Douglas L. Parker, Assistant Secretary of Labor
U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Via: Regulations.gov

January 14, 2025

RE: Comments by WeCount! in Support of the Proposed Safety Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings and Recommendations for Strengthening the Rule (Docket No. OSHA-2021-0009)

Dear Mr. Parker:

On behalf of WeCount!, we write to you to provide public comment in support of the Occupational Safety and Health Administration's (OSHA's) proposed Heat Injury and Illness Prevention rule (Docket Number. OSHA-2021-0009) (hereinafter referred to as "heat safety standard" or "proposed rule").[1] Founded in 2006, WeCount! is a non-profit organization dedicated to improving the living and working conditions of immigrant workers and families in South Florida. This work includes the Qué Calor! Campaign, a nationally recognized, worker-led campaign which has been advocating for life-saving heat protections for outdoor workers in Miami-Dade County, including farmworkers, plant nursery workers, construction workers, landscapers, and day laborers.[2]

WeCount! submits these comments in support of OSHA's proposed rule to create a much-needed federal standard to protect workers from heat related illness and death. In submitting these comments, WeCount! urges OSHA to treat climate change projections of record-breaking heat year after year—against a lack of state and local protections for workers nationally—as a

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[1] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, Notice of Proposed Rulemaking, 89 Fed. Reg. 70698 (Aug. 30, 2024), available at https://www.federalregister.gov/documents/2024/08/30/2024-14824/heat-injury-and-illness-prevention-in-outdoor-and-indoor-work-settings ("*Proposed Rule*").

[2] *See e.g*. Alexis Harris, '*Water, rest, shade': The fight to protect Florida's outdoor workers from extreme heat,* WUSF (Feb., 5, 2022), https://www.wusf.org/environment/2022-02-05/water-rest-shade-the-fight-to-protect-floridas-outdoor-workers-from-extreme-heat; Isabel Sánchez and Oscar Londoño, *This heat is deadly. Miami-Dade agricultural workers deserve water, shade, rest*. The Invading Sea (July 19, 2023), https://www.theinvadingsea.com/2023/07/19/extreme-heat-miami-dade-agricultural-workers-we-count-que-calor/; Alexandra Martinez, *Outdoor workers and organizers in Miami are fighting for a countywide heat standard,* Prism Reports (Oct. 6, 2022), https://prismreports.org/2022/10/06/outdoor-workers-miami-heat-standard/.

mandate to act. In support thereof, WeCount! further provides firsthand accounts and testimonials of a selection of its members in South Florida, including agricultural and construction workers in South Florida, who labor outdoors in the heat and who are routinely denied adequate rest breaks, water access, and the benefits of other heat safety protocols. In response to the proposed national heat safety standard, WeCount! provides specific recommendations regarding the proposed heat metrics, clarification as to the applicability of the rule, more effective enforcement, and promoting language access for all workers. Lastly, WeCount! respectfully requests a public hearing on this proposed rule.

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I. INTRODUCTION

Laboring in the heat is a dangerous working condition that millions of people in the United States endure. The likely underreporting of its impacts indicate heat-related injury, illness, and death are a more widespread phenomena than currently estimated. Absent meaningful federal, state, or local heat protections for workers, and with climate change causing record-breaking heat levels projected to become worse over time, it is necessary for OSHA to adopt this heat safety standard and prevent further harm to workers.

Occupational heat stress is "the combination of metabolic heat, environmental heat, and clothing and personal protective equipment (PPE)," resulting in increased heat storage within the body.[3] Occupational heat stress can cause heat-related illness, which includes heat stroke, rhabdomyolysis, heat cramps, heat rashes and more.[4] As documented in a recent Tampa Bay Times investigation on worker deaths from extreme heat:

> Heat ravages the body, waging a multi-front attack on its systems. It can cause the pulse to quicken and muscles to cramp. Dizziness sets in. The rise in body temperature leads to vomiting and seizures. Toxins enter the bloodstream. Organs shut down. Finally, the heart stops.[5]

Many different industries put employees at risk of these life-threatening health complications by failing to implement common sense heat protection measures. Industries with workers most at risk include agriculture, construction, landscaping, delivery and transportation, as well as indoor jobs around sources of heat, such as manufacturing.[6]

Heat can also exacerbate unsafe conditions. When employers expose employees to extreme heat without proper protections, additional concerns arise, including incidents of dizziness and fatigue, loosened PPE, and slippery conditions from sweat on the floor or sweaty palms.[7] These effects caused by heat stress can lead to serious injuries, especially as many outdoor workers are already working in dangerous conditions or with dangerous equipment.

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[3] CDC NIOSH, *Heat Stress and Workers*, (July 11, 2024), https://www.cdc.gov/niosh/heat-stress/about/index.html.
[4] *Id*.
[5] Hannah Critchfield & Juan Carlos Chavez, *Florida Workers Died in the Heat. Their Deaths were Kept from Authorities*, Tampa Bay Times (Dec. 14, 2024), https://www.tampabay.com/investigations/2024/12/14/florida-workers-died-heat-their-deaths-were-kept-authorities/.
[6] OSHA, *Overview: Working in Outdoor and Indoor Work Environments*, https://www.osha.gov/heat-exposure (last visited Nov. 13, 2024).
[7] CDC NIOSH, *supra* note 3.

There are around 32 million outdoor workers in the United States.[8] Currently, there is no federal regulation that specifically aims to protect workers from heat stress and prevent heat-related illnesses, injury, or death, and there are only seven states with heat protections for outdoor or indoor workers: Washington, California, Oregon, Colorado, Minnesota, Maryland, and most recently, Nevada.[9] As a result, there is a significant gap in protections for outdoor workers across the country, especially in the hottest regions where workers face the gravest risks. And even in states that have implemented heat protections, there have still been compliance issues. For instance, a study on farmworkers in California found that nearly half of the surveyed farmworkers never had an employer provide them with a HIIPP, and 15% did not receive the required ten-minute rest breaks from their employers.[10] The piecemeal enactment and enforcement of state protections displays the need for a national standard.

Some states, including Florida and Texas, have even preempted local governments from implementing any heat protections for their workers.[11] Protection from workplace hazards should not be dependent on the state where workers live and the politics of that state's legislature. Heat safety for our country's millions of outdoor workers is not and should not be a partisan issue. A federal rule will close the gaps in protections, especially in the South, in a truly nonpartisan fashion. In response to state and local government's failures to protect workers in their states, federal regulations must respond to the critical need for a federal backstop.

A. Underreporting suggests that heat-related deaths are more widespread than realized.

Farmworkers are 35 times more likely than the average person to die from heat exposure.[12] The Bureau of Labor Statistics shows that around 400 workers have died from heat exposure since 2011;[13] however, this number is a gross underestimate. The official cause of death is largely determined by looking at death certificates, which often do not state the underlying

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[8] Kristina Dahl & Rachel Licker, *Too Hot to Work: Assessing the Threats Climate Change Poses to Outdoor Workers*, Union of Concerned Scientists (Aug. 17, 2021), https://www.ucsusa.org/resources/too-hot-to-work.

[9] WASH. ADMIN. CODE § 296-62-095 & 296-307-097; CAL. CODE REGS. tit. 8 § 3395; OR. ADMIN. R. 437-002-0156; COLO. CODE REGS. § 1103-15; MINN. R. 5205.0110; MD. CODE REGS. 09.12.32; NEV. ADMIN. CODE. § R131-24.

