both acute and chronic kidney disease. Chronic Kidney Disease of Uncertain Etiology (CKDu) is chronic kidney disease that is not a result of traditional risk factors such as hypertension and diabetes, old age, or other known causes. Recently there have been multiple epidemics of CKDu among workers in Central America, Sri Lanka,

³ *High Heat Index Days*, Climate Central (July 12, 2023), <https://www.climatecentral.org/climate-matters/high-heat-index-days-2023>.

⁴ Aaron Sanchez-Guerra, *Department of Labor investigates death of migrant Mexican farmworker in Eastern North Carolina*, WFAE (July 20, 2024), <https://www.wfae.org/2024-07-29/migrant-mexican-farmworker-death-north-carolina-department-labor>.

⁵ Ariel Wittenberg, *His boss thought he was on drugs. But he was dying of heatstroke*, Politico (July 5, 2024), <https://www.politico.com/news/2024/07/05/biden-heat-death-rules-00164661>.

⁶ Nat'l Inst. for Occupational Safety & Health (NIOSH), *Heat Stress and Workers*, Ctr. Disease Control & Prevention (CDC) (July 11, 2024), <https://www.cdc.gov/niosh/heat-stress/about/index.html>.

India, and Thailand. There is evidence that heat stress may contribute to CKDu.⁷ In Central America, the death toll of CKDu runs into the tens of thousands, affecting mostly young men working in agriculture.⁸

Extreme heat poses health risks for both pregnant women and developing fetuses. Prenatal exposure to extreme heat, particularly during the third trimester of pregnancy, is associated with adverse birth outcomes. There is increasing evidence that extreme heat can increase the risk for preterm birth, low birth weight, and fetal death.⁹ Exposure to heat in the first trimester may increase the likelihood of certain birth defects.¹⁰

Children as young as 10 years of age can be hired in agriculture.¹¹ Children differ from adults in their physiological ability to regulate internal body temperature. Heat exposures, both in terms of the temperatures and the duration of exposure, are experienced differently in the pediatric population than in adults. In addition to physiological impacts of heat exposures, cognitive function among youth may also be affected by heat exposures. While there is limited data among young workers, in a study of college students exposed to air-conditioned and non-air-conditioned environments, students who were in the non-air-conditioned environment experienced reduced cognitive functioning.¹²

B. Only a handful of states protect workers from heat stress injuries.

In the absence of a federal regulation, only seven U.S. states (California, Colorado, Maryland, Minnesota, Nevada, Oregon, and Washington) currently provide regulations for how employers should protect workers from heat stress, and these standards are sometimes limited to either indoor or outdoor workers, or are sector-specific.¹³ Some states, including Texas and Florida, prohibit their municipalities from passing their own local heat regulations.¹⁴

⁷ Fumihiko Sasai et al., *Climate change and nephrology*, 38(1) *Nephrology Dialysis Transplantation* 41 (2023), <https://academic.oup.com/ndt/article/38/1/41/6362903>.

⁸ Catharina Wesseling et al., *Chronic kidney disease of non-traditional origin in Mesoamerica: a disease primarily driven by occupational heat stress*, 44 *Revista Panamericana de Salud Pública* 15 (2020), <https://pubmed.ncbi.nlm.nih.gov/31998376/>.

⁹ Sylvester Dodzi Nyadanu et al., *Maternal exposure to ambient air temperature and adverse birth outcomes: An umbrella review of systematic reviews and meta-analyses*, 917 *Sci. Total Env't* 170236 (2024), <https://doi.org/10.1016/j.scitotenv.2024.170236>.

¹⁰ *Clinical Overview of Heat and Pregnancy*, CDC (June 18, 2024), <https://www.cdc.gov/heat-health/hcp/clinical-overview/heat-and-pregnant-women.html>.

¹¹ *State Child Labor Laws Applicable to Agricultural Employment*, Wage & Hour Div. (June 13, 2024), <https://www.dol.gov/agencies/whd/state/child-labor/agriculture>.

