THE HEAT OF THE MOMENT

Recent Litigation Regarding Heat Stress Injuries

By Matthew T. Arvin

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THE SUMMER OF 2023 was the hottest summer since global records began in 1880, with July 2023 being hotter than any other month in the global temperature record (NASA, 2023; O'Shea, 2023). Even with record-setting temperatures, the U.S. federal government has been slow to enact national regulations that protect workplace employees from heat injuries and illnesses, despite there being 436 work-related deaths between 2011 and 2021 caused by heat exposure (BLS, 2023).

Part I: Select States Take the Lead

While the federal government has been slow in response to the heat illness and injury arena, five states—Minnesota, Oregon, California, Washington and Colorado—have taken it upon themselves to enact heat illness and injury standards through their state plans. However, since the conception of these programs, steady litigation has ensued contesting both the constitutionality of these standards and the subsequent citations arising from employer violations of these standards.

Oregon OSHA: Sovereign Immunity & Federal Due Process

In *Oregon Manufacturers and Commerce et al. v. Oregon Occupational Safety and Health Division* (2022), plaintiffs sued Oregon OSHA in the U.S. District of Oregon claiming that Oregon OSHA exceeded its authority given under Oregon state law, and Oregon OSHA's heat stress rules violated the due process clause of the U.S. Constitution.

The plaintiffs argued that federal jurisdiction was appropriate for the state law claims because Oregon OSHA was "acting in the shoes of the federal government" (*Oregon Manufacturers and Commerce et al. v. Oregon Occupational Safety and Health Division*, 2022). However, the defendants raised the affirmative defense of sovereign immunity against the plaintiff's state law claims. [Note. The 11th Amendment of the U.S. Constitution prohibits states from being sued by citizens of another state in federal court. This is commonly referred to as sovereign immunity. However, states may waive their sovereign immunity and consent to be sued (see *Hans v. Louisiana*, 1890).] The court separated the plaintiff's claim into two different analyses, one against Oregon OSHA and the other against the directors of the state plan. Regarding sovereign immunity against Oregon OSHA, the court decided that these are state claims against a state agency that belongs in state courts and that the state did not clearly and unequivocally waive its sovereign immunity right. And likewise, the state claims against the state directors who were attached to the suit were dismissed because sovereign immunity extends to state officers who act on behalf of the state.

The court then turned to the due process claim. The plaintiffs claimed that the heat stress standard violated the due process clause because it was impermissibly vague as it fails to:

> Provide employers . . . with a means to determine when the acclimatization plan is required to be triggered on a particular work site, how long such plans must be implemented if the weather changes or what type of employer-specific would be considered not in compliance. (*Oregon Manufacturers and Commerce et al. v. Oregon Occupational Safety and Health*, 2022)

The court acknowledged that sovereign immunity cannot bar a federal due process claim but that the plaintiffs could not state an actual claim because they could not prove the rules were vague in all circumstances. [Note. The Supreme Court ruled that the 14th Amendment gives the federal government the power to override a state's sovereign immunity right under the 11th Amendment to enforce due process rights against that state (see *Fitzpatrick v. Bitzer,* 1976).]

Cal/OSHA's Definition of "Outdoor Places of Employment"

In 2006, California OSHA (Cal/OSHA) adopted a state heat injury plan that included all outdoor places of employment. However, in *California Department of Industrial Relations, Division of Occupational Safety and Health v. California Occupational Safety and Health Appeals Board* (2018), Alameda County (Oakland and its surrounding area) contested a Cal/OSHA citation for 1) failure to supply adequate drinking water to bus drivers; 2) failure to make shade continuously available for drivers; and 3) failure to develop heat illness procedures and related training for employees and supervisors. AC Transit claimed that Cal/OSHA's heat injury regulations do not apply to non-air-conditioned vehicles because they fall outside the scope of outdoor places of employment. (Note. This litigation led to California drafting and ultimately passing on June 20, 2024, Cal/OSHA's indoor heat injury and illness standard.)