[10] Paul Brown, Edward Flores, & Ana Padilla, *Farmworker Health in California: Health in a Time of Contagion, Drought, and Climate Change,* University of California Merced Community and Labor Center (Aug. 2022), https://clc.ucmerced.edu/sites/clc.ucmerced.edu/files/page/documents/fwhs_report_2.2.2383.pdf?_gl=1*fyx6ud*_ga*MTkyMTYxMTgxNy4xNjczMDU2MTM4*_ga_TSE2LSBDQZ*MTY3NTQ1MTgzMS4yMC4xLjE2NzU0NTIyOTkuNTMuMC4w.

[11] FLA. STAT. § 448.106; H.B. 2127 (Tex. 2023).

[12] FEMA, *Tips for Outdoor Workers in Extreme Heat* (June 25,2024), https://www.fema.gov/blog/tips-outdoor-workers-extreme-heat (last visited December 12, 2024).

[13] *Id*.

causes.[14] For example, if a worker experiences heat stroke which leads to renal failure, the cause of death may only be characterized as renal failure. This worker's death from heat exposure will thus not be counted in the national statistics.

Additionally, beginning in 2020, the Bureau of Labor Statistics changed its disclosure methodology policy on reporting fatalities.[15] This change has resulted in less detailed information published on work-related deaths, including less information on the nature, events, and sources of worker fatalities.[16] From 2011 to 2022, OSHA estimates that nationally, the number of heat-related illnesses is 295,875 and the number of heat-related fatalities is 6,706.[17] However, other estimates predict the number of deaths to be even higher, with one estimate finding that as many as 2,000 workers die every year from extreme heat.[18]

A recent investigation by the Tampa Bay Times uncovered the extent of underreporting of heat-related deaths in Florida, discovering 37 heat-related fatalities in the past decade, double what federal regulators recorded.[19] Reporters identified these deaths by reviewing medical examiner records listing heat as a cause of death, as well as reviewing law enforcement records and interviewing witnesses. Additionally, because employers are only required to report deaths that occur within 30 days of the employee becoming sick or injured, heat-related deaths that occur weeks after exposure go unreported.[20] Two deaths uncovered by this investigation occurred outside of the 30-day reporting window.[21] The Times investigation ultimately found that Florida companies failed to report the vast majority of heat-related deaths, as required, and reporting requirements themselves are limited if deaths occur outside of the prescribed timeframe.

That deaths from laboring in the heat are more widespread than realized urgently warrants not only the promulgation of a federal heat standard but also better mechanisms to assess the extent and scope of heat-related deaths.

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[14] *See* Juley Fulcher, *Hot Take - Urgent Crisis for Workers*, Public Citizen (May 25, 2023), https://www.citizen.org/article/hot-take/.
[15] Rebecca L Reindel & Ayusha Shrestha, *Death on the Job: The Toll of Neglect*, AFL-CIO (33rd ed. April 2024), https://aflcio.org/reports/dotj-2024.
[16] *Id.*
[17] *Proposed Rule*, *supra* note 1, at 70967.
[18] Juley Fulcher, *Boiling Point: OSHA Must Act Immediately to Protect Workers from Deadly Temperatures*, Public Citizen (June 28, 2022), https://www.citizen.org/article/boiling-point/.
[19] *See* Critchfield & Chavez, *supra* note 5.
[20] *Id*.
[21] *Id*.

B. Climate change as a heat aggravator means the threat to workers of heat injury, illness, and death is only increasing, and adaptation measures are needed.

Extreme heat is the leading cause of death out of all weather-related events in the United States.[22] With climate change, the threat of extreme heat will only get worse. Due to human activity, the global 10-year mean temperature reached 1.14ºC above pre-industrial levels from 2013 to 2022, triggering "global climate and environmental changes that pose an unequivocal, immediate, and worsening threat to the health and survival of people worldwide."[23] Additionally, the past eight years were the warmest ever registered on Earth.[24] August 2024 set a new monthly temperature record as Earth's hottest summer, closely rivaling the peak heats of July 2023.[25] October 2024 was the second hottest October on record, after October 2023.[26] And compared with 1986 to 2005, the number of heatwave days during 2013 to 2022 increased 94% globally.[27]

These statistics reflect a frightening trend that will not go away; studies show that climate change is a driving factor in making many of these events more severe or likely to occur.[28] The sixth Intergovernmental Panel on Climate Change (IPCC) found with "high confidence" that heatwaves have increased in frequency since the 1950s due to human influence.[29] The World Meteorological Organization predicts that at least one of the next four years will set a new temperature record, beating the current hottest year on record, 2023.[30]

The most vulnerable and minoritized populations—who contribute the least to climate change—are the most disproportionately affected, "a direct consequence of structural injustices[] and harmful power dynamics."[31] Wealthier individuals, who primarily benefit from an "extractive and greenhouse gas-emitting economic model," have the means to achieve better

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[22] EPA, *A Closer Look: Heat-Related Workplace Deaths*, https://www.epa.gov/climate-indicators/closer-look-heat-related-workplace-deaths#ref7 (last visited Nov. 12, 2024).
[23] Marina Romanello et al., *The 2023 Report of the Lancet Countdown on Health and Climate Change: the Imperative for a Health-Centred Response in a World Facing Irreversible Harms*, THE LANCET, Dec. 16, 2023, at 2349 ("*Lancet 2023 Report*").
[24] World Meteorological Organization, *Eight Warmest Years on Record Witness Upsurge in Climate Change Impacts*, (Nov. 6, 2022). https://wmo.int/news/media-centre/eight-warmest-years-record-witness-upsurge-climate-change-impacts (last visited Dec. 11, 2024).
[25] Sally Younger, *NASA Find Summer 2024 Hottest to Date,* NASA (Sept. 11, 2024), https://www.nasa.gov/earth/nasa-finds-summer-2024-hottest-to-date/.
[26] Climate Copernicus, *Surface Air Temperature for October 2024*, https://climate.copernicus.eu/surface-air-temperature-october-2024 (last visited Nov. 25, 2024).
[27] *Lancet 2023 Report*, *supra* note 23, at 2358.
[28] *Id.* at 2349.
[29] Hoesung Lee et al*., Climate Change 2023 Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* IPCC, 35-115, at 46, DOI: 10.59327/IPCC/AR6-9789291691647.
[30] World Meteorological Organization, *WMO Global Annual to Decadal Climate Update (2024-2028)* (June 5, 2024), https://wmo.int/publication-series/wmo-global-annual-decadal-climate-update-2024-2028.
[31] *Lancet 2023 Report*, *supra* note 23, at 2349.

health outcomes, while less affluent and historically marginalized groups "bear the health repercussions of the environmental devastation and climate system alteration stemming from wealth generation."[32]

Such realities bear true for the population groups this rule would protect. For instance, in the United States, 70% of agricultural workers are foreign-born, and 78% identify as Hispanic.[33] An estimated 10% are Indigenous, and the majority can be classified as limited English proficient.[34] Of the unreported deaths discovered by the Tampa Bay Times investigation in Florida, over half were Latino, and one of every five was an undocumented worker.[35] A Centers for Disease Control (CDC) study found that poverty, frequent mobility, low literacy, and language and cultural barriers impede agricultural workers' access to social services and cost-effective primary health.[36] People who work outdoors are on the frontlines of the climate and extreme heat crisis, with farmworkers in particular being one of the most vulnerable and marginalized groups in our society. Action by the federal government is urgently needed to protect these groups.