¹² Jose Guillermo Cedeño Laurent et al., *Reduced cognitive function during a heat wave among residents of non-air-conditioned buildings: An observational study of young adults in the summer of 2016*, 15(7) *PLOS Med.* 1002605 (2018), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002605>.

¹³ See Cal. Code Regs. tit. 8, § 3395 (2022); Colo. Code Regs. § 1103-15 (2022); Md. Code Ann. Lab. & Empl. § 5-1201 (2023); Minn. R. § 5205.0110; Nev. Stat. R131-24; Or. Admin. R. § 437-002-0156 (2022); Wash. Admin. Code § 296-62-095 (2022).

¹⁴ Fla. Sta. § 488.106 (2024); Tex. H.B. No. 4673 (2023).

C. The General Duty Clause is an insufficient enforcement tool to protect workers from heat stress.

Without a heat regulation in place, OSHA’s primary option for remedy in heat stress cases has been the General Duty Clause (GDC). The GDC requires that each employer provide a workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”¹⁵ However, proving that an employer violated heat standards under the GDC is a resource-intensive task requiring an almost unobtainable burden of proof. Promulgating a federal heat standard frees OSHA from having to use the GDC, which requires establishing a heat standard anew for each case, from the establishment of scientific evidence to the feasibility of abatement measures. GDC violations are among the citations most commonly challenged in court due to the legal ambiguities that arise when trying to define what is a “hazard.”¹⁶

The Occupational Safety and Health Review Commission (OSHRC), the independent federal agency tasked with “decid[ing] contests of citations or penalties that OSHA issues to employers following inspections[,]”¹⁷ has interpreted the GDC to require OSHA to meet a high evidentiary burden to prove a violation. To make a claim that an employer has not protected its employees from heat injury, OSHA must show: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized this hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.¹⁸ Each prong of this test is effectively mitigated by the evidence and criteria set forth in the NPRM, mooted the need to litigate heat violations under the GDC.

The GDC alone is insufficient to preemptively protect workers from heat-related injury, and the high standard of proof often means no remedy even after disaster. Although OSHA has previously issued guidance on heat standards, its nonbinding nature means that employers are not required to have a heat-specific policy. Without an employer who is actively trying to prevent heat injuries, workers are more likely to suffer heat-related injuries on the job. In contrast, with a heat regulation in place, OSHA can issue a citation for failure to have a heat policy in the first place, which can act to deter and even prevent heat-related injuries.

Almost half of all farmworkers are not protected by OSHA regulations at all, even under the GDC. Due to an appropriations measure that has been renewed annually since 1976, OSHA is not permitted to enforce its regulations, standards, rules, or orders on farms that have ten or fewer employees and does not maintain a temporary labor camp.¹⁹ The vast majority of farms — over 91% — employ nine or fewer

¹⁵ 29 U.S.C. 654(a)(1).

¹⁶ Alan Ferguson, *OSHA’s General Duty Clause*, Safety & Health Mag. (Dec. 20, 2019), <https://www.safetyandhealthmagazine.com/articles/19258-oshas-general-duty-clause>.

¹⁷ *About the Commission*, Occupational Safety & Health Review Commission, <https://www.oshrc.gov/> (last visited Dec. 19, 2024).

¹⁸ *A.H. Sturgill Roofing, Inc.*, 2019 O.S.H. Dec. (CCH) ¶ 33712, 2019 WL 1099857 (No. 13-0224, 2019).

¹⁹ OSHA, Field Operations Manual, ch. 10 (2020), <https://www.osha.gov/fom/chapter-10#agriculture>.

employees, accounting for over 980,000 farmworkers, according to the most recently available data (2022).²⁰ In total, they account for roughly 45% of the national farmworker labor force.