The California Court of Appeals looked at the legislative intent through recorded discussions captured at the time the standards were being finalized. The standard board's final standard of reason gave insight into outdoor vehicles, clarifying that "the proposed standard would apply to non-air-conditioned work vehicles used for extended travel during periods of extreme heat. Employees traveling in these conditions are entitled to all the protections provided by the standard including access to shade" (*California Department of Industrial Relations, div. of Occupational Safety and Health v. California Occupational Safety and Health Appeals Board*, 2018). The court found that:

> Shade is not adequate when heat in the area of shade defeats the purpose of shade, which is to allow the body to cool. For example, a car sitting in the sun does not provide acceptable

KEY TAKEAWAYS

- **The U.S. federal government has been slow to implement national regulations protecting workers from heat-related injuries, despite hundreds of heat-related workplace deaths over the past decade.**
- **This article discusses recent legal cases brought against state heat illness plans, as well as federal cases involving OSHA and the U.S. Postal Service, helping safety professionals understand how courts are shaping the legal landscape in the absence of federal regulation.**
- **It also explores OSHA's progress toward a national heat injury and illness standard, including the proposed rule submitted in July 2024 and the public hearing held in June 2025.**

shade to a person inside it, unless the car is running with air-conditioning.

Because of this rationale, the case was dismissed.

Practical tip: Outdoor places of employment may include many different types of professions. Knowing how to classify your workplace is critical to properly protecting workers.

Cal/OSHA's Regulation to Train & Acclimatize New Workers

In another Cal/OSHA citation case, Olam West Coast Inc. (2022) was heard by the Occupational Safety and Health Appeals Board over a vegetable processing company that failed to 1) effectively train their supervisors, 2) implement an effective acclimatization program, 3) provide supervisors with information on how to monitor weather reports, and 4) closely monitor new workers.

Regarding the first citation, the board found that the supervisors had significant gaps in their knowledge, indicating that the overall training was not effective. For the second citation, the court found that to comply with the standard, the employee program "must go beyond the mere language of the regulation and include specific methods and procedures tailored to employer's workplace" (Olam West Coast Inc., 2022). So, without any control measures tailored to the workplace, an employer's acclimatization program does not satisfy the standard.

Practical tip: Training should go beyond just restating the standard and should be tailored to the workplace.

In the third citation, failure to provide supervisors with information on how to monitor weather reports and how to respond to hot weather advisories, the board found that the standard "implies that supervisors must be trained to track the temperature throughout the workday, and to react to this information by implementing high heat procedures or other appropriate response as necessary" (Olam West Coast Inc., 2022). Employers remain noncompliant with the standard if supervisors implemented high-hazard procedures only when directed to do so by the company at the start of the workday, which was the case with this employer.

Practical tip: Monitor weather throughout the day, not just at the start of the day.

Finally, the citation for failing to closely observe an employee that is newly assigned to a high-heat area for signs of symptoms of heat illness during the first 14 days of the employee's employment was also upheld. The board found that:

> Both Ornelas and Gomez [the supervisors] testified that they took no additional steps to more closely monitor or observe newly-assigned employees such as Garica [the injured worker]. Indeed, Employer did not even provide Ornelas with information that Garcia was newly-assigned to working in a high heat area. (Olam West Coast Inc., 2022).

Practical tip: Always observe new workers more closely than the rest of the workforce.

Cal/OSHA's Regulation to Locate Water as Close as Practicable

In February 2023, the Rios Farming Company contested a Cal/OSHA citation in front of the Occupational Safety and Health Appeals Board. In this case, the employer was cited for failing to locate water as close as practicable to the area where employees were working. The employer operated a vineyard management business where a small group of employees pruned and trained the grapevines. The employer had water jugs at the end of the approximately 2,100-ft-long grapevine rows. A shade trailer was stationed inside one of the rows, which included a picnic table, awning and water jug that traveled with one of the workers. However, workers needed to either walk to the end of the rows or step over, balance, and bend at the hips to maneuver between the trellises irrigation hose and horizontal support wires as many as 20 times to get to the water on the shade trailer and back to their workplace (Rios Farming Company LLC, 2023). The board found persuasive language in the regulatory history where "employees should not be required to cross crop rows to get to water where there are barriers or risk of injury to the employees or to the crops." The board found that employees crossing the employer's crops presented the very type of risk of injury that the standard wished to avoid.