Under different emissions modeling, by midcentury, we could see more than double the amount of days that reach a heat index of over 100 degrees Fahrenheit.[37] The Southeast and Southern Plains regions of the United States would experience the largest increase in days with a heat index of 100 and 105 degrees Fahrenheit. [38] The southern portions of Texas and Florida can expect to experience up to 150 days per year with a heat index of 100 degrees Fahrenheit. [39] South Florida, where most of WeCount!'s members work, could experience up to 150 days with a heat index over 105 degrees Fahrenheit.[40] Working outdoors is only going to continue to get more hazardous every year. As workers are already experiencing the harmful—and even fatal—health consequences of climate change in the current regulatory vacuum, OSHA should

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[32] Thalia Viveros-Uehara, *Climate Change and Economic Inequality: Are We Responding to Health Injustices?*, 25(2) 191-197 HEALTH & HUMAN RIGHTS, 192 (2023) https://www.hhrjournal.org/2023/12/06/climate-change-and-economic-inequality-are-we-responding-to-health-injustices/#_edn8.

[33] Nat'l Ctr for Farmworker Health, Inc., *Facts about Agricultural Workers* (Jan. 2022), https://www.ncfh.org/facts-about-agricultural-workers-fact-sheet.html (last visited Dec. 11, 2024) ("*Facts about Agricultural Workers*").

[34] *Id.*

[35] Critchfield & Chavez, *supra* note 5.

[36] CDC, *Migrant and Seasonal Farmworkers: Health Care Access and HIV/AIDS in This Population* (2017) https://npin.cdc.gov/publication/migrant-and-seasonal-farmworkers-health-care-access-and-hivaids-population.

[37] Kristina Dahl, et al., *Increased frequency of and population exposure to extreme heat index days in the United States during the 21st century*, 1(7) ENVIRONMENTAL RESEARCH COMMUNICATIONS, at 6, (July 16, 2019) DOI: 10.1088/2515-7620/ab27cf.

[38] *Id*.

[39] *Id*.

[40] *Id*.

implement this heat safety standard now to protect the health and lives of millions of outdoor workers across the country.

II. THE IMPACTS OF EXTREME HEAT ARE ACUTELY FELT IN FLORIDA, WHERE WECOUNT! HAS ADVOCATED TIRELESSLY FOR WORKER HEAT SAFETY.

Every year without federal heat protections is a year where the federal government turns a blind eye to employers who place outdoor workers in greater danger of heat-related illness, injury, and death.[41] Heat protections are crucial for workers in Florida, where the humid subtropical climate can be unforgiving for the majority of the year, even without the added threat of worsening climate change. There are nearly two million outdoor workers in Florida who are on the frontlines of climate change, who have historically been ignored by the state when seeking protections.[42] Globally, almost half a million people die every year from extreme heat, and the last 10 years have been the hottest on record. Because Florida's Legislature has failed to enact laws to protect workers from the heat—even going a step further and blocking local governments from being able to do so—heat protections federally are desperately needed in our state and states like it.

The number of extreme heat events, which is defined as two consecutive days where the daily maximum temperatures exceeds the 90th percentile threshold temperature, more than doubled in Miami-Dade County (Miami-Dade) from 2022 to 2023.[43] In 2023, Miami experienced 46 consecutive days with a heat index over 100 degrees Fahrenheit,[44] with July 2023 being the hottest month ever recorded in Miami since 1937. This year, the National

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[41] *See* NASA Earth Observatory, *Extreme heat hammers U.S. Coasts,* https://earthobservatory.nasa.gov/images/153054/extreme-heat-hammers-us-coasts (last visited Nov. 6, 2024); *see also* Dani Anguiano, *Heatwave Across US West Breaks Records for Highest Temperatures*, The Guardian (Sept. 6, 2024), https://www.theguardian.com/us-news/article/2024/sep/06/heatwave-us-west-breaks-records.

[42] Alejandra Borunda, *Florida Blocks Heat Protections for Workers Right Before Summer*, NPR (April 12, 2024), https://www.npr.org/2024/04/12/1244316874/florida-blocks-heat-protections-for-workers-right-before-summer#:~:text=Two%20million%20people%20in%20Florida,to%20shade%20when%20temperatures%20soar.

[43] Miami-Dade Matters, *Number of Extreme Heat Events*, https://www.miamidadematters.org/indicators/index/view?indicatorId=8679&localeId=414 (last visited Dec. 9, 2024).

[44] And on two days, the heat index exceeded 110 degrees Fahrenheit. *See* Florida Climate Center, *Climate Summary for Florida – July 2023*, https://climatecenter.fsu.edu/images/climate_summaries/flmonthly_2023_07.pdf.

Weather Service issued heat advisories for Miami-Dade on 63 days and the county saw two days in May in which the heat index reached 112 degrees Fahrenheit.[45]

Not only are workers exposed to higher temperatures than in the past, but they are also enduring these temperatures a greater number of days throughout the year. A majority of the 57 weather stations located throughout the state have measured an increase in the length of the hot season.[46] In Miami, from 1950 to 2007, the heat season has increased by at least three weeks.[47] Yet WeCount!'s members and the nearly two million outdoor workers in the state of Florida have been denied basic rights to rest, shade, and water breaks.[48] Maintaining this status quo in the face of ever-worsening conditions is not a sustainable business model and is certainly not a way to protect people's lives. This proposed rule is crucial for the workers of Florida, who, as discussed below, have advocated for heat protections to no avail.

A. WeCount!'s ¡Qué Calor! Campaign advocates for crucial heat protections for Florida's workers.

WeCount! has been leading the fight for heat protections for outdoor workers in South Florida for years and has advocated for workers' rights since its founding in 2006. Today, WeCount! has hundreds of members and engages in issues affecting workers' rights, including wage theft, occupational safety and health, labor trafficking, and more. As part of the ¡Qué Calor! Campaign, WeCount! has engaged in worker education and advocated to state and local governments to enact heat protections, highlighting the impacts of extreme heat on workers, employers, and the public.

In 2021, WeCount! launched its ¡Qué Calor! campaign at a Heat Assembly in Homestead, Florida. This worker-led campaign puts those who are on the frontlines of heat-related illness at the center of organizing and advocating for state and federal protections. Over 1,000 outdoor workers in Miami-Dade pledged support and took action in the ¡Qué Calor! campaign, alongside a broad coalition of labor unions, climate organizations, health providers, and community groups.[49] After launching the ¡Qué Calor! Campaign, WeCount! became a recognized leader in Miami-Dade, statewide, and nationally, demanding action to protect workers from heat related illness.

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[45] Patricia Mazzei, *This Florida Farmworker is 75 and Still Toiling in the Heat*, N.Y. Times (Oct. 24, 2024), https://www.nytimes.com/2024/10/26/us/florida-farmworkers-heat.html.
[46] Morton D. Winsberg & Melanie Simmons, *An Analysis of the Beginning, End, Length, and Strength of Florida's Hot Season,* Florida State University Climate Center, https://climatecenter.fsu.edu/topics/specials/floridas-hot-season.
[47] *Id*.
[48] Borunda, *supra* note 42.
[49] WeCount!, *Qué Calor! Campaign*, https://www.we-count.org/quecalor (last visited Dec. 12, 2024).