III. Legal Justifications for the NPRM in a Post-*Loper Bright* Context

In June 2024, the majority opinion in *Loper Bright Enterprises v. Raimondo* (*Loper Bright*) overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*), a landmark opinion that mandated that the courts defer to “reasonable” agency interpretations of ambiguous language in their governing statutes.²¹ Now, under *Loper Bright*, when courts interpret ambiguous statutes, they “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority[.]”²² *Loper Bright* did leave intact the *Skidmore* deference, under which “agency interpretations ‘constitute a body of experience and informed judgment’ that may be ‘entitled to respect.’”²³

However, OSHA’s NPRM is safe from challenges under *Loper Bright*, as the legislative history specifically spoke to heat as an issue to be addressed in the statute, and because courts must still defer to agency factfinding if it is supported by substantial evidence.²⁴ OSHA has established that the “best” interpretation of the OSH Act permits OSHA to promulgate regulations regarding heat as an occupational hazard.

Prior to *Loper Bright*, agencies merely had to show that they had a “reasonable” interpretation of the statute under which they promulgated rules, and *Chevron* directed courts to accept “permissible” agency interpretations.²⁵ Now, courts are required to adopt the “best” interpretation of a statute.²⁶ By drafting rules that hew closely to the language of the OSH Act and its underlying legislative intent, OSHA has shown that the “best” interpretation of the OSH Act shows that it expressly authorizes the agency to promulgate standards regarding heat as an occupational hazard.

The legislative history of the OSH Act recognized heat as a preventable workplace hazard. The NPRM preamble points to a letter in the Legislative History of the Occupational Safety and Health Act of 1970 submitted by Senator Edmund Muskie that lists “heat” among the problems that legislation had not yet addressed.²⁷ Two years after the passage of the OSH Act, the National Institute for Occupational Safety and Health (NIOSH) recommended that OSHA issue a heat standard. Within two years, the newly-created OSHA Standards Advisory Committee on Heat Stress presented recommendations for workplace standards for hot environments. The advisory committee overwhelmingly (12 out of 15 members) agreed that a standard on occupational heat stress was warranted.²⁸ NIOSH’s *Criteria for a Recommended*

²⁰ This is a conservative estimate. Nat’l Agric. Stat. Serv., 2022 Census of Agriculture 326 (2024), https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

²¹ *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²² *Loper Bright*, at 35.

²³ *Id.* at 29 (Kagan, J., dissenting).

²⁴ *Loper Bright*, at 14 (quoting 5 U.S.C. § 706(2)(E)).

²⁵ *Id.* at 23.

²⁶ *Id.*

²⁷ Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698, 70700–01, 70703 (proposed Aug. 30, 2024).

²⁸ *Id.*

Standard, which provides recommendations to protect workers from heat stress, was updated as recently as 2016.²⁹

Loper Bright does not challenge Congress’s power to grant authority to agencies, nor does it deny Congressional grants of discretionary decision-making. Since the OSH Act explicitly allows OSHA to act with heat specifically in mind, courts are required to respect that delegation of power. Therefore, OSHA’s discretionary authority under the Occupational Safety and Health Act (OSH Act) to “develop[] and promulgat[e] occupational safety and health standards” should not be in jeopardy.³⁰

A. OSHA’s NPRM meets caselaw standards for OSHA actions.

The proposed regulation draws upon the primary cases that have shaped DOL rulemaking and fulfills the standards and requirements established by cases looking at OSHA authority. Both cases discussed below, which predate *Chevron*, address statutory interpretations of the OSH Act and were resolved without agency deference, and thus should not be ripe for challenge under *Loper Bright*. DOL still follows the standards set by each case, and would likely prevail in challenges under those principles.

The first prominent case interpreting the OSH Act is *Industrial Union Department, AFL-CIO v. American Petroleum Institute (“Benzene”)*, 448 U.S. 607 (1980). In *Benzene*, the Supreme Court held that for a new regulation to be “reasonably necessary or appropriate” under 29 U.S.C. § 652(8), DOL must first make a threshold finding of a “significant risk.” In establishing “significant risk,”

OSHA is not required to support its finding ... with anything approaching scientific certainty. ...[S]o long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data ... risking error on the side of overprotection, rather than underprotection.³¹

The preamble of the NPRM acknowledges this legal standard, and demonstrates that “a significant risk of material harm from occupational exposure to hazardous heat exists” in Section VI.³² This section pulls data from peer-reviewed studies and national and international authoritative bodies to establish its legitimacy. It furthermore dedicates Section IV to “health effects,” which is also robustly supported by peer-reviewed literature and internationally respected scientific authorities. *Loper Bright* is unlikely to affect this standard, because it was formulated by the Court without deference to the agency’s statutory interpretation.