The board further expanded its rationale, saying that:

> There was no reason put forth as to why Employer could not have reconfigured the layout of the crew, by having multiple employees working in a row, which would have lessened the number of rows requiring water jugs. . . . Along these same lines, Employer put forth no reason it could not have located water jugs within more than one row, for example, in every other row. This would have eliminated the need to cross the trellises as the crew would only need to pass water once the cone rim cups that were provided as opposed to the multiple passings from one crew member to another it took with water located in only one row. (Rios Farming Company LLC, 2023)

Practical tip: Consider reconfiguring the workforce layout to keep water as close as practicably possible.

Part II: USPS Federal OSHA Citations Appeals (2020 to 2023)

In the summer of 2016, federal OSHA issued citations to the U.S. Postal Service (USPS) in five different cities (San Antonio and Houston, TX; Benton, AR; Martinsburg, WV; and Des Moines, IA) under the General Duty Clause, for exposing post office employees to potetial heat stress hazards. USPS contested the citations and administrative law judge Sharon Calhoun was assigned the five cases.

To establish a violation of the general duty clause, OSHA must show:

> 1) "that a condition or activity in the workplace presented a hazard," (2) "that the employer or its industry recognized this hazard," (3) "that the hazard was likely to cause death or serious physical harm," and (4) "that a feasible and effective means existed to eliminate or materially reduce the hazard." (USPS, 2023)

During the summer of 2020, Judge Calhoun vacated all the citations on the grounds that OSHA failed to prove

that the workplace conditions posed a hazard, and feasible and effective means were not available to abate the hazard. OSHA appealed Judge Calhoun's ruling, and Occupational Safety and Health Review Commission (OSHRC) heard the five cases on appeal. OSHRC consolidated the San Antonio, Houston, Benton and Martinsburg citations into one case because all four cases had the same parties, facts and outcomes; the commission did not consolidate the Des Moines case with the rest of the cases.

Heat injury risks can be caused by several factors, such as the heat index, physical exertion level committed by the worker, and duration of exposure.

Was a Hazard Present?

Judge Calhoun found that a hazard was not present in any of the cases because the USPS 8-hour work shift did not equate to prolonged, longer than usual exposure, and the workload was considered moderate, not strenuous, based on the evidence provided by the secretary of labor's witness, Dr. Aaron Tustin. However, on appeal, OSHRC disagreed with Judge Calhoun's reasoning. The commission did not use Judge Calhoun's prolonged exposure or strenuous activity standard. Instead, OSHRC found persuasive the secretary's expert witness that relied on multiple studies on heat-related illnesses he had personally conducted, including a systematic review and meta-analysis of related published medical literature, as well as his general review of scientific papers on the topic from other authors (USPS, 2023). Regarding the USPS witnesses, OSHRC found that:

> Neither [witness] challenged the consistent opinions of the Secretary's experts that the cited conditions were hazardous. In fact, [one post office employee] essentially agreed that the heat conditions posed a hazard that an employer should take efforts to mitigate. (USPS, 2023)

Practical tip: Heat injury risks can be caused by several factors, such as the heat index, physical exertion level committed by the worker and duration of exposure.

Were Effective & Feasible Means Available to Abate the Hazard?

Judge Calhoun found that the proposed abatements would be both economically and technically infeasible. "In cases involving the general duty clause, [OSHRC] has generally held that an abatement method is not economically feasible if it 'would clearly threaten the economic viability of the employer'" (USPS, 2020). The primary factor when determining economic feasibility is whether compliance would affect long-term profitability and competitiveness. In this case, the judge found that "the Secretary presented no witnesses, expert or otherwise, to show funding the proposed additional rest/recovery/acclimatization/break time is economically feasible," (USPS, 2020) and that USPS, in contrast, "presented a detailed analysis explaining why the Secretary's proposed time-related abatements are unworkable."

Regarding being technically feasible, Judge Calhoun observed, based upon the USPS chief operating officer's testimony, that:

> Delivering the mail requires the nationwide coordination of a complex network of employees, facilities, and vehicles in a "24-hr clock" schedule and "one snag could create a bullwhip effect." In addition, the judge found that the Postal Service's collective bargaining agreements . . . with the carrier unions would pose "obstacles" to these time-based measures, such as their limitations on the number of employees who can work part-time and prohibition on the Postal Service making unilateral changes to hours or working conditions. (USPS, 2023)

On appeal, OSHRC members ultimately agreed with Judge Calhoun and concluded that the secretary on the four consolidated cases did not prove feasibility.