In addition to policy and legislative advocacy, part of WeCount!'s organizing efforts include developing accessible research and data that properly illustrate the conditions that outdoor workers face.[50] For example, WeCount!'s research on plant nursery workers found that over half of agricultural workers surveyed in South Miami-Dade were not allowed to rest in the shade, 15% reported no easy access to safe drinking water, and 69% had experienced signs and symptoms of heat-related illness.[51] These findings make clear that WeCount!'s efforts to secure worker protections are crucial to workers in South Florida.

1. Florida's failure to pass a heat protection law to protect workers.

WeCount! and other members of the community have long attempted to achieve heat protections for workers in Florida at the state and local levels. Since 2018, state lawmakers, from both parties, have filed heat injury prevention bills in the Florida Legislature. In 2021, Senator Ana Maria Rodriguez introduced Senate Bill 732, titled Heat Illness Prevention.[52] This bill would have provided outdoor workers in Florida with access to water, shade, and recovery periods, and required training for employers on risk factors for heat illness (although it did not provide for any penalties or real enforcement mechanism).[53] At a hearing on the bill, many members of the community, including the Chief Executive Officer of Sunripe Certified Brands, a large tomato grower in Florida, spoke in support of the bill, and no one spoke in opposition to it.[54] The bill unanimously passed the Senate Agriculture Committee with bi-partisan support but eventually died after failing to receive another hearing, likely as a result of pressure from business lobbyists.

2. The Florida Legislature preempted local governments from passing life-saving heat protection ordinances, derailing momentum in Miami-Dade County.

After this failure on the part of the Legislature to act, WeCount! focused its advocacy efforts on Miami-Dade. According to the Union of Concerned Scientists, there are nearly

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[50] WeCount!, *The Human Landscape: Wages and Working Conditions of Plant Nursery Workers in South Miami-Dade County* (Oct. 2018), https://drive.google.com/file/d/1G-C_X0FQ7kkg-C9qha95pgz_x8t8sgRv/view ("*The Human Landscape*"); Nik Theodore & Zaina Alsous, *Behind the Skyline: Labor Conditions in South Florida's Commercial Construction Industry*, WeCount! (Oct. 2024), https://www.we-count.org/s/SF-Construction-Worker-Survey-Report-Letter-Size-1-1.pdf.

[51] *The Human Landscape*, *supra* note 50, at 3.

[52] S.B. 732 (Fla. 2022); Alexis Harris, '*Water, rest, shade': The fight to protect Florida's outdoor workers from extreme heat*, WUSF (Feb. 5, 2022), https://www.wusf.org/environment/2022-02-05/water-rest-shade-the-fight-to-protect-floridas-outdoor-workers-from-extreme-heat.

[53] S.B. 732 (Fla. 2022).

[54] Florida People's Advocacy Center, Immigration and Worker Rights, *Heat Illness Prevention Bill Progresses Committee Recording* (Jan. 2022), https://www.floridapac.org/immigration.

330,000 outdoor workers living and working in Miami-Dade.[55] Miami-Dade, recognizing the severity of heat stress issues to these workers, appointed the world's first ever Chief Heat Officer in 2021, and established a Climate Heat and Health Taskforce to address the increasing risk of extreme heat to people's health and livelihood.[56] WeCount! was a member of this Taskforce, which hosted several community listening forums, surveyed stakeholder organizations, and published a first-ever Extreme Heat Action Plan, citing worker heat protections as the top priority among all stakeholders.

In 2023, in direct partnership with WeCount!, Miami-Dade County Commissioners announced a proposed ordinance that would provide heat protections for outdoor workers.[57] The proposed ordinance, titled Heat Standard for Outdoor Workers ("Proposed Heat Standard") would have prevented companies who repeatedly violated the Heat Standard from receiving business from Miami-Dade and would have applied to all agricultural and construction businesses with at least five employees.[58] The Proposed Heat Standard also would have required a mandatory Heat Exposure Safety Program that required worker and supervisor training about heat related illness, high heat procedures when the heat index reached 90 degrees Fahrenheit, provisions for access to drinking water and ten-minute shaded recovery periods for every two hours the employee worked in the outdoor environment, acclimatization protocols, and more.[59] If enacted, this ordinance would have become one of the strongest heat standards in the country and would have been a significant step forward for outdoor workers in Florida, a result of years of advocacy efforts from WeCount! and a coalition of supporters.

In July 2023, the proposed Heat Standard for Outdoor Workers passed the Miami-Dade County Commission unanimously on its first reading with bi-partisan support and was then referred to the Community Health Committee, where it passed 4-1 in the Community Health Committee.[60] However, on November 2023, the day of the proposed Heat Standard's final vote, industry lobbyists, including representatives from construction and agricultural industry associations, successfully pressured the Miami-Dade County Commission to defer the vote to March 2024. By then, the Florida Legislature caught wind of the progress the community was

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[55] Union of Concerned Scientists, *Extreme Heat Could Threaten $8.4 Billion Annually in Florida Outdoor Worker Earnings by Midcentury* (Aug. 15, 2021), https://www.ucsusa.org/about/news/extreme-heat-could-threaten-84-billion-annually-florida-outdoor-worker-earnings.
[56] Miami-Dade County, *Chief Heat Officer*, https://www.miamidade.gov/global/economy/environment/chief-heat-officer.page (last visited Nov. 4, 2024).
[57] Miami-Dade County, Fla., *Proposed Ordinance Creating a Heat Standard for Outdoor Workers* (Sept. 11, 2024), Legislative Item File Number 2311454 ("*Miami-Dade Proposed Ordinance*").
[58] *Id*.
[59] *Id*. at Sec. 22A-7; *see also* Alexandra Martinez, *Outdoor Workers and Organizers in Miami are Fighting for a Countywide Heat Standard*, Prism (Oct. 6, 2022), https://prismreports.org/2022/10/06/outdoor-workers-miami-heat-standard/.
[60] *Miami-Dade Proposed Ordinance*, *supra* note 57.

making and introduced House Bill 433[61] ("HB 433") within one week, proposing a full-scale preemption of local municipalities from establishing their own heat exposure requirements. Because this bill invalidated the Proposed Heat Standard, Miami-Dade Commissioners had no choice but to withdraw the Proposed Heat Standard after Governor DeSantis signed HB 433 into law in April 2024.[62]

Currently, there is no federal regulation that specifically aims to protect workers from heat stress and prevent heat-related illnesses, injury, or death. Without a specific rule establishing safety standards and protocols, workers in Florida are left without protections from heat hazards, and communities cannot fill this void at the local level.

