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# Facing the Heat Alone: How the Absence of an Imminent National Heat Prevention Standard Puts Workers at Risk

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INTRODUCTION

In 2022, San Antonio experienced its hottest June on record.1 In a typical June, San Antonio experiences an average of two days when the temperature exceeds 100 degrees,2 yet June 2022 brought seventeen days of triple-digit heat to the city.3 During one of these triple-digit degree days, twenty-four-year-old Gabriel Infante was working outdoors laying fiber optic cables for B Comm Constructors.4 While working, Infante became confused, dizzy, and eventually lost consciousness.5 A concerned coworker noticed Infante exhibiting symptoms of heatstroke and attempted to cool him down.6 Unfortunately, the coworker’s efforts were unsuccessful, and Infante died shortly after arriving at the hospital.7 Gabriel Infante had not even received his first paycheck from B Comm Constructors.8

According to the Center for Disease Control, an internal body temperature of 103 degrees Fahrenheit or higher is a prominent symptom of heatstroke;9 the day he died, Infante’s internal temperature reached 109.8 degrees.10 Since 2011, Texas has been home to forty-two heat-related deaths on the job.11 Rather than legislati


3. Id.


5. Id.

6. Id.

7. Id.

8. Id.


10. Id.

11. Francisco Uranga, Limited Regulations Make Texas Workers Responsible for Preventing On-the-Job Heat Injuries, TEX. TRIB. (July 12, 2023, 5:00 AM),
heat-related deaths, Texas has barred local ordinances from enacting such measures through the Texas Regulatory Consistency Act. More-
over, there is no federal standard for heat prevention that requires Texas’s workplaces to maintain or establish heat prevention stand-
ards. Thus, workers in Texas—along with workers in the forty-five other states that lack heat prevention standards—are left to fend for themselves in the heat.

It comes as no surprise that the United States, along with the rest of the world, is experiencing unprecedented levels of heat. Nationally, there have been 436 deaths as a result of workplace heat exposure since 2011. The World Meteorological Organization measured 2022 as the “fifth or sixth warmest year on record,” and 2023 as the hottest year on record. With global temperatures continuing to rise at an alarming
rate, the problem of addressing unsafe heat in the workplace remains incomplete. Specifically, there is a concerning lack of heat prevention standards to protect workers across the country from the heat.

The purpose and aim of the Occupational Health and Safety Act (“OSHA”) is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .” Yet, OSHA has failed to enact a national heat standard. Despite the growing prevalence of workers like Gabriel Infante facing illness or death-inducing heat levels, workers must rely on other regulations for protection. In the absence of an on-point heat standard, OSHA determines liability for heat-related incidents using its “General Duty Clause.” The General Duty Clause mandates that employers ensure that their place of employment is “free from recognized hazards that are causing or likely to cause death or serious physical harm to [] employees.” Following Gabriel Infante’s death, OSHA issued a citation against Infante’s employer, B Comm Constructors, under the General Duty Clause, stating:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were not protected from the hazard of high ambient heat while performing jobs duties. On or about June 23, 2022, and at times prior thereto, employees were exposed to the hazard of high ambient direct heat from the sun while performing softscaping to bury internet fiber optic lines. Such exposures are likely to lead to the development of serious heat-related illnesses such as, but not limited to, heat cramps, heat stress, heat exhaustion, and heat stroke.

20. Evidence, supra note 16.
Despite OSHA’s explicit condemnation of B Comm Constructors due to its failure to recognize apparent heat hazards, its means of enforcement remained limited by the General Duty Clause. Ultimately, the company was only issued a citation of $13,052 for failing to prevent against Infante’s death.

In the face of rising temperatures and the lack of regulatory oversight, the most vulnerable workers are left with little protections. While select states have existing protections and others are moving closer to implementing regulations, many states have no protections in place and worse, no plans to create them. Moreover, as demonstrated in the case of Texas, many states remain ardently resistant to enacting regulations. Therefore, in the absence of proper workplace protections, workers like Gabriel Infante will be forced to endure heatstroke-inducing temperatures without any assurances for their safety.

Part I of this Comment will review the history and purpose of OSHA and the rising demand to address the devastating toll of climate change on workers. Then, Part II will explore the proposed national heat standard and compare its elements with existing and proposed state regulations. Additionally, this Comment will compare states with existing heat prevention standards alongside states which have failed or chosen not to act. Finally, in Part III, this Comment will propose that OSHA enact an emergency temporary standard (“ETS”). Moreover, the justification for this proposal will, in part, rely on the Supreme Court’s decision in National Federation of Independent Business v. Department of Labor in asserting the suitability of a national heat standard as an ETS. Specifically, this Comment will argue that the Supreme Court’s reasoning in National Federation of Independent Business will serve as a cushion for the inevitable resistance the ETS will experience when challenged in court. Additionally, this Comment will argue that a need for a temporary heat standard satisfies the

26. See id.
27. Id. Infante’s mother brought a suit against B Comm Constructors seeking one million dollars in damages. Hilliard Law Responds to Lawsuit Filed Against B Comm Constructors Highlighting Tragic Consequences of HB2127 on Texas Citizens, HILLIARD LAW (July 14, 2023), https://hilliard-law.com/gabriel-infante/. As of the date of this publication, the lawsuit remains in the pre-trial stage and has not settled. Id.
28. See Uranga, supra note 11.
29. Id.
requirements for an ETS because the rising hazard of heat presents a grave danger to employees and the implementation of protections is necessary.

