

CONSTRUCTION INDUSTRY SAFETY COALITION

August 8, 2019

The Honorable Alma S. Adams
Chairwoman
Subcommittee on Workforce Protections
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Bradley Byrne
Ranking Member
Subcommittee on Workforce Protections
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Adams and Ranking Member Byrne:

The undersigned member associations of the Construction Industry Safety Coalition (hereinafter referred to as the “CISC”) appreciate the opportunity to submit our comments for the record for the July 11, 2019 Subcommittee hearing “From the Fields to the Factories: Preventing Workplace Injury and Death from Excessive Heat.”

The CISC was formed several years ago to provide comments on Occupational Safety and Health Administration (“OSHA”) regulatory initiatives from the wide-range of construction trades affected by OSHA standards. The CISC speaks for small, medium, and large contractors; general contractors; subcontractors; union contractors; etc. The CISC has submitted comments on a variety of OSHA rulemaking initiatives.

The CISC recognizes the potential hazards of heat exposure and strongly believes that employers should take steps to ensure that employees are protected. Many CISC member associations have published guidance material to employers to inform them of the hazards of excess heat exposure and measures that can be implemented to protect employees. Many of these measures include common sense solutions. For example, construction employers frequently schedule work shifts to begin earlier in the morning so that the shift ends in the early afternoon, before the hottest part of the day.

Notwithstanding this, the CISC has significant concerns with H.R. 3668, the “Asuncion Valdivia Heat Illness and Fatality Prevention Act of 2019”:

- *First*, issues of heat exposure and the means to address it on the variety of construction worksites across the country are extremely complex. H.R. 3668, which essentially

dictates how and what should be included in an OSHA standard for heat exposure, does not account for the complexities of the issue.

- *Second*, how “excessive heat” is defined in the legislation depends upon personal characteristics that would make compliance with any OSHA standard difficult and potentially infringe upon the privacy interests of employees. Defining “excessive heat” as heat at “levels that exceed capacities of the body” is not a standard that can be objectively applied. It has the potential to create significant compliance difficulties as employers must make a judgement as to what constitutes “excessive heat” based upon an individualized assessment of the health condition of their workers.
- *Third*, requiring OSHA to publish a standard that provides “no less protection than the most protective heat prevention standard adopted by a State plan” is also problematic. A few states have implemented heat exposure standards and those states address the problem very differently. It would be almost impossible for OSHA to determine which state approach to heat exposure was more or less protective than another state’s approach.
- *Fourth*, the CISC is concerned that the time frames set forth in the legislation for OSHA to issue proposed and final rules would not provide sufficient time for the Agency to complete important rulemaking steps. This includes convening a small business review panel under the Small Business Regulatory Enforcement and Fairness Act (“SBREFA”) and engaging in meaningful consultation with the Advisory Committee on Construction Safety and Health (“ACCSH”), the standing advisory committee created to advise the Agency on all construction proposed rules.

Background on H.R. 3668

H.R. 3668 seeks to direct OSHA to issue an occupational safety and health standard to protect workers from heat-related injuries and illnesses. The bill requires OSHA to introduce a proposed standard on the prevention of occupational exposure to excessive heat within 2 years from the date of enactment of the legislation. OSHA would then be required to issue a final standard within 42 months after the date of enactment. According to the bill, the final standard must provide no less protection than the most protective heat prevention standard adopted by an OSHA State-plan State.

The final standard must also take into consideration the “NIOSH Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments” published in 2016. Covered employers would be expected to develop, implement, and maintain heat illness prevention plans for covered employees, which must be tailored and specific to hazards in the workplace, and published in English (and the language understood by a majority of the employees at the workplace, if such language is not English).

The plans would need to include procedures for initial and regular monitoring of employee exposure; provision of water, paid rest breaks, and access to shade or cool-down areas; emergency response; acclimatization; and hazard prevention. Employers would be required to provide annual training and education to covered employees who may be exposed to high heat levels and training

and education to covered employees who are supervisors. Each covered employer is also expected to adopt a policy prohibiting any person from discriminating or retaliating against any employee for exercising any rights under the standard, which would be enforced in the same manner as other safety and health standards issued under Section 6(b) of the Occupational Safety and Health Act of 1970 (“OSH Act,” “Act,” or the “Statute”), rather than through the anti-discrimination provisions of the Act set forth in Section 11(c) of the Statute.

Many of the requirements of the final standard would be triggered where there is “excessive heat.” “Excessive heat” is defined as including “outdoor or indoor exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality (including heat stroke, heat exhaustion, heat syncope, heat cramps, or heat rashes).” Finally, should OSHA fail to promulgate a proposed standard in 2 years from the date of enactment, the legislation requires that an interim final standard be adopted that also requires employers to develop a heat prevention plan containing the same basic requirements as described above.