It is important to note that while there are no heat protections for workers in Florida, there are other heat-related protection laws, including the Zachary Martin Act, which includes protective measures for high school athletes.[63] This law establishes guidelines for identifying heat stress, requires an operational defibrillator on school grounds and a person with training on how to operate it, and mandates cooling zones that include cold-water immersion tubs or an equivalent way of rapidly cooling the body.[64] The Florida Legislature enacted the Zachary Martin Act after Zachary Martin, a high school student, died from a heat stroke during a football game.[65] Recognizing the importance of providing heat protections to all Floridians—high school student athletes and outdoor workers alike—Zachary Martin's family has expressed their support for WeCount!'s efforts to pass worker heat protections in Florida. As Laurie Giordano, Zachary Martin's mother, said in a 2024 interview with Grist, referring to a state heat protection law for workers: "I'm just a little incredulous that it hasn't been passed yet. If it's hot, there should be water, and they should be able to take breaks…whether you are working out for football or cheering, or someone working on a roof. What does that hurt?"[66]

When avoidable tragedies occur, our government has a duty and responsibility to protect people from further harm, which is exactly what happened with the Zachary Martin Act.

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[61] H.B. 433 (Fla. 2024).
[62] FLA. STAT. § 448.106; Miami-Dade County, Fla*., Proposed Ordinance Creating A Heat Standard for Outdoor Workers* (Sept. 11,2024), Legislative Item File Number 231773, Agenda Item 7A Legislative item withdrawn, https://www.miamidade.gov/govaction/matter.asp?matter=231773&file=true&fileAnalysis=false&yearFolder=Y2023; Ashley Misnazi*, Miami-Dade's ends push to protect outdoor workers from Florida heat,* Health News Florida (March 22, 2024), https://health.wusf.usf.edu/health-news-florida/2024-03-22/miami-dades-ends-push-to-protect-outdoor-workers-from-florida-heat.
[63] FLA. STAT. § 1006.165.
[64] *Id.*
[65] Steve Maugeri, *State guidelines aim to protect student-athletes from heat,* CBS News (Aug. 9, 2024), https://www.cbsnews.com/miami/news/state-guidelines-in-place-to-limit-student-athletes-to-heat-exposure/.
[66] Amelia Bates, *As heat becomes a national threat, who will be protected?*, Grist (Mar. 13, 2024), https://grist.org/extreme-heat/extreme-heat-protection-florida-law-athletes-workers/.

However, despite known heat-related deaths in Florida, Florida has so far taken no action to prevent harm to outdoor workers and has instead only put up more obstacles to protecting workers' lives.

3. *WeCount! continues to advocate for life-saving heat safety measures; however, a comprehensive and uniform standard is required.*

Following HB433 and Florida's preemption of local heat safety standards, WeCount! has continued its efforts to protect outdoor workers from extreme heat. For example, WeCount! is partnering with developers and general contractors in Miami-Dade to advocate for Community Benefit Agreements (CBAs) that include heat protections for construction workers. This new initiative, called Build a Better Miami, focuses on leveraging CBAs to ensure construction worker employers adopt responsible practices, including implementing HIIPPs on their worksites and partnering with community-based organizations and health providers to establish on-site mobile cooling centers and heat safety clinics to mitigate and respond to heat stress incidents.[67]

Another important industry in Florida in which workers are at risk of heat-related illness is the plant nursery industry. Florida is the largest producing state of indoor plants and tropical foliage in the United States.[68] In Miami-Dade alone, there are over 1,500 plant nurseries.[69] Through the Planting Justice Campaign, WeCount! is working to educate workers, consumers, and responsible employers about the need for heat safety protections and find collaborative solutions. Additionally, WeCount! is partnering with clinicians to set up mobile health clinics to connect outdoor workers to doctors who can instruct them on extreme heat and fill in for the gaps in medical care and education.

While all of WeCount!'s efforts in Miami-Dade provide powerful examples of steps that can be taken at the local and state level to protect workers from extreme heat, WeCount! believes a definitive, uniform standard, as proposed in this rule, is an important step to guarantee baseline protections for millions of outdoor and indoor workers, across industries and geographies.

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[67] WeCount!, *Build a Better Miami Coalition*, https://www.we-count.org/buildbettermia (last visited Dec. 10, 2024).
[68] Stevan Novakovik, *Impact and Outlook for Florida's Green Industry*, Florida Nursery, Growers and Landscape Association and Farm Credit of Central Florida (2022), at 20, https://fngla.org/file/26/2022-Economic-Impact-Floridas-Nursery-Landscape-Industry.Optimized.pdf.; WeCount!, *Planting Justice Project*, https://www.we-count.org/plantingjustice (last visited Jan. 14, 2025).
[69] *Id*.

III. EXPERIENCES OF FLORIDA WORKERS AND WECOUNT! MEMBERS RISKING THEIR HEALTH AND LIVES IN THE HEAT.

It is important for OSHA regulators to recognize that health harms and lives lost from unsafe working conditions in the heat are not merely statistics on paper, but the lived experiences of real people—many of whom are essential workers whose labor ensures Americans have food to eat and homes to live in. Their stories reflect industries in which productivity and profit are valued over workers' health and lives, where heat illness and death from the heat are entirely preventable. These accounts serve to corroborate the necessity for this rule to protect workers from the heat.

Last year, there were at least three known instances in which farmworkers in Florida died from heat-related illness, according to OSHA data. In one instance, on January 1, 2023, a 28-year-old worker from Mexico who had just arrived a day earlier with a work visa, was working at a farm in Parkland, Florida, placing wooden stakes in the ground to support bell peppers. The heat index neared 90 degrees, and he reportedly complained of fatigue and leg pain, symptoms of heat illness. His co-workers later found him unresponsive in a shallow drainage ditch.[70] OSHA subsequently found that the employer failed to properly acclimate the worker and provide water, rest, and shade from the high ambient heat and direct sunlight.[71]

In another instance, a 26-year-old worker from Mexico died of heatstroke on the first day of a job at a sugar cane farm in Belle Glade, Florida. She, too, said that she was not feeling well before collapsing.[72] The heat index reached 97 degrees Fahrenheit the day she died, yet the employer did not properly acclimate the worker or provide adequate rest breaks.[73]

And in a third instance, a 41-year-old worker harvesting oranges in Arcadia, Florida collapsed after having difficulty talking and appearing disoriented—symptoms consistent with heat stroke.[74] On that day, the heat index reached approximately 92 degrees. Although OSHA took enforcement action in each case (resulting in fines to the respective employers ranging from $15,000 to $30,000), these tragic losses of life could have been prevented had a standard such as

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[70] OSHA, *U.S. Department of Labor cites Okeechobee Labor Contractor After Heat Illness Claims the Life of 28-Year-Old Farmworker in Parkland* (June 28, 2023), https://www.osha.gov/news/newsreleases/region4/06282023.
[71] *Id.*
[72] OSHA, *U.S. Department of Labor cites South Florida contractor for lack of heat illness prevention program after heatstroke claims 26-year-old worker's life* (Apr. 15, 2024), *https*://www.osha.gov/news/newsreleases/region4/04152024.
[73] *Id.*
[74] OSHA*, Department of Labor cites Arcadia labor contractor after farmworker suffers fatal illness while harvesting oranges with heat index over 90* (June 26, 2024), https://www.osha.gov/news/newsreleases/region/06262024#:~:text=ARCADIA%2C%20F0%E2%80%93%20A%20federal%20workplace,hazards%20associated%20with%20high%20temperatures.

OSHA's proposed heat safety rule been in place, instead of depending on OSHA's limited General Duty Clause.

Absent the worst-case scenario of death, heat-related illness can cause serious injury and long-term consequences for individuals who experience it. This is the case for WeCount! members—agricultural and construction workers in Miami-Dade County—who were interviewed for this comment letter.