I. THE UNPRECEDENTED TOLL OF HEAT WAVES

In the next five years, global temperatures are expected to surge.31 Whereas 2023 was the hottest year on record,32 there is a 98% likelihood that 2023–2027 will be the warmest five-year period on record.33 Moreover, the length, intensity, and frequency of heat waves have risen substantially within the past few decades.34 The average number of heatwaves has increased significantly over the last eighty years, from an average of two per year, to more recently an average of six per year starting in 2020.35 Furthermore, unusually devastating heatwaves which would be “virtually impossible without human-caused climate change,” will become more commonplace.36 Extreme heat waves that occurred only once every half-century will become something people experience at least once a decade.37 These extreme heat waves have deadly effects, and will continue to increase as extreme weather events

32. Dickie et al., supra note 19.
33. Global Temperatures Set to Reach New Records In Next Five Years, supra note 31.
35. Id.
In turn, rising temperatures will inevitably threaten the well-being of communities and workers across the country.

A. Alarming Degrees of Unpreparedness for the Heat

In 2023 alone, more than 2,300 heat records across the country were shattered. According to experts, unless the global community “rapidly” stops utilizing outdated forms of energy, such as burning fossil fuels, the situation will continue to deteriorate. The rising number of heat waves predominately impacts southern states. For example, over the next thirty years, states like Florida, Arizona, and Texas could face more than seventy consecutive days of triple-digit heat in a given year. Likewise, in the summer of 2023, Phoenix, Arizona, experienced twenty-six consecutive days where the temperature exceeded 110 degrees Fahrenheit. Prospectively, areas along the Gulf Coast will endure over 30 additional days above 100 degrees Fahrenheit by 2053. Inevitably, such unprecedented levels of heat will wreak havoc on employees in states which lack heat prevention standards. In turn, the unprecedented levels of summer heat present an immediate threat to communities across the country.

39. Id.
43. Frazin, supra note 40.
From June 25, 2021 to July 2, 2021, the Pacific Northwest endured “unprecedented heatwaves.” At the peak of the heatwave, Portland, Oregon faced an all-time record of 116 degrees Fahrenheit. Across the Pacific Northwest, many locations broke temperature records by more than five degrees Celsius. Despite weather forecasts accurately predicting the heatwave, the actual heat exceeded expectations. The unbearable heat wrought 100 heat-related deaths in Washington and eighty-three heat-related deaths in Oregon. While most of the heat-attributable deaths occurred inside residences, the devastating event illustrated the immediate demand for heat preparation and protection for others, including workers.

B. Heat’s Toll on Human Health

Extreme heat causes more than an estimated 1,220 deaths annually. Inevitably, rising temperatures present a serious threat to workers. Along with rising temperatures comes an increase in heat-related

45. Rachel White et al., The Unprecedented Pacific Northwest Heatwave of June 2021, NATURE COMM 1 (Feb. 9, 2023), https://doi.org/10.1038/s41467-023-36289-3.


47. White et al., supra note 45.

48. Karen A. McKinnon & Isla R. Simpson, How Unexpected Was the 2021 Pacific Northwest Heatwave?, AGU (Sept. 15, 2022), https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2022GL100380#:~:text=very%20extreme%20events,Plain%20Language%20Summary,high%20temperatures%20were%20so%20extreme. In anticipation of this heatwave, forecasts indicated an extreme heatwave which would likely break daily temperature records. Id. However, the observed highs were often 1–3 degrees Celsius higher than the forecasts indicated. Id.

49. White et al., supra note 45.

50. Id.; Townsend & Evans, supra note 46 (finding that a “[l]ack of sufficient cooling infrastructure contributed to the death toll too, as many homes in the area lack air conditioning.”).

illnesses. Exposure to unnaturally high temperatures leads to heat stroke and other heat-related illnesses. Once exposure begins, heat illness sets in rapidly and within ten to fifteen minutes, the body can lose its ability to cool itself. When workers are first exposed to scorching temperatures, they initially display symptoms including “increased core temperatures and heart rates, headache or nausea, and other symptoms of heat exhaustion.” For example, fatigue occurs when workers engage in physical activity in temperatures ranging from eighty degrees Fahrenheit and above. Prolonged exposure to heat may also cause physiological stress. Starting at seventy-nine degrees Fahrenheit, people experience a decline in cognitive performance.