The second case that provides a set of limiting principles to DOL’s rulemaking powers is *American Textile Manufacturers Institute, Inc. v. Donovan (“Cotton Dust”)*, 452 U.S. 490 (1981). As interpreted in *Cotton Dust*, the OSH Act requires regulations to be both technologically and economically feasible, defined as “capable of being done, executed, or effected.”³³ The NPRM analyzes, in detail, its technological feasibility in Section IX, and its economic feasibility in Section VIII(D), fulfilling the

²⁹ NIOSH, ID# 37811, Occupational exposure to heat and hot environments: revised criteria 2016 (Feb. 2016), <https://stacks.cdc.gov/view/cdc/37911>.

³⁰ 29 U.S.C. § 651(b)(9).

³¹ *Industrial Union Department, AFL-CIO v. American Petroleum Institute (“Benzene”)*, 448 U.S. 607, 656 (1980).

³² Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. at 70700–01, 70766.

³³ *Cotton Dust*, 452 U.S. at 508–09.

Cotton Dust standard. *Loper Bright* is unlikely to affect this standard, because it was formulated by the Court without deference to the agency’s statutory interpretation.

IV. Recommendations on the Proposed Rulemaking

A. Scope

- **Use additional metrics to ensure indoor workers are adequately protected from heat injury illness.**

We appreciate that the OSHA’s NPRM covers both indoor and outdoor workers. However, for nursery workers, fernery workers, and others, the distinction is somewhat arbitrary. Fernery workers, for example, may work under a porous black shade cloth or other partially closed environment that is characterized by high ambient temperatures due to the shade cloth absorbing the solar radiation and diminished air circulation.³⁴ These structures are not easily classifiable as “indoor” or “outdoor.” Under the NPRM, these structures would likely be defined as “outdoor” because its entire perimeter is not closed. We recommend that the NPRM modify its definition of “indoor” and include additional metrics such as ventilation, airflow, and cooling properties of the structure. Oregon’s heat standard, for example, includes an explicit exemption for buildings and structures that have a mechanical ventilation system that keeps the heat index below 80 degrees Fahrenheit.³⁵ By adding additional metrics to the definition of “indoors,” we can ensure that workers are provided adequate and appropriate heat protection measures, regardless of where they physically work.

- **Extend the regulation to employer-provided housing.**

Many migrant farmworkers, including workers on the temporary H-2A non-immigrant visa, live in on-farm, employer-provided housing. Under the H-2A program, for example, employers are required to provide housing to their workers while they are in the U.S. In 2024, there were 384,900 H-2A positions certified by the Department of Labor.³⁶ Workers in employer-provided housing have little control over their living conditions, which are often overcrowded and lack adequate access to air conditioning and/or filtered air. Workers who are working in high heat may not be able to adequately recover if their sleeping areas do not have cooling systems. Especially in extreme heat conditions where overnight temperatures may be above 90 degrees Fahrenheit, fans and/or open windows are not sufficient cooling systems, undermining the effectiveness of heat illness prevention measures. Employers who are responsible to protect their workers from heat injury and illness on the job should also be responsible for protecting their workers in housing that they provide and maintain. We urge OSHA to follow Oregon’s example and expand heat protections to agricultural labor housing and other employer-provided housing.

³⁴ Valerie Vi Thien Mac et al., *Heat Exposure in Central Florida Fernery Workers: Results of a Feasibility Study*, 22(2) J. Agromed. 89 (2017), <https://pubmed.ncbi.nlm.nih.gov/28118110/>.

³⁵ Or. Admin. R. § 437-002-0156 (2022).