These interviews of WeCount!'s members took place on November 24, 2024, by Earthjustice staff, either in person at WeCount!'s office or virtually via Zoom. Members shared their personal experiences with enduring intense heat in their workplaces. All of these workers described work cultures in which water, shade, and rest breaks are not normally available and where asking for any of these necessities can lead to confrontation with supervisors and fear of retaliation. Workers are frequently pushed to their limits, as most employers value productivity above all else, including health and safety. Many of these workers have experienced life-altering consequences from being exposed to the extreme heat for years. After experiencing heat illness personally, and witnessing co-workers experience it on the job, these individuals view this proposed rule as a life-saving standard that will protect their health and safety and drastically improve their working conditions. Spending up to 12 hours a day in the Florida heat performing strenuous work without any protective measures is a human rights issue that demands action by the federal government. It is time for OSHA to listen to these workers' voices, take seriously their experiences, and take action to protect them.

A. José Delgado, 75, suffered two heat strokes and kidney damage from the heat; he continues to work in an industry in which agricultural workers are pushed to do more and more without respect for their health or lives.

José Delgado is 75 years old and is an agricultural worker who harvests sweet potatoes in Homestead, Florida. Originally from Mexico, Mr. Delgado has been an agricultural worker for the past 15 years and a member of WeCount! since its founding, after participating in the "A Day without Immigrants" march in 2006.[75] Prior to becoming an agricultural worker, Mr. Delgado worked in construction, but after suffering an accident for which he lost a finger and received no workers' compensation, he decided to leave construction to pursue agricultural work.

Mr. Delgado is a survivor of two work-induced heat strokes that required hospitalization and caused permanent damage to his kidneys.[76] He suffered his first heat stroke in 2018, at the

[75] Dan Glaister & Ewen MacAskill, *US Counts Cost of Day Without Immigrants*, The Guardian (May 1, 2006), https://www.theguardian.com/world/2006/may/02/usa.topstories3.
[76] Mr. Delgado's story was also featured in the New York Times. Patricia Mazzei, *This Florida Farmworker is 75 and Still Toiling in the Heat*, N.Y. Times (Oct. 24, 2024), https://www.nytimes.com/2024/10/26/us/florida-farmworkers-heat.html.

peak of the heat season in the Florida summer. On the way to cash his paycheck at the end of his work day, he experienced headaches and dizziness. Then he collapsed, losing consciousness. He woke up three days later in the hospital, where the doctors told him that his kidneys were in shock, and he was close to having a heart attack. He suffered his second heat stroke in 2020, also in the summer. After a morning of planting sweet potatoes under the sun, he became sick to his stomach and felt like he was going to vomit. He described feeling like he lost sensation in his body, and he required an oxygen mask when the paramedics arrived. He had to be hospitalized again, and again the doctors told him that this exposure to extreme heat had placed further strain on his kidneys. After both hospitalizations, Mr. Delgado returned to work after just a few days of rest, needing to earn a living. In both instances, his employer did not pay his medical bills.

As part of his daily work in the fields, including when he suffered heat stroke, Mr. Delgado must wear several layers of clothing to protect his skin: a long-sleeve shirt, pants, a bandana, hat, thick gloves, boots, and a cover over his pants (to protect against an acidic liquid that sweet potatoes emit when they are harvested). These clothing layers exacerbate the heat impacts to his body.

Mr. Delgado described a pervasive work culture in which agricultural employers do not encourage their employees to take breaks, and instead, may harass and taunt them if they do, saying "You don't want to work? What's going on?" The piece-rate wage system, in which workers are paid by how much they harvest, further discourages workers from stepping away for breaks. In his time as an agricultural worker, Mr. Delgado has repeatedly seen co-workers pushing themselves and toiling in the heat, as employers demand more and more of the workers. According to Mr. Delgado, newer and smaller growers can often be the harshest, routinely driving their workers to produce more so that they can compete against larger growers. As for water and shade, employers rarely provide either. When employers do provide water, workers might not know where the water came from, or it might be unsafe to drink. There is often no shade, and Mr. Delgado has had to seek shade underneath his truck on sweltering days—parking it at an angle and positioning himself underneath the small shadow of his truck.

Based on his firsthand experiences, Mr. Delgado believes it is imperative that employers implement practices in keeping with this proposed rule to protect workers from the heat, including being required to educate workers about taking breaks under shade, and providing water to workers. Without workers, employers are unable to operate their business and can make no money. The food we eat is because of agricultural workers, like Mr. Delgado, who toil in harsh and dangerous conditions. The least employers can do is take care of their workers in the fundamental way that this rule would require.

B. Isabel, a plant nursery worker, describes a work environment of fear and no meaningful access to rest, shade, or water.

Isabel, a name used for an outdoor worker who wished to remain anonymous, is 49 years old and works at a plant nursery in South Florida. Originally from Guatemala, she has worked in plant nurseries for the past 10 years, and she has worked specifically in weeding for about a year. She explained the intense working conditions in plant nurseries, where workers are bent over all day and employers require them to finish three lanes of 500 plants each day. Isabel explained that in the plant nurseries where she has worked, there is a black tarp that covers the plants and emits a vapor, which adds heat to already hot outdoor working conditions. She has also previously worked in plant shipping, where she was required to lift up to 35 pounds of packaged plants onto an assembly line continuously throughout her workday. She described a work culture where you would get yelled at if you did not move fast enough.

Isabel has been a member of WeCount! for over a year, and she believes that if the proposed rule is not passed, more workers will get sick and die. She herself experiences symptoms of heat stress daily. She described feeling heart palpitations and pressure in her head when it gets really hot. These symptoms are not limited to times when she is exposed to the heat, as it usually takes about an hour for her head to stop hurting and to feel normal even after she gets home from work.

On one day in August of 2024, Isabel experienced a heat stress episode that caused her to lose consciousness. Two hours into her workday, she began experiencing a headache, but she felt that she had to keep working. Her physical symptoms and discomfort became so intense that she did not feel she could even tolerate water, and by late afternoon, she said “everything went black.” She sat down because she could not move, and a supervisor took her into the office and gave her a bottle of water. Her head was pounding, but after going to the office, she started to feel somewhat better. Her supervisor did not call an ambulance or advise her to go to the doctor, instead sending her home for the day. Isabel spent all night with a headache and had no appetite, but she was expected back at work the next morning.

Isabel is subjected to poor treatment by supervisors who do not provide water, shade, or rest breaks. There is often no water because it quickly runs out, and supervisors get upset when workers ask for more. If workers do take time to drink water, supervisors will hurry them along and back to work. There is no shade, and they are not allowed anywhere on the property that is out of the sun. Once, a co-worker asked to sit and rest in the shade, and the supervisor told her that if she needed to rest, she should just punch out and go home. Isabel has also witnessed a co-worker faint and collapse on the job. Isabel noted that many of her co-workers speak Mam, an indigenous dialect, and do not understand English or Spanish at all, but their supervisors frequently yell at them in Spanish.

These unforgiving working conditions cause Isabel to fear going to work, knowing it will be arduous and dangerous to her health. She feels that people are afraid to speak out because their employers will fire them. During the heat season, Isabel and her co-workers work nine- or ten-hour days with only a 30-minute break for lunch. Isabel stated that she is anxious every year when heat season comes around, and she wants to see these heat protections implemented to ensure safer working conditions for herself and for all of her co-workers in the plant nurseries.