Individuals with underlying conditions are particularly susceptible to heat. Heat increases the probability of heart attacks, enhances the effects of asthma, and irritates the lungs, making it harder to breathe. Older people with cardiovascular diseases are particularly vulnerable to

52. Id.
54. BRENDA JACKLITSCH ET AL., DEP’T OF HEALTH & HUM. SERVS., CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO HEAT AND HOT ENVIRONMENTS 31 (2016) [hereinafter NIOSH CRITERIA FOR A RECOMMENDED STANDARD].
55. Ahmed & Muyskens, supra note 53.
58. See Extreme Heat: Staying Safe If You Have Health Issues, HARVARD HEALTH PUBL’G (July, 13, 2023), https://www.health.harvard.edu/blog/extreme-heat-staying-safe-if-you-have-health-issues-202108062563#:~:text=Heat%20may%20also%20influence%20symptom,insulin%20pumps%2C%20and%20glucose%20monitors%20(“Heat%20combined%20with%20humidity—or%20high%20temperatures%20alone—can%20make%20it%20difficult%20for%20your%20body%20to%20cool%20off%20sufficiently%2C%20especially%20if%20you%20have%20a%20chronic%20health%20condition.”).
59. Id.
the effect of heat on their health.\textsuperscript{60} Further, for diabetic people, high heat increases the difficulty to regulate body temperature and blood glucose.\textsuperscript{61}

Moreover, workers not provided with an acclimatization period\textsuperscript{62} are prone to even higher risks.\textsuperscript{63} Nearly half of all heat-related employee deaths happen on an employee’s first day at work.\textsuperscript{64} After repeated exposure to such extreme temperatures, and with proper procedures in place, workers can develop beneficial adaptations such as “increased sweating efficiency . . . greater sweat production, and lower electrolyte concentration.”\textsuperscript{65} Undeniably, extreme, hot weather can bear immense harm to outdoor workers.

II. THE UNDERLYING INFRASTRUCTURE OF OSHA’S RULEMAKING

OSHA has the power to establish permanent and emergency standards.\textsuperscript{66} The path to creating a permanent OSHA standard is a long and winding process comprising of seven main stages.\textsuperscript{67} The first stage involves conducting the preliminary rulemaking decision, which ranges from twelve to thirty-six months.\textsuperscript{68} This stage typically begins when the need for a new standard is identified and various studies have been conducted on the matter.\textsuperscript{69} In the second stage, OSHA begins developing the proposed rule; this process also varies from twelve to thirty-six

\begin{itemize}
  \item \textsuperscript{60} Heat and Health, supra note 56.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} NIOSH Criteria for a Recommended Standard, supra note 54, at 34.
  \item \textsuperscript{66} Mark M. Hager & Randy S. Rabinowitz, Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada, 33 CORNELL INT’L L.J. 373, 378 (2000).
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Hager & Rabinowitz, supra note 66, at 379, 381.
\end{itemize}
months. Once the proposed rule is developed, it is then published at stage three, where the range from first obtaining approval to publish all the way towards sending the proposed rule for publication takes two to three months. After the proposed rule is published, stage four involves a six to twenty-four-month period of receiving and reviewing public comments and creating a summary of the comments. At stage six, OSHA publishes its final rule, which it submits to the Federal Register for publication. Occurring after the rule is promulgated, stage seven demands the development of a compliance guide, training material, letters of interpretation, and responding to legal action. Despite the fact that the initiation of this standard-making process is predicated on an identified pressing need for such a standard, the journey to develop a standard may span upwards of a decade.

In recognizing the meticulous and drawn-out nature of the permanent standard rulemaking process, OSHA provides for a temporary fix. If the creation of a standard is necessitated based on a “grave danger” and is “necessary,” OSHA permits the creation of an emergency standard, an ETS, to circumvent the notice and comments requirements. Once an ETS is published, it takes immediate effect and becomes the framework for a proposed permanent standard. While an ETS offers a quicker solution to the roadblock posed by the permanent standard process, it is not without its drawbacks: a six-month limitation.

III. EXISTING WORKPLACE HEAT PROTECTIONS AT THE FEDERAL AND STATE LEVELS

OSHA has already identified the emergent threat of heat on workers and has begun the rulemaking process toward establishing a temporary

70. The OSHA Rulemaking Process, supra note 67. Lengthy comment periods procedures before administrative law judges are factors that contribute to the long-spanning rulemaking process. Hager & Rabinowitz, supra note 66, at 380.
71. Id.
72. Id.
73. Id.
74. Id.
75. Hager & Rabinowitz, supra note 66, at 380.
76. See id. at 379.
77. 29 U.S.C. § 655(c).
78. Id.; Hager & Rabinowitz, supra note 66, at 379.
79. § 655(c).
heat standard.80 This process began in October 2021 when OSHA published an Advance Notice of Proposed Rulemaking for a heat standard.81 This stage initiated the notice and comment process necessary for the approval of a temporary standard.82 On June 20, 2023, OSHA began the Small Regulatory Enforcement Fairness Act process, a step that falls within the second stage of the process.83 While OSHA is making considerable progress on this standard, the process still has many more stages to satisfy.

In the absence of an established specific heat prevention standard, the General Duty Clause is the mechanism by which the federal government can penalize employers for heat violations. The General Duty Clause establishes that an employer “shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”84

The General Duty Clause operates like a catch-all because it is used as an enforcement measure when there is no specific OSHA standard on point to punish employers for working their employees in violative conditions.85 Markedly, the General Duty Clause serves as a useful enforcement device in the absence of specified prevention requirements.86 To more effectively enforce the General Duty Clause, OSHA initiated a National Emphasis Program.87 Beginning in April 2022, this

81. Id.
82. Id.
83. Id.; The OSHA Rulemaking Process, supra note 67.
84. 29 U.S.C. § 654.
85. Richard R. Carlson, OSHA and Public Health in an Emergency and a Culture War, 87 MO. L. REV. 4, 1020 (2022); § 654.
86. Carlson, supra note 85, at 1021.
program aims to protect employees from high-heat hazards through
more frequent use of the General Duty Clause.88