³⁶ Off. Foreign Lab. Certification, Emp. & Training Admin., U.S. Dep’t Lab., *H-2A Selected Statistics FY 2024* (Sept. 30, 2024), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2024_Q4.pdf.

B. Heat Injury and Illness Prevention Plan

- **Include specific language to ensure HIIPP is accessible to all employees**

We appreciate that the NPRM includes a language accessibility requirement for the HIIPP, but it does not specify any additional accessibility requirements. While the majority of farmworkers are Spanish-speaking, there are a growing number of workers who are from Indigenous communities in Mexico and Guatemala. These workers are often limited Spanish proficient and have their own distinct languages and cultures. Further, the average worker has a 9th grade education.³⁷ It is not sufficient to require language accessibility. To ensure workers fully understand the HIIPP, we recommend that there is specific language requiring culturally and linguistically appropriate formats to ensure accessibility for all workers, regardless of literacy level.

C. Heat triggers - initial heat and high heat

- **Require a minimum schedule for rest breaks at the initial heat trigger**

It is vitally important that workers are provided paid rest breaks at both the initial and high heat triggers. Currently, the proposed regulation only requires paid rest breaks after temperatures reach the high heat trigger. At the initial heat trigger, the proposed regulation states that employers only need to allow and encourage rest breaks on an as needed basis. For farmworkers, who are often paid on a piece rate and are fearful of employer retaliation, it is unrealistic to expect that they will ask for a rest break if it is not mandated, even though the rest break would be paid. Workers are often discouraged from taking a break to maximize their productivity; according to an H-2A worker in North Carolina, “the boss didn’t like when we stopped to take a breath or go into the shade for a few minutes.”³⁸ The preamble of the NPRM cites several studies where farmworkers expressed reluctance to take breaks due to pressure from their employer.³⁹ A mandated minimum schedule of paid rest breaks at the initial heat trigger would ensure that workers who are experiencing early signs of heat stress are able to take the necessary measures to prevent a worsening of their condition.

- **Require the use of the wet bulb globe temperature as the heat trigger measurement**

Heat stress is a function of 1) ambient temperature, 2) humidity, 3) radiant heat exposures, 4) wind speed, 5) work load, and 6) clothing. The Heat Index, proposed by OSHA as the primary metric, only considers the first two factors. The wet bulb globe temperature (WBGT) also includes radiant heat and wind speed. Radiant heat is a very significant factor in estimating heat load. Wind speed can be an important factor at lower temperatures where it can have a cooling effect. Clothing is primarily a factor for workers who must wear impermeable clothing that does not allow sweat to evaporate, including pesticide applicators, fernery workers, and others who use some sort of personal protective equipment (PPE). While the proposed OSHA rule allows employers to use the WBGT as the heat trigger measurement, it is not

³⁷ Emp. & Training Admin., U.S. Dep’t Lab., Findings from the National Agricultural Workers Survey (NAWS) 2021-2022, Research Report no. 17, Sept. 2023, <https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf>.

³⁸ Aaron Sánchez-Guerra & Celeste Gracia, *Climate change is fueling extreme heat. For outdoor workers, that means life-threatening work conditions*, N.C. Pub. Radio (Oct. 1, 2024), <https://www.wunc.org/environment/2024-10-01/climate-change-extreme-heat-outdoor-scorched-workers>.

³⁹ Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. at 70788.

required. Requiring the use of the WBGT and including clothing and workload adjustments would result in a much more accurate assessment of risk and prevent many more heat-related illnesses. WBGT monitors have come down in price and are relatively affordable and the costs will drop as well if OSHA were to require them. The American Industrial Hygiene Association (AIHA) introduced a heat stress app in 2024 that is available on google play and apple store. It provides real time WBGT as well as five-day WBGT forecasts. In addition, the National Weather Service has been testing providing available WBGT data on their website.