C. Alexander, a construction worker in Miami, describes the physical impacts he suffered from not properly acclimatizing to the extreme heat.

Alexander, who requested only his first name be used in this letter, is 25 years old, and he works as a carpenter in Miami, Florida. He has worked as a carpenter for three months, but he has been in other construction jobs for three years. He joined WeCount! as a member around eight months ago. Alexander experienced heat stress during his first few days on the job, as his body was not adjusted to performing strenuous work in intense temperatures. After being in the United States for only seven months, he started working in construction outdoors and fainted his first three days on the job. He recalls the temperatures being between 110 and115 degrees Fahrenheit and feeling pressured to finish the day's work. While his body was adjusting to the heat, he also experienced dizziness, weakness, blurred vision, and intense sweating. Fainting as a result of the intense heat caused strain to his body and financial stress, as he was not compensated for any time when he was unable to work for medical reasons.

Alexander discussed the importance of a national standard to protect workers, stating "we are not made of iron." From his experience, most companies do not give breaks to their workers, and some supervisors scold employees who seek shade to rest. Alexander has seen other co-workers get sick or faint from the heat as well, and he noted that resting in the shade helps them to feel better. Aside from fainting, being in the sun and heat with no breaks frequently causes Alexander to feel unwell. Water can also be difficult to access, because even when it is provided and available, it can be a long walk to reach it, or it is not replaced fast enough when it runs out.

Although working in different industries, Alexander echoed Mr. Delgado's experience, described above, that oftentimes, bigger companies may allow more breaks than smaller ones; however, this is not always the case. The opportunity to take breaks can often be dependent on the supervisors. Right now, Alexander works for a supervisor who allows breaks but noted that this experience is rare, and it is more common for rest breaks to be denied because there is no law or requirement that employers allow them.

Alexander highlighted the importance of this proposed rule by explaining that not all workers have the same capacity to endure working in the heat. Alexander urges OSHA to implement these protections so workers can have water, rest, and shade.

D. Heat, overwork, and a fast pace are a life-threatening combination, according to Ana, a plant nursery worker in Homestead, Florida.

Ana, who requested only her first name be used in this letter, is 46 years old and is a plant nursery worker in Homestead, Florida. Ana has been a nursery worker for the past 12 years and has been a member of WeCount! for the past two to three years.

Ana can speak to the risks and dangers of extreme heat, having suffered heat stroke while on the job on a hot day when the temperature reached over 100 degrees Fahrenheit. At that time, Ana had heart palpitations that she felt to the tips of her fingers, along with a headache, chills, and dizziness. By the point she had these symptoms, her body could not tolerate water, and she wanted to vomit. She fainted and lost consciousness. When she regained consciousness, Ana saw human resources onsite. They recommended she remove as much clothing as possible and rest in a bed, but they did not call 911. Ana's experience underscores that working in the heat is literally a matter of life or death, and no one should have to risk their lives in this type of work. Ana also pointed out the amount of money and value outdoor workers bring to their employers, yet they, the workers, are the ones facing life-threatening conditions.

The routine exposure to hot temperatures has also increased Ana's blood pressure, in turn increasing her risk of heat stroke; she had a six-month stretch of high blood pressure for which she had to take medication. She also began experiencing urinary tract infections. Ana has observed injury to other workers from the heat over the years as well, seeing many co-workers experience heat stroke and faint, with some being hospitalized.

Ana described a work culture in which rest breaks, aside from a short lunch break, are discouraged, even with workdays routinely averaging 12 hours. Businesses want workers to move at a fast pace for higher production, and if they do not, they are fired. Overwork, a fast pace, and extreme heat are a life-threatening combination. In Ana's experience, there are employers who deny or discourage water breaks, seeing it as a waste of time that could be spent working. When water has been provided on the job, she noted it tasted like chlorine, or it was too far from her workstation to actually access it. Ana believes these tactics are intentional by the employer, to keep workers from taking rest or water breaks. Ana further notes that undocumented workers hired by businesses are uniquely vulnerable, being less able to search for better job opportunities. Ana is now in a slightly better work situation, in an orchid nursery in which there is more shade, and some areas have air conditioning.

Ana noted that in 2020, at the start of the pandemic, agricultural workers were declared essential workers, but agricultural workers are often mistreated and not actually valued. In a line of work in which essential workers are dehumanized and their lives are devalued, Ana says this rule is necessary to protect human rights.

E. Allan, a construction worker in Miami, describes a work culture where workers have to consistently fight with unwilling employers for water and rest breaks.

Allan, who did not wish to use his last name, is 35 years old and works in construction as a carpenter. He has worked as a carpenter for the last four years, and he has been a member of WeCount! for six months. Allan highlighted the significance of this proposed rule, emphasizing that workers are human beings who should always have the right to basic necessities, like water, rest breaks, and protection from the heat, which are necessary to stay alive and healthy.

Allan has personally experienced heat stroke, and he has helped other workers who have experienced heat stroke as well. Allan suffered heat stroke while working in extreme heat, and the managers had to allow him to take a break so his symptoms could subside. He also recalled a time when he helped another man who was experiencing cramps and difficulty speaking. Allan reported to a supervisor, and the supervisor lay the man down, removed his work equipment, and provided water and electrolytes. In this situation, the supervisor knew how to respond to the man's heat stress symptoms and took them seriously, which Allan says is not always the case.

Allan sees this proposed rule as a way to reduce abuses and unequal treatment in the workplace and require employers to treat their employees with dignity. At his job, Allan notes that they only get two breaks throughout the day, a 15-minute break in the morning and a 30-minute lunch break. However, Allan has seen employers not allow lunch breaks because they have to keep up with a certain construction schedule (while the workers who work through their breaks do not receive additional compensation). Shade can also be hard to come by, as Allan stated that tents are not always available, and sometimes there are no trees nearby. Allan noted the stark contrast between the workers' lack of shade access and the trailers with air conditioning for managers at worksites. The workers who are out in the heat and sun should have a similar place to rest and recover.

Regarding water, Allan has confronted supervisors over the lack of provision of water. Because there are no standards for providing water or breaks, the employees must consistently advocate for themselves, and Allan states that they meet with the company once a week and demand access to water and bathroom breaks. He has experienced times when the workers have to walk down several floors to have access to a bathroom, which can be time-consuming, and results in workers not taking the breaks they need. If even animals deserve care with water to stay alive and healthy, Allan questions why workers are not afforded that same level of concern by employers.

This proposed rule is also extremely important to Allan because he does not have access to adequate healthcare. Many outdoor workers' employers do not provide health insurance, and long-term heat exposure can have lasting impacts on overall health. Lack of healthcare access creates a critical need for workers to have these preventative measures that will protect their long-term health.

IV. EMPLOYERS' REASONING AGAINST THE PROPOSED RULE IS FLAWED AND SHOULD NOT PREVENT THIS CRITICAL, LIFE-SAVING STANDARD FROM BEING PROMULGATED.