While OSHA has moved towards establishing a heat standard, the
absence of an already-existing standard has been a pressing concern for
Congress.89 Despite growing concern, Congress has yet to enact any
legislation on the matter. As a result, state legislatures are left to their
own accord. Some states have forgone independent standards, while
others have filled the gap with their own heat standard.90

A. The Long-winding Path Towards a National Heat Standard

The National Institute for Occupational Safety and Health
(“NIOSH”) recommended a standard to address the hazards of heat
exposure in the workplace.91 While NIOSH is not part of OSHA, it
operates as OSHA’s research partner.92 NIOSH’s research creates non-
binding criteria and recommendations that OSHA may use in setting
standards.93 In the past, OSHA has opted not to act on prior NIOSH
heat standard recommendations.94 For example, NIOSH’s most recent
heat standard recommendation was published in 2016, and OSHA has
yet to act upon it. NIOSH recommended similar heat standards in 1972
and 1986 to no avail.95

related to heat illness prevention, measurement of environmental conditions and
workload estimate. Id.
88. Id.
89. See Asuncion Valdivia Heat Illness and Fatality Prevention Act of 2021,
90. Druley, supra note 87.
91. See generally NIOSH CRITERIA FOR A RECOMMENDED STANDARD, supra
note 54.
92. Hager & Rabinowitz, supra note 66, at 376.
93. Id.
94. Stephanie Milner, Hot Topic Getting Hotter: Employer Hear Injury Liability
Mitigation in the Age of Climate Change, 36 A.B.A. J. Lab. & Emp. L. 177, 192
(2022).
95. Id.; Katie Lawrie, As Planet Warms, Advocates Urge U.S. To Set Rules To
Protect Workers From Heat, NPR (Aug. 27, 2018, 3:36 PM),
https://www.npr.org/2018/08/27/642237217/as-planet-warms-advocates-urge-u-s-to-
NIOSH recommended that . . . OSHA set a specific standard to prevent heat stress in
workers and hold employers accountable. OSHA, however, has yet to do so.¨).
The overarching aim of NIOSH’s recommendation on heat standards is to control the risk of heat-related illnesses for workers.96 NIOSH’s recommended standard derives from myriad of factors.97 The standard determines heat stress based on “the heat generated in the body (metabolic heat), plus the heat gained from the environment (environment heat), minus the heat lost from the body to the environment.”98

NIOSH’s recommended standard accounts for varying heat tolerance levels across different people.99 The recommendations also consider an employee’s degree of acclimatization.100 Acclimatization is a person’s adaptation to the heat following repeated exposure.101 Accordingly, NIOSH recommends that employees be slowly introduced to working in hot weather, a process which typically requires between seven to fourteen days.102 Additionally, NIOSH recommends that employees wear clothing that can limit heat stress103 and limit heat exposure by incorporating recovery rest breaks.104 Similarly, it suggests that employers create a “buddy system” where coworkers essentially monitor one another for signs of heat illness.105 On the same note, it recommends that employees “self-monitor” for any heat-related symptoms.106 It also states that workplaces should provide heat training for supervisors and workers and create a program that alerts workers about impending heat waves.107 Moreover, the recommendation

96. NIOSH CRITERIA FOR A RECOMMENDED STANDARD, supra note 54, at 1.
97. Id. at 93. NIOSH bases its recommended standard from “(a) the available scientific literature; (b) the many new technologies available for assessing heat stress and strain that are currently available; (c) suggested procedures for predicting risk of incurring heat-related disorders, of potentially unsafe acts, and of deterioration of performance; (d) accepted methods for preventing and controlling heat stress; and (e) domestic and international standards and recommendations for establishing permissible heat-exposure limits.” Id.
98. Id. at 1.
99. Id. at 100.
100. Id. at 1.
101. Id. at XIX.
102. NIOSH CRITERIA FOR A RECOMMENDED STANDARD, supra note 54, at 34.
103. Id. at 82.
104. Id. at 75.
105. Id. at 9.
106. Id.
107. Id. at 9–10.
encourages employers to have readily available, cool, potable drinking water.\textsuperscript{108} Likewise, it proposes brief work periods with longer rest periods to recover.\textsuperscript{109}

In moving towards a national heat standard, The Asuncion Valdivia Heat Illness and Fatality Prevention Act of 2019 was introduced to Congress as a means to compel OSHA to establish a heat-stress standard.\textsuperscript{110} The namesake of the Act, Asuncion Valdivia, was a California farmworker who died from heatstroke after working a ten-hour shift.\textsuperscript{111} Ohio Senator Sherrod Brown features a one-pager on the Act on his website, which includes a summary of the tragic story behind the legislation:

In 2004, after picking grapes for ten hours straight in 105-degree temperatures, Asunción Valdivia fell over, unconscious. Instead of calling an ambulance, his employer told Mr. Valdivia’s son to drive his father home. On his way home, he started foaming at the mouth and died of heat stroke. Because of the lack of preventative heat safety measures and emergency planning, a son had to witness his father die a preventable death at the age of 53. Mr. Valdivia’s death was completely avoidable, yet his story is not unique.\textsuperscript{112}

The proposed final standards of the bill included a heat illness prevention plan, training, and education on heat-related issues, and whistleblower protections.\textsuperscript{113} Moreover, the bill would similarly require OSHA to take NIOSH’s recommended standard into consideration.\textsuperscript{114} Nevertheless, the bill failed to gain traction after its introduction.\textsuperscript{115}

\textsuperscript{108} NIOSH CRITERIA FOR A RECOMMENDED STANDARD, \textit{supra} note 54, at 9.
\textsuperscript{109} \textit{Id}.
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} H.R. 3668.
\textsuperscript{114} \textit{Id}.
Most recently, in July 2023, the proposed bill was reintroduced before the Senate as the “Asuncion Valdivia Heat Illness, Injury, and Fatality Prevention Act of 2023.” The proposed bill would require the Secretary of Labor to enact an emergency interim heat protection standard within one year of its enactment.