Practical tip: Understand any collective bargaining agreements that apply to the workforce before making any changes to schedules.

OSHRC Des Moines Case: Training Feasibility

Regarding training, OSHRC ruled in the four consolidated cases that the secretary provided no concrete evidence that training could have been improved. Notably, OSHA's Martinsburg citation claimed that training was inadequate because the USPS computer-based training was not mandatory. However, the secretary acknowledged that employees in Martinsburg were trained "on heat safety in several ways, including through stand-up talks given in the mornings before carriers start their routes. The Secretary also does not explain why mandating [computer-based] training would have materially improved upon any other type of training" (USPS, 2023).

Practical tip: Applicable training can be conducted through various mediums, such as toolbox talks, classroom settings and computer-based learning.

While Judge Calhoun dismissed the Des Moines citations for failing to properly train employees, OSHRC disagreed with her ruling, finding that USPS did fail to properly train supervisors. The commission relied on the testimony of the injured employee's supervisor, who testified that she had never been trained by USPS on heat-related illnesses prior to this incident because all the safety toolbox talks were conducted in the morning before she reported to work. According to the supervisor, her lack of training directly affected the way she responded to carriers' heat-related complaints. None of her testimony was rebutted by USPS.

Practical tip: If the workforce has staggered start times, ensure that everyone receives the toolbox talk.

PART III: A National Spotlight

From 2023 to present, a national spotlight has been brought to heat stress injuries, causing states and federal organizations to address the issue.

States' Preemption Laws & Local Water Break Laws

Texas State's Consistency Laws (2023 to Present)

Despite gains toward a national heat injury and illness standard, lawsuits are still filed regarding heat stress

issues at the state level. On June 13, 2023, Texas Governor Greg Abbott signed Texas H.B. 2127, known as the Texas Regulatory Consistency Act. According to the act (2023):

> (2) In recent years, several local jurisdictions have sought to establish their own regulations of commerce that are different from the state's regulations;
>
> (3) and the local regulations have led to a patchwork of regulations across that state that provide inconsistency.

According to the act, the provisions of this code preclude municipalities and counties from adopting or enforcing an ordinance, order, rule, or policy in a field occupied by a provision of this code unless explicitly authorized by statute. A municipal or county ordinance, order or rule, or policy that violates this section is void and unenforceable (Texas Regulatory Consistency Act, 2023).

Proponents of the Texas Regulatory Consistency Act claim that large construction companies working throughout different parts of the state would have to understand what laws are on the books in every county in which they would be working. Understanding what rights to give workers at each of their jobsites would become a confusing and burdensome task, subjecting the companies to possible liabilities. However, opponents of the law say that workers' health could be put in jeopardy by overturning what are colloquially called water break laws in Dallas (Ordinance No. 29965) and Austin (Ordinance No. 20100729-047), which state that an "employee performing construction activity at a construction site is entitled to a rest break of not less than ten (10) minutes for every four (4) hours worked" (City of Austin, 2010; Dallas City Code, 2015). The cities of El Paso, Houston and San Antonio sued the state of Texas. On Aug. 30, 2023, 1 day before the Texas Regulatory Consistency Act was to go into effect, Judge Maya Guerra Gamble of the District Court of Travis County found the bill "in its entirety is unconstitutional—facially, and as applied to Houston as a constitutional home rule city and to local laws that are not already preempted under article XI, section 5 of the Texas Constitution" (City of Houston, 2023). [Note. Under Section 5 of Article XI, once a city has more than 5,000 inhabitants it is authorized to adopt a home-rule city charter. Section 5 grants the power of local self-government to a home-rule city. A home-rule city may act in a way that is authorized by its charter and not prohibited by state or federal law (Njuguna, n.d.).] The governor's office is expected to appeal the decision.