- **Include an acclimatization schedule for new and returning workers**

As OSHA cautions on its heat safety prevention page, almost half of all heat-related deaths occur on a worker's first day and more than 70% occur during the first week on the job.⁴⁰ Unacclimatized workers are at the highest risk of HRI and death.⁴¹ Therefore acclimatization for new and returning workers is critical to prevent HRI. For new and returning workers, an acclimatization protocol should include both the requirements of paragraph f (high heat trigger requirements) and a gradual acclimatization schedule. Workload increases metabolic heat that when added to environmental heat exposure, increases the total heat stress to workers. Many new and returning workers may work harder because they want to ensure they do not lose their job. Workers with precarious immigration status may be particularly vulnerable. Working harder increases their workload. We concur with comments from the American College of Occupational and Environmental Medicine (ACOEM) that the gradual acclimatization schedule described for new employees (1910.148(7)(B)) also be required for returning employees. A gradual acclimatization schedule is the only way to control and safely increase workload.

- **Clarify responsibility for ensuring acclimatization of temporary workers**

The majority of H-2A workers arrive during the summer.⁴² According to data analysis by the American Immigration Council, the U.S. counties with the highest number of H-2A workers are in some of the hottest regions in the country; in Arizona, Georgia, New Mexico, and Texas, over a quarter of H-2A workers are required to work during months when the local temperature exceeds 90 degrees Fahrenheit.⁴³ Further, a growing number of H-2A workers are hired by Farm Labor Contractors (FLCs) and 22% of crop workers were employed by FLCs in 2022.⁴⁴ Employers sometimes use FLCs to evade responsibility under employment laws. We recommend that OSHA clarify that employers are responsible for confirming that temporary workers (including migrant workers under FLCs) are trained using acclimatization protocols.

- **Implement a mandatory buddy system at the initial and high heat triggers and during acclimatization period.**

⁴⁰ OSHA, U.S. Dep't Lab., *Heat Safety Prevention*, <https://www.osha.gov/heat-exposure/protecting-new-workers> (last visited Jan. 6, 2024).

⁴¹ Brenda Jacklitsch et al., NIOSH, CDC, *Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments*, DHHS (NIOSH) Publication 2016-106, Feb. 2016.

⁴² Off. Foreign Lab. Certification, *supra* note 36.

⁴³ *Amid Deadly Heat, Migrant Farm Workers are Keeping Americans Fed*, Am. Immigr. Council (July 2, 2024), <https://www.americanimmigrationcouncil.org/news/amid-deadly-heat-migrant-workers-keeping-americans-fed>.

⁴⁴ NAWS, *supra* note 37.

The proposed rule calls for a buddy system at the suggested high heat trigger. This requirement should be expanded. A buddy system should be mandatory for both unacclimatized workers and workers working in high heat which should include the initial heat trigger of 80 degrees Fahrenheit. Workers laboring alone in high heat environments do not have other workers to observe for signs and symptoms of HRI. Workers may not be aware of their symptoms or be able to call for help as they may experience confusion and disorientation as a result of the HRI.

D. Worker training

- **Include requirements that trainings are in a language and format accessible to workers**

Comprehensive trainings are critically important to ensure that workers are knowledgeable about heat injury illness and prevention and their rights under the regulation. The proposed regulation does not specify how the training should be provided to workers beyond that it should be provided in a language and literacy level each employee, supervisor, and heat safety coordinator understands. We recommend that OSHA be more specific and require trainings that are in languages and formats that are culturally and linguistically accessible to workers. We encourage OSHA to look at the training requirements in the EPA Worker Protection Standard as it finalizes the NPRM.

- **Require emergency response information as part of the worker training**

The training should include information about how to handle heat-related emergencies. Required training content should include a review of the employer's emergency response plan for workers experiencing HRI. This would include how to handle emergency incidents where a worker is experiencing HRI. For example, the worker training should include the location of supplies and methods to cool an individual suffering from HRI, and who has the authority and responsibility to contact emergency medical services and/or transport an affected individual to receive medical care.