While the Act has not yet been passed, both OSHA and the Office of the President have communicated a clear desire to introduce a national heat standard. The Assistant Secretary of Labor has stated that not only is OSHA formulating a national heat protection standard, but that the creation of such a standard is a top priority. The effort to implement a national heat standard has been brewing for decades. Nonetheless, the passage of a new standard continues to remain just out of reach.

The Executive Office has recognized the urgent need for a heat standard. In September 2021, President Biden released a statement emphasizing the importance of establishing a national heat standard. Accordingly, the Biden Administration announced an interagency effort to address extreme heat. This proposal involved OSHA initiating “a rulemaking process to develop a workplace heat standard.”

117. Id.
119. Statement of Douglas L. Parker, supra note 118.
120. Milner, supra note 94, at 181.
121. FACT SHEET: Biden Administration Mobilizes to Protect Workers and Communities from Extreme Heat, supra note 117.
122. Id.
123. Id.
however, this proposal was announced nearly three years ago and, like the Asuncion Valdivia Act, remains in limbo.124

B. State Action and Inaction

Most states rely on the aforementioned federal recommendations and the General Duty Clause of OSHA; however, states remain free to regulate hazards not already covered by OSHA.125 Therefore, in the absence of a specific and tangible federal policy, California, Minnesota, Oregon, Colorado, and Washington have taken it upon themselves to enact their own heat standards.126

In August 2005, California established an emergency heat standard.127 The emergency standard applied to outdoor workplaces and required employers to provide access to potable drinking water, a recovery break with shade, heat training on the risks of heat illness, and proactive measures to prevent heat illness.128 This emergency standard expired and was readopted in December 2005, and again in April 2006.129 In continuing to extend the emergency standard, California sought to ensure the existence of a heat prevention standard prior to the issuance of the permanent standard.130

California enacted its own permanent heat prevention regulation in 2006.131 California’s heat standard was named after Maria Isabel Vasquez Jimenez, who died from preventable heat-related stress injuries.132 The Maria Isabel Vasquez Jimenez heat illness standard applies to protected outdoor workplaces, requiring employers to provide potable drinking water and access to shade.133 Furthermore, employers must implement a high-heat procedure for when temperatures equal or exceed

125. Hager & Rabinowitz, supra note 66, at 378.
126. Druley, supra note 87.
128. Id.
129. Id.
130. See id.
131. Id.
133. CAL. CODE REGS. tit. 8, § 3395 (2019).
ninety-five degrees Fahrenheit. These procedures require that employers are trained to observe employees for symptoms of heat illness. Moreover, employers must have emergency response procedures, including first aid measures and how employees will receive medical services. Additionally, employers must provide an acclimatization period, in which the employer’s duty to observe employees is heightened during an employee’s first fourteen days of being assigned to a high-heat area or during heat waves. Finally, employers must operate their own heat illness prevention plans. Notably, this regulation’s guidelines are mostly based on NIOSH’s recommended standards.

California is also seeking to expand heat prevention plans into indoor work settings. In 2017, California enacted Labor Code section 6720, which mandated that the California Division of Occupational Safety and Health (“DOSH”) propose an indoor heat standard. The Act’s legislative intent demonstrates the California Legislature’s desire to protect employees by implementing specific and effective preventative plans. Despite this intent and the mandate, DOSH has yet to propose an indoor heat order.

Within the last ten years, Minnesota, Washington, and Colorado have each created their own heat standards, albeit each is less encompassing than California’s standard. Minnesota’s heat standard is solely applicable to indoor workspaces. With the exception of Oregon, Minnesota is the only state to regulate indoor temperatures.

134. Id.
135. Id.
136. Id.
137. Id.
138. Id.
139. CAL. CODE REGS. tit. 8, § 3395 (2019); NIOSH CRITERIA FOR A RECOMMENDED STANDARD, supra note 54.
140. CAL. LAB. CODE § 6720 (West 2017).
141. Id.
144. R. 5205.0110.
Minnesota’s rule establishes temperatures of heat to which workers cannot be exposed; the limits vary depending on whether a worker is engaged in heavy, moderate, or light work.\(^{146}\) While Washington also holds an outdoor heat standard policy, the law is only in effect from May 1st through September 30th each year.\(^{147}\) Moreover, as of 2022, Colorado’s heat illness and injury protection rule specifically protects agricultural workers on days exceeding eighty degrees Fahrenheit.\(^{148}\) A commonality amongst these three states’ heat standards is their reliance on NIOSH’s recommended heat standard.\(^{149}\)

Distinctly, Oregon’s heat standard applies to both indoor and outdoor workspaces.\(^{150}\) This heat standard first came into fruition on March 10, 2020, when former Oregon governor, Kate Brown, issued Executive Order 20-04.\(^{151}\) Executive Order 20-04 directed the Oregon Health Authority and Oregon OSHA to prepare a statewide heat protection standard aimed at protecting employees from excessive heat.\(^{152}\) The necessity for a heat standard became abundantly clear a little over a year into the rulemaking process.\(^{153}\) The heatwaves of 2021 brought unprecedented heat, the like of which Governor Brown had been preparing for when she first issued her Executive Order.