Florida Workplace Heat Exposure Requirements (2024)

On April 11, 2024, Governor Ron DeSantis signed Florida H.B. 433, which became codified as Florida Statute 448.106 and went into effect on July 1, 2024. The statute says that:

> A political subdivision [which means a county, municipality, department, commission, district, board or other public body, whether corporate or otherwise, created by or under state law] may not establish, mandate, or otherwise require an employer, including an employer contracting to provide goods or services to the political subdivision, to meet or provide heat exposure requirements not otherwise required under state or federal law. (Florida Statutes § 448.106, 2024)

Presumably, this law will have the same effect as the Texas bill, which limited local municipalities from enacting their own ordinances to address heat stress issues. While no municipality has yet sued Florida, it is presumably only a matter of time before litigation on the statute is argued in front of the state's court system.

Proposed Emergency Temporary Standards (2023 to 2024)

On Feb. 9, 2023, the attorneys general of seven states petitioned then-assistant secretary of labor Douglas Parker, calling him to:

> Issue an emergency temporary standard for occupational heat exposure pursuant to Section 6(c) of the Occupational Safety and Health Act . . . beginning May 1, 2023. Under Section 6(c), OSHA is required to promulgate an emergency temporary standard if it finds (1) workers are exposed to a grave danger in the workplace, and (2) an emergency standard is necessary to protect workers from such danger." (Attorneys General, 2023)

In their petition, the group outlined that extreme workplace heat poses a grave danger to the safety and health of millions of workers across the nation. They argued that an emergency temporary standard is necessary because "in many states, OSHA is the only entity authorized to issue occupational safety standards, meaning that workers in those states will lack protection from heat exposure until OSHA acts" (Attorneys General, 2023). Ultimately, however, the U.S. Department of Labor denied the petition. On Feb. 9, 2024, the attorney generals of 10 states and the District of Columbia again petitioned the U.S. Department of Labor for an emergency temporary standard. The petition pointed out that:

> As OSHA acknowledges, enforcement of heat hazards under the General Duty Clause of the Occupational Safety and Health Act presents legal challenges because, without a defined heat standard, OSHA must prove on a case-by-case basis that a heat hazard existed in the workplace when the injury or fatality occurred, and employers have no specific guidance on what constitutes a heat hazard under the Act." (Attorneys General, 2024)

This petition also specifically addresses the Florida and Texas preemption bills stating that:

> Recent political developments strongly suggest that the most heat-vulnerable states will not implement heat standards on their own, and at least two states have acted to preempt local ordinances aimed at protecting workers. Moreover, many other cities and states that have endeavored to promulgate heat standards have faced prolonged and contentious rulemakings, along with coordinated pushback from lobbyists and business interests, resulting in significant weakened proposals. By issuing an emergency

temporary standard, OSHA could immediately resolve these inconsistencies across the states and provide a defined and uniform rule to protect farmworkers and construction workers from extreme heat. (Attorneys General, 2024)

The Future of an OSHA Heat Injury Prevention Standard (2024 to 2025)

Even though an emergency temporary standard has not yet been issued by the U.S. Department of Labor, since 2021 huge inroads have been made toward a national heat injury and illness standard. In 2021, the Department of Labor issued an advanced notice of proposed rulemaking where it solicitated questions intending to obtain information, relevant data sources, and considerations over several topics (OSHA, 2021). Almost 3 years later in July of 2024, the Department of Labor submitted a proposed heat injury and illness prevention rule in the Federal Register (OSHA, 2024a). After publication, the public was encouraged to submit written comments on the rule. In the waning days of the Biden administration, that public comment period was officially closed on Jan. 14, 2025, with a public hearing on the proposed rule that took place virtually on June 16, 2025 (OSHA, 2024b).

However, on Jan. 20, 2025, newly elected President Donald Trump, signed an executive order titled "Regulatory Freeze Pending Review," which stated that, all executive departments and agencies shall not propose or issue any rule in any manner, including by sending a rule to the Office of the Federal Register until a department or agency head appointed or designated by the president after noon on Jan. 20, 2025, reviews and approves the rule.

It is yet to be determined whether the Trump administration will, upon review, continue to push the heat stress standard toward fruition, and even if the administration allows the heat injury and illness rulemaking process to continue, a final national standard is still years away. [Note. The time between the publication of the proposed rule and of the final rule of OSHA's silica standards (1926.1153 and 1910.1053) was nearly 3 years from September of 2013 to March of 2016 (CPWR, 2024).] Until the proposed law because final, the courts will continue to lead the way in developing the law in this arena. **PSJ**

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