The CISC shares the goals of H.R. 3668 – to protect employees from exposure to excess heat and to prevent heat illness from occurring in construction employees. However, the CISC has significant concerns with the approach taken in the legislation to accomplish these goals.

1. H.R. 3668 Does not Account for the Complexity of Issues Associated with Heat Exposure.

Determining when heat exposure becomes a hazard is exceedingly difficult. There are numerous factors to consider when determining at what point or under what conditions the potential for “heat” becomes a hazard. This is particularly acute in the construction work environment, which is frequently outdoors, highly variable, and changes throughout the course of a day or shift.

There are a number of tools and resources available to assess whether there is a heat hazard, but many do not consider the full range of environmental and work conditions that could impact the determination. For example, OSHA established a Regional Emphasis Program for Heat Illness in 2015 for OSHA Region VI covering Arkansas, Louisiana, Texas, Oklahoma, and parts of New Mexico. *OSHA Regional Emphasis Program for Heat Illness*, CPL 2 02-00-027, October 1, 2015. The emphasis program focuses on heat advisories issued by various National Weather Services offices in the specific region. However, this program is not implemented in other regions across the country and heat advisories themselves are often very general and do not account for site-specific environmental conditions.

The complexity of the issue is further exemplified by the NIOSH criteria document cited in the legislation. It is a 160-page document comprehensively analyzing from NIOSH’s perspective when heat exposures can become dangerous, and steps to take based on heat level to protect employees. The NIOSH document involves more than simply considering local National Weather Advisories, or even Heat Index Tables. It is a useful guide regarding heat, but it also demonstrates how determining when heat becomes dangerous and how to address that danger is very difficult.

The CISC believes that H.R. 3668 does not fully consider the range of issues presented with identifying heat as a hazard and then what is the appropriate response to the hazard. The legislation uses words such as “high heat” and “excessive heat,” but these are either undefined (in the case of “high heat”) or raise very complicated compliance issues (in the case of “excessive heat” as described below). A requirement for employers to implement a “plan” to address heat exposure is non-controversial in the abstract, but the legislation avoids difficult issues such as when certain controls must be implemented and how and to what extent they must be implemented.

On a daily basis, construction contractors throughout the country work outdoors, subject to a wide range of environmental conditions. The environmental conditions can involve temperature, wind, sun, and humidity. Determining when those factors become hazardous and specifying in a regulation how to address the factors is very complicated. H.R. 3668, while well-meaning, does not fully consider this complexity.

2. Determining what Constitutes “Excessive Heat” Depends upon Individual Risk Factors.

Further complicating the issue, H.R. 3668 seemingly defines “excessive heat” based upon individual characteristics of employees. The legislation does not define “excessive heat” by an objective standard, such as a specific temperature or even by reference to a heat index. Instead, it defines “excessive heat” as “exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality.” This approach seems to define the hazard based upon personal characteristics of employees, as every person will react differently to heat based upon a number of personal risk factors (weight, body fat, other health conditions, etc.)

Analyzing personal health conditions to determine whether there is excessive heat would place an incredibly difficult burden on employers. It would also potentially infringe upon employee privacy rights under the Americans with Disabilities Act. The CISC is very concerned that H.R. 3668 pushes employers in this very direction. The CISC also notes that two states that have implemented specific outdoor heat standards or heat illness prevention standards do *not* require employers to assess personal conditions. *See* California, Cal. Code Regs., tit. 8 § 3395(h)(1)(A) (addressing personal risk factors for heat illness only in the context of training employees so that they are aware of the potential personal factors that may impact their risk and making clear in rulemaking that the standard does not require employers to get personal information from employees, and employers are neither expected nor encouraged to do this); Washington, WAC 296-62-09560(1)(b) (equally addressing personal factors as part of training to provide general awareness of these factors to employees and specifically stating that such information is for the employee’s personal use).

H.R. 3668 seems to envision an OSHA requirement – and thus a requirement placed upon employers – to delve into personal characteristics of employees and use that information to judge whether heat is “excessive” in a particular case. The CISC disagrees with this approach.

3. Requiring OSHA to Establish a Standard that is No Less Protective than the Most Protective State Standard is Virtually Impossible to Implement.

H.R. 3668 correctly notes that several states have implemented heat illness prevention standards, including California, Washington, and Minnesota. The bill, however, goes further and requires that any final standard put forward by OSHA shall “provide no less protection than the most protective heat prevention standard” adopted by an OSHA State-plan State. Unfortunately, it would be virtually impossible for OSHA to determine which approach to the issue of heat at the state level is “the most protective.”