Shortly thereafter, on July 8, 2021, after the rulemaking process for the permanent rule had already begun, Governor Brown established a temporary emergency heat-prevention plan.\(^{154}\) The lack of protection for employees who were faced with unprecedented levels of heat...

\(^{146}\) R. 5205.0110.
\(^{148}\) CODE REGS. § 1103-15.
\(^{149}\) Id.; ADMIN. § 296-62-09560; R. 5205.0110.
\(^{152}\) REGUL. 606840.
\(^{153}\) White et al., supra note 45, at 1.
\(^{154}\) Hammock & Martin, supra note 151.
justified the temporary standard.\textsuperscript{155} Moreover, the temporary standard recognized that the lack of specific rules to safeguard against heat led to a diminished understanding of existing workplace protections.\textsuperscript{156} Once in effect, this emergency heat prevention plan regulated indoor and outdoor work areas that met or exceeded eighty degrees Fahrenheit.\textsuperscript{157} The plan mandated that employers provide shade, drinking water, training, high-heat practices, and an emergency medical plan.\textsuperscript{158} In crafting these guidelines, Oregon relied on various pre-existing standards, including California’s heat standard, Washington’s heat standard, and NIOSH’s recommended standard.\textsuperscript{159} This temporary emergency heat standard was effective through January 3, 2022.\textsuperscript{160}

The Oregon OSHA Heat Illness Prevention Standard took effect on June 15, 2022.\textsuperscript{161} This heat standard applies to indoor and outdoor workplaces which meet or exceed eighty degrees Fahrenheit.\textsuperscript{162} If the heat index reaches this level, employers must provide employees with the following amenities: (1) at least one shaded area within reach of outdoor workers; (2) access to immediate free, cool drinking water; (3) high-heat practices for when air conditioning or fans do not reduce the heat index to less than ninety degrees Fahrenheit; (4) an emergency medical plan; (5) an acclimatization plan; (6) a heat illness prevention plan; and (7) various trainings.\textsuperscript{163} Likewise, when temperatures exceed ninety degrees, employees are entitled to varying lengths of rest breaks, and employers must closely monitor their employees for signs of heat-related illness.\textsuperscript{164}

Despite the growing number of states that are keen on enacting heat protection standards, several states remain steadfast against heat

\textsuperscript{155} OR. OSHA ADMIN. ORD. 6-2021 (2021).
\textsuperscript{156} Id.
\textsuperscript{157} Hammock & Martin, supra note 151.
\textsuperscript{158} Id.
\textsuperscript{159} ADMIN. ORD. 6-2021.
\textsuperscript{160} Id.
\textsuperscript{161} ADMIN. R. 437-002-0156.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.; Tim Gordon, Oregon OSHA has Received More than 60 Complaints Related to Heat, KGW (July 29, 2022), https://www.kgw.com/article/weather/oregon-osha-complaints-citations-heat-wave/283-97df3eb7-274c-4825-9332-863fe92b36c.
protection standards. The Gabriel Infante tragedy sparked national headlines due to its implicit indignation of Texas’s House Bill 2127, recently enacted as the Texas Regulatory Consistency Act.\(^{165}\) Before Texas Governor Abbott signed this Bill, cities such as Austin and Dallas retained the authority to implement local ordinances containing their own heat protection standards.\(^{166}\) As part of these standards, both cities included regulations mandating ten-minute water breaks every four hours;\(^{167}\) however, House Bill 2127 sought to limit “Texas cities and counties from creating rules that go beyond what state law requires on issues such as labor, agriculture, business, and natural resources.”\(^{168}\) In effect, cities with local heat protection standards must discard regulations safeguarding employees in their regions. Similarly, legislatures in both Florida and Nevada have struggled to pass heat standards.\(^{169}\) Despite residing in some of the country’s hottest states, the General Duty Clause is the only recourse for Florida and Nevada residents.