- **Clarify that employers or supervisors should provide information about the HIIPP and retaliation protections**

It is not clear in the NPRM who is responsible for providing the heat safety training to workers. While the heat safety coordinator may be best suited to provide information on heat stress hazards and the signs and symptoms of heat-related illness, an employer or supervisor would be the most effective person to provide information on workers' rights and the standard's retaliation protections. As discussed in this comment, farmworkers are often reluctant to assert their rights due to fear of retaliation, which can include firing and blacklisting. Workers are more likely to assert their rights if the employer tells them that they have these rights and that they will not retaliate against them if they report violations. We recommend OSHA clarify employers' role in their worker training on the HIIPP and that they require an employer or supervisor provide information directly to workers on their rights under the regulation.

E. Retaliation protections

- **Strengthen retaliation and whistleblower protections**

Retaliation in agriculture is well-documented. Legal services providers and other community partners regularly share incidents of workers who were fired or blacklisted because they asserted their workplace rights. Given the well-documented prevalence of health and safety related retaliation, we recommend OSHA develop an enforceable provision that expressly prohibits employer retaliation for workers who assert their rights under this rule. Such a provision will provide an effective means for protecting affected workers when they seek to access these rights, over and above other protections that may be otherwise available to them under the law.

F. Other

- **Include enhanced protections for children (under 18), pregnant, and elderly workers**

Children, pregnant, and elderly individuals have enhanced vulnerabilities to heat-related illness and injury. In 2008, a 17-year-old pregnant farmworker woman died of a heat stroke while working in the fields in California.⁴⁵ According to the National Agricultural Workers Survey, 7% of workers are 14 to 19 years old and 18% are 55 or older.⁴⁶ There are approximately 300,000 child farmworkers.⁴⁷ The proposed regulation does not provide any enhanced protections for these populations of workers. We encourage OSHA to specify protections for children, pregnant, and elderly workers in the final regulation. Some recommendations include a lower heat trigger and additional mandatory rest breaks.

- **Apply the regulation to all employers, even small employers with 10 or fewer employees**

OSHA's small farm exemption prevents OSHA from enforcing its regulations on farms with 10 or fewer employees. Yet this exemption is legislative, not statutory and can be changed through the appropriations process. Many farmworkers and other workers would be left unprotected if the regulation applies only to employers with more than 10 employees. As OSHA finalizes this regulation, it is important that it covers all employers, even small employers. We believe that modifications to the regulations can be made to support its implementation by small employers.

V. Conclusion

We appreciate the opportunity to comment on the Heat Stress Standard and thank the Occupational Health and Safety Administration for taking action to address the growing risk of excessive heat exposure. Farmworkers and other workers urgently need these protections. We urge OSHA to incorporate our recommendations and to promptly finalize and rigorously enforce this standard.

Respectfully submitted,

⁴⁵ Maricela De La Cruz, *How farm workers' rights have strengthened since the 2008 death of a pregnant 17-year old Maria Isavel Vazquez Jimenez*, KCRA (Aug. 23, 2022), <https://www.kcra.com/article/farm-workers-rights-pregnant-17-year-old-death-2008-maria-isavel-vasquez-jimenez/40950637>.

⁴⁶ NAWS, *supra* note 37.

⁴⁷ Taylor J. Arnold et al., *Understanding Latinx Child Farmworkers' Reason for Working: A Mixed Methods Approach*, 38(6) *J. Adolescent Rsch.* 1142 (2022), <https://journals.sagepub.com/doi/10.1177/07435584221144956>.

Farmworker Justice
Migrant Clinicians Network
Association of Farmworker Opportunity Programs (AFOP)
Centro de los Derechos del Migrante, Inc. (CDM)
Center for Biological Diversity
Clean+Healthy
Comite de Apoyo a los Trabajadores Agricolas
CRLA Foundation
Economic Policy Institute
Farmworker Association of Florida
FarmSTAND
Friends of Farmworkers, Inc. d/b/a Justice at Work
Health Outreach Partners
Justice in Motion
Legal Aid Chicago
Michigan Immigrant Rights Center
National Center for Farmworker Health
National Immigration Law Center
Polaris
Toxic Free North Carolina
UFW Foundation
Worker Justice Center of New York