To date, the state approaches to heat illness have differed significantly. For example, California, recognizing the need for simplicity, relies solely on outdoor temperature to trigger various requirements under its existing rules. The standard defines temperature as “the dry bulb temperature in degrees Fahrenheit obtainable by using a thermometer to measure the outdoor temperature in an area where there is no shade.” Cal. Code Regs., tit. 8, § 3395. Washington State, on the other hand, has three “outdoor temperature action levels” based on the type of clothing worn by employees. WAC 296-62-09510. Both of these approaches may make sense for the states involved, but it is virtually impossible to determine which is more protective than the other, as H.R. 3668 would require OSHA to do.

This approach also turns the entire structure of the OSH Act on its head. Under the OSH Act, federal OSHA is authorized to issue safety and health standards and OSHA State-plan States must then adopt those standards or develop their own standards that are at least as effective as the federal ones. 29 U.S.C. § 667. Here, H.R. 3668 limits OSHA’s rulemaking authority by requiring it to follow the lead of current or future state standards in promulgating a standard that is no less protective than the most protective State-plan State rule. Rather than federal OSHA setting a floor for the states, H.R. 3668 has states setting a floor for the rest of the country. This is contrary to the OSH Act and could allow one state with certain climate and weather characteristics essentially to impose requirements on another state with entirely different climate and weather characteristics.

4. The Time Prescribed for OSHA to Issue a Final Standard is Insufficient to Ascertain Meaningful Input in this Complex Area.

Finally, H.R. 3668 contemplates that a final standard will be promulgated within 42 months of the bill being enacted into law. The CISC respectfully believes that this time period is too short for the Agency to fully consider stakeholder input and conduct required analyses for any rule. Developing a heat exposure standard would significantly affect employers across a wide range of industries and OSHA should be allowed to meticulously develop such a standard without added pressure from Congress to speed up the process.

The CISC believes that any federal heat exposure standard will undoubtedly have a significant impact on a substantial number of small entities, thus triggering the review procedures required by the SBREFA. Most CISC member associations are dominated by small businesses and it is vitally important that small entities be given the opportunity to comment on any approach proposed by the Agency and that the Agency have time to meaningfully address those comments and make changes to any proposed approach, as appropriate.

Even if any standard does not exceed the triggering threshold, the CISC encourages OSHA to convene a “SBREFA-like” panel to gather small entity views on the costs and impacts of a heat exposure proposal. As OSHA can attest, small entity input at the earliest stages of a rulemaking can provide valuable insight and data to OSHA regarding how a rule should be structured, and the costs and economic impacts of such a rule. When OSHA opens channels for input from small entities that may be affected by proposed standards, OSHA is more likely to issue a final rule that will have maximum beneficial impact with minimized burden across affected industries. The CISC is very concerned that the timeframes established in the legislation will not provide for meaningful small business input.

In addition, the CISC feels strongly that any OSHA standard on heat exposure be fully vetted by OSHA’s Advisory Committee on Construction Safety and Health (“ACCSH”).¹ Given the significant impact that any standard would have on the construction industry, the CISC believes that OSHA should work in close consultation with ACCSH during the standard’s development. This should involve more than the Agency simply presenting to ACCSH what it proposes to include, but instead should involve a true back-and-forth and consultation with the Committee. Again, as with the small business feedback, the CISC is very concerned that the timeframes for completion of a standard do not allow for this important interaction.

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The CISC appreciates the Subcommittee’s efforts in trying to develop legislation to protect employees from heat exposure and shares the Subcommittee’s goal of ensuring employees are fully protected from the hazards of heat. However, for the reasons set forth above, the CISC has significant concerns with H.R. 3668 as currently drafted.

CISC member associations will continue to provide guidance and compliance assistance material to construction contractors regarding heat exposure and heat illness prevention. Getting the “word out” by trade associations, OSHA, NIOSH, and other stakeholders is critically important to prevention in this area. Furthermore, should an employer not appropriately address heat hazards

¹ ACCSH is a standing advisory committee initially created by Congress pursuant to Section 107 of the Construction Safety Act (or the Contract Work Hours and Safety Standards Act). 40 U.S.C. § 3701 *et seq.* ACCSH advises the Agency on the promulgation of standards applicable to the construction industry. This consultation is mandatory. *See* 29 C.F.R. § 1911.10(a) (“The Assistant Secretary shall provide the committee with any proposal of his own ... together with all pertinent factual information available to him, including the results of research, demonstrations, and experiments.”)

in the workplace, OSHA can bring an enforcement action against the employer under Section 5(a)(1) of the OSH Act, which the Agency has done on numerous occasions.

The CISC would be happy to meet with the Subcommittee to discuss this letter, our views on heat exposure hazards, and to answer any questions the Subcommittee may have.

Sincerely,

American Road & Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers & Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
Mechanical Contractors Association of America
National Association of Home Builders of the United States
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute
The Association of Union Constructors
Tile Roofing Industry Alliance