VI. THE NEED FOR AN IMMEDIATE HEAT PREVENTION STANDARD

In the absence of a full-fledged national plan, OSHA must enact an emergency temporary heat standard. The enactment of an ETS culminates from “exceptional circumstances,” which necessitate active regulation.\(^{170}\) Select state attorneys general in New York, California, Illinois, Maryland, Massachusetts, New Jersey, and Pennsylvania wrote to the Assistant Secretary of Labor to support this enactment.\(^{171}\) In their call for an emergency standard, these attorneys general highlighted the grave danger posed by the increasing frequency and duration of heat

165. Schneider, supra note 12; see, e.g., Sainato, supra note 4.
166. Uranga, supra note 11.
167. Id.
168. Id.
170. BST Holdings, LLC v. OSHA, 17 F.4th 604, 612 (5th Cir. 2021).
caused by climate change.172 Moreover, they contest that OSHA’s role as the exclusive arbiter of workplace safety in numerous states necessitates that it establish an immediate standard.173

Under OSHA, the Secretary of Labor is authorized to enact an ETS.174 Once an ETS is published in the Federal Register, it takes immediate effect.175 However, in order for an ETS to exist, the Secretary of Labor must show “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” while also demonstrating that the “emergency standard is necessary to protect employees from such danger.”176 Beyond this, neither the “grave danger” prong, nor the “necessity” prong, has been entirely developed.177

OSHA is reluctant to issue ETSs; since the inception of OSHA in 1971, it has issued only ten.178 Similarly, ETSs are regarded with disfavor by many courts, evidenced by the six ETSs which have been challenged in court, only one of which survived.179 In general, courts disfavor OSHA’s approach to using ETSs, often finding them to be both an attempt to work around the standard rulemaking process and an unauthorized use of the agency’s statutory authority.180 This commingled resistance to an ETS could impede the implementation of any ETS even when the “grave danger” and “necessity” are satisfied. As such, proponents against the enactment of an ETS would argue that such an initiative would falter, as the path to a permanent standard is highly unlikely to occur six months following the enactment of the ETS.

173. Id. at 26–27.
176. Id.
179. Id.
As mentioned, occasionally ETSs are successfully implemented. One such ETS, a vaccine mandate, required employers with at least 100 employees to ensure all of their employees were vaccinated against COVID-19.\(^\text{181}\) The exception to this rule required employees to wear a mask to work while also placing the burden on the employee to obtain their own medical test each week at their own expense.\(^\text{182}\) OSHA estimated that approximately eighty-four million employees would be subject to this mandate.\(^\text{183}\) Due to the innate concern over the mandate’s intrusions into the personal lives of employees, the Supreme Court reviewed a Motion to Stay on the mandate.\(^\text{184}\)

In *National Federation of Independent Business*, OSHA argued that it held the congressional authority to implement an ETS under 29 U.S.C. § 655(c)(1).\(^\text{185}\) In particular, OSHA contested that in the presence of a “grave danger” and “necessity,” it was permitted to enact an ETS.\(^\text{186}\) In granting the Motion to Stay the vaccine mandate, the Court explicitly clarified its concern with the mandate, which involved its overreach beyond simple occupational and workplace protections.\(^\text{187}\) Specifically, the Court reasoned that OSHA “empowers the Secretary to set workplace safety standards, not broad public health measures.”\(^\text{188}\) As such, the Court found that COVID-19 risks (while still a workplace hazard to a certain degree) existed outside the workplace and were, therefore, not precisely an occupational hazard.\(^\text{189}\) The Court clarified, however, that “targeted regulations are plainly permissible.”\(^\text{190}\) Similarly, the concurrence significantly honed in on this ETS’s impact on eighty-four million Americans.\(^\text{191}\) This concurrence, penned by Justice Gorsuch, argued that the impact of this mandate on such a large number of people clearly exceeded OSHA’s existing congressional authorization.\(^\text{192}\)

\(^{181}\) *Id.* at 1026.


\(^{183}\) *Id.* at 115.

\(^{184}\) *Id.* at 109.

\(^{185}\) *Id.* at 123.

\(^{186}\) *Id.*

\(^{187}\) *Id.* at 117–120.


\(^{189}\) *Id.* at 118.

\(^{190}\) *Id.* at 119.

\(^{191}\) *Id.* at 121.

\(^{192}\) *Id.* at 122.
this decision, the Court has clearly indicated that OSHA remains free to enact needed regulations with precision.

As such, the Court’s decision implicitly supports the execution of a national heat standard ETS. First, the implementation of heat prevention standards is isolated in the workplace. While heat risks assuredly exist outside of the workplace, heat prevention standards in the workplace (standards which would implement requirements for employers to provide amenities such as shade, potable drinking water, and recovery breaks) specifically and solely address an occupational hazard. Additionally, while the imposition of a mandatory vaccination extended beyond a societally accepted boundary, the burden of a heat standard applies only to a relatively small sector of workers. The Court’s disdain for the COVID-19 vaccine mandate relied in part on its impact upon a staggering eighty-four million workers. In total, this mandate applied to two out of every three private-sector employees. In contrast, the Bureau of Labor Statistics estimates that under four percent of Americans hold outdoor jobs. As such, a national heat prevention standard ETS would be incredibly precise in application in comparison to the sweeping vaccine mandate.

Consequently, OSHA must implement an ETS aimed at protection against excessive heat. The increased harm resulting from rising temperatures presents a serious threat to the physical well-being of workers. Consistently placing workers in intense heatwaves, which were previously considered once-in-a-lifetime is an emergent and grave danger. Moreover, establishing a national heat prevention standard is imperative to shield employees from the continuing impacts of stress induced by climate change. The prominence of heatstroke-inducing heatwaves presents a clear danger to employees. Employees like Gabriel Infante, working in states without adequate protection during unprecedented heatwaves, are putting their lives on the line. Furthermore, with states like Texas implementing counterproductive legislation that hinders the

193. BST Holdings, LLC v. OSHA, 17 F.4th 604, 615 (5th Cir. 2021).
195. Spring, supra note 37 (“Extreme heat waves that previously struck once every 50 years are now expected to happen once per decade.”).
creation of heat prevention standards, the necessity to protect outdoor workers is amplified. Unlike the COVID-19 ETS, a heat standard strictly applies to creating preventative measures for occupational hazards.

Oregon’s issuance of an emergency heat standard during the lengthy rulemaking process provides an illustrative model for OSHA to follow. There, Oregon implemented an emergency heat standard after having already begun the rulemaking process for its permanent standard.197 Similarly, OSHA has already begun its rulemaking process for a national heat standard and clearly articulated its plan to establish this plan.198 Moreover, Oregon’s implementation of its own emergency standard demonstrates how an emergency standard can be utilized while in the transitional phase preceding the establishment of a permanent standard. While the promulgation of OSHA’s national heat standard involves navigating a more complex set of bureaucratic processes, Oregon’s emergency standard demonstrates the usefulness of such a standard while also accentuating the emergent demand to act in the face of extreme heat.

Moreover, the ETS should follow the recommended guidelines from NIOSH. As this Comment has articulated, each state that has implemented its own regulation has modeled its rules in part from NIOSH’s recommended standard. The ETS would also benefit from covering both indoor and outdoor work settings.

While courts in general have disfavored the use of ETSs, the Supreme Court in National Federation accepted the use of ETSs, which respond to a grave danger and solely apply to an existing occupational hazard. Following the Supreme Court’s rationale in National Federation poses a solution to overcoming court hesitancy towards accepting ETSs.

A substantial constraint on the ETS capacity is the six-month limitation. An ETS may only take effect for six months, after which a permanent order is meant to take its place; however, because of the bureaucratic constraints on OSHA’s rulemaking process, six months provides an unrealistic time frame for any permanent rule to take

196. Uranga, supra note 11 (“Known as the ‘Death Star law,’ HB 2127 limits Texas cities and counties from creating rules that go beyond what state law requires on issues such as labor.”).

197. Hammock & Martin, supra note 151 (“The permanent rulemaking is ongoing, but these emergency rules will stay in effect until the permanent rule is complete.”).

198. 2022 OR. REGUL. TEXT 606840 (West 2023); Hammock & Martin, supra note 150.

199. Hager & Rabinowitz, supra note 66, at 379.
effect.\textsuperscript{200} Notably, the language of the statute does not specifically prohibit OSHA from extending the six-month time frame.

Another roadblock is business owner backlash. Such resistance has been made evident in states without regulations, such as Texas, and within regulated states, like Oregon. The proponents of this argument insist that strict heat regulations fail to consider the wide array of business needs and demands. Moreover, such business owners argue a national standard deprives states of promulgating rules that best fit their unique needs. In turn, this modest, yet formidable, opponent will certainly challenge any ETS, as did the opponents of the COVID-19 vaccine mandate.\textsuperscript{201}

Ultimately, employers who are not mandated to follow a precise code of conduct will not abide by a set of recommended rules.\textsuperscript{202} With awareness of OSHA’s riddled history of enacting ETSs, it would be prudent to enact the NIOSH’s recommendations for heat standards in the interim. The implementation of an ETS would be all for naught if OSHA is unable or unwilling to implement a permanent standard six months later.

**CONCLUSION**

Newly recruited employees working outdoors are the most vulnerable workers. Gabriel Infante died from heatstroke before he even received his first paycheck.\textsuperscript{203} Across the United States, workers like Infante face the same dire threat. Without enforceable protections in places that compel employers to implement preventative measures, many additional employees will suffer the same or similar fates—all which are preventable through the enactment of and compliance with heat standards.

Both the necessity for and benefit of a heat standard are clearly illustrated in Oregon’s heat standard implementation. During the summer of 2022, at least twelve cities in Oregon experienced their hottest July and August ever.\textsuperscript{204} Inevitably, Oregon employees endured

\textsuperscript{201} See Carlson, \textit{supra} note 85, at 1050–51.
\textsuperscript{203} Sainato, \textit{supra} note 4.
\textsuperscript{204} Associated Press, \textit{Cities In Oregon Break Records for Summer Heat}, KGW (Sept. 3, 2022, 7:32 PM), https://www.kgw.com/article/weather/oregon-cities-break-records-hottest-summer/283-56a1c7ca-7198-4e39-a08e-f83dba441aea. Then, the
unworkable degrees of heat, with many working without any air conditioning or rest breaks. These workers had the ability to hold their employers accountable for the injustice they faced. Following the violations, Oregon OSHA received 269 complaints. Had the Oregon heat standard not gone into effect in June of that year, these workers would have had little recourse.

Evidently, existing regulations do not provide adequate preventative measures. While OSHA’s General Duty Clause and NIOSH’s recommended standard serve as motivating factors for some employers to ensure the provision of safe working environments, a substantial regulatory gap still exists. Even the few states that maintain a comprehensive heat standard lack full coverage. Even worse, without a mandatory standard, many states will abandon their own preventative measures. Initiating an Emergency Temporary Standard provides a necessary and viable solution for the short-term future and paves the path for enacting a temporary standard. As OSHA has established, a heat prevention standard is in the works and remains a top priority. With each year becoming hotter than the last, there has never been a more urgent time to protect employees from the effects of heat.

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