Opposition to the proposed rule is largely based on employers' allegations of added costs to their businesses, a contention that a standard would be duplicative of already existing protections, and concern that the proposed rule is not specific enough to certain regions or industries. However, as OSHA touches on in the proposed rule, many of these concerns are overstated as to the actual impacts that rule would have, and a deeper assessment reveals that the overall increased benefits from the rule outweigh any perceived "burdens" on employers. This letter responds to each of these objections in turn.

A. Contrary to industry opposition, the failure to implement a national heat protection standard will be costly and result in lost productivity.

A driving factor behind lawmakers' failure to protect outdoor workers is a misplaced focus on perceived costs to industries and employers. By prioritizing production over safety, lawmakers are not only jeopardizing people's lives, they are also working against their own stated goals by creating more inefficient outcomes. For example, the Florida House Representative who introduced the local preemption bill, HB 433, stated that she introduced this bill to make sure that people in Florida were protected. Representative Tiffany Esposito stated that this bill would help employees by allowing their employers to thrive.[77] Yet her reasoning fails to account for heat-stress induced losses of worker productivity that have micro- and macro-economic consequences to employers and the economy at large.

If productivity and costs are a driving factor in whether this rule should be adopted, on a global scale, statistics show that it is costlier *not* to implement this proposed rule. Over 650 billion hours of labor annually is lost because of humid heat.[78] This number is comparable to lost productivity seen during COVID-19.[79] The United States loses over 90 billion in purchasing power parity per year due to heat.[80] In fact, the two states that have preempted local governments on heat protections, Texas and Florida, are the two states with the highest levels of labor

[77] Tristan Wood, *Florida House Passes a Bill that would Preempt Local Heat Ordinances*, Health News Florida (March 4, 2024), https://health.wusf.usf.edu/health-news-florida/2024-03-04/florida-house-passes-a-bill-that-would-preempt-local-heat-ordinances.
[78] Luke Parsons et al., *Global Labor Loss Due to Humid Heat Exposure Underestimated for Outdoor Workers*, ENVIRONMENTAL RESEARCH LETTERS (Jan. 13, 2022), at 1, https://doi.org/10.1088/1748-9326/ac3dae.
[79] *Id*.
[80] *Id*. at 7.

productivity losses due to heat.[81] These productivity losses are projected to increase more than fourfold in Florida, from $11 billion to $52 billion by 2050, and in Texas, from $30 billion to 110 billion by 2050.[82]

Additionally, employers often argue that providing the necessary trainings and translation of materials into employees' native languages is too costly. However, by providing these trainings, employers can reduce insurance costs, fines, litigation costs, and workers' compensation claims resulting from worker injury, illness, or death.[83] There are also ways to minimize costs of translating training materials into multiple different languages, such as peer training from other employees who are bilingual.[84] Technological advances, including the use of artificial intelligence and web- or phone-based applications can also make this process relatively inexpensive.

Notwithstanding a moral imperative to ensure people are protected from dangerous and deadly working conditions, from a purely economic perspective, the argument can be made that it is more inefficient and costly to *not* implement this standard.

B. OSHA's current programs for regulating heat exposure are insufficient and do not satisfy the need for a mandatory national standard.

This heat safety standard is important because of the lack of state-level protection for workers. However, employers and legislators argue that implementing state-level protections is redundant because OSHA is already under the obligation to protect workers from hazards under the General Duty Clause of the OSH Act,[85] and that a National Emphasis Program (NEP) addressing heat hazards already exists.[86] However, both of these mechanisms fail to sufficiently protect workers from heat-related injury and illness. As OSHA describes in the proposed rule, the current enforcement mechanism under the General Duty Clause is reactionary and does not provide protections for workers before an injury or death occurs. This rule would allow for more expansive protections pursuant to OSHA's clear congressional authority under the General Duty Clause to ensure workplaces free from hazards. As the statistics and testimony from WeCount!

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[81] Atlantic Council: Adrienne Arsht Rockefeller Foundation Resilience Center and Vivid Economics, Extreme Heat: The Economic and Social Consequences for the United States (2021), at 4-6, https://bit.ly/3D8FGDA.
[82] *Id*. at 4, 6. (Projections are based on baseline climate data from 1986-2005 and 2020 economic data).
[83] *Ensuring Language Justice in Occupational Safety and Health Training,* AM. PUB. HEALTH ASS'N. (Nov. 7, 2017), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/ensuring-language-justice ("*Ensuring Language Justice*").
[84] *Id*.
[85] 29 U.S.C. § 654.
[86] OSHA, National Emphasis Program-Outdoor and Indoor Heat-Related Hazards, Directive No: CPL-03-00-024 (April 8, 2022) ("*OSHA NEP*").

members make clear, these more expansive protections are needed to prevent essential workers from illness and death as temperatures continue to rise.

In 2022, OSHA introduced an NEP for "Outdoor and Indoor Heat-Related Hazards," aimed at encouraging "early interventions by employers to prevent illnesses and deaths among workers during high heat conditions."[87] However, states with approved OSHA State Plans, are not required to follow the NEP.[88] There are 29 states with an OSHA-approved State Plan[89], and these states can choose to adopt the NEP policies and procedures, inform OSHA that the state already has a similar plan, or notify OSHA that is does not intend to adopt this plan.[90] Of the 29 states with State Plans, 15 states chose not to adopt the program or something similar.[91] Even though NEPs apply in the remainder of states within OSHA's federal jurisdiction, NEPs themselves do not have the force of law, and are simply policy guidelines for the agency. This program certainly does not have the strength, applicability, or enforcement mechanisms to sufficiently protect workers from heat.

Additionally, NEPs are temporary programs, with this NEP set to expire three years after the effective date.[92] Therefore, even for states that have implemented the program, the proposed rule is still the next important step in ensuring that workers always have these protections.

C. The scope of the proposed rule is not overly broad and should apply to all industries where workers are exposed to the heat.

Some employers argue that for certain industries, such as construction, a broad rule that is not specifically tailored to that particular industry will be too onerous with which to comply, or outright impossible. However, of the states with already existing heat protections, almost all apply equally to industries across the board, with few exceptions.[93] For example, California's heat protection law, which has been in effect since 2005, applies to all outdoor workers, and high heat procedures apply in agriculture, construction, landscaping, oil and gas extraction, and transportation or delivery.[94] For almost 20 years, industries with outdoor workers in California have been required to comply with the provisions for shade access, rest, water, and trainings, and

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[87] *Id*. at ABSTRACT-1.
[88] *Id*. at 3.
[89] OSHA, *State Plans*, https://www.osha.gov/stateplans (last visited Dec. 13, 2024).
[90] *Id*. at 3.
[91] OSHA, State Plan Adoption of Federal OSHA Standards and Directives, *National Emphasis Program-Outdoor and Indoor Heat-Related Hazards*, Directive No. CPL 03-00-024 (last updated Jan. 19, 2024), https://www.osha.gov/stateplans/adoption/directives/2022-04-08.
[92] *OSHA NEP, supra* note 86, at 3.
[93] *See* Juley Fulcher, *Scorched States: A Report Card on State Level Laws Protecting Workers from Heat*, Public Citizen (May 22, 2024), https://www.citizen.org/article/scorched-states/.
[94] CAL. CODE REGS. tit. 8 § 3395(a)(2).

are now applying these provision to indoor workers as well.[95] Oregon, Nevada, and Maryland also all have heat protection standards that apply industry-wide.[96]

While planning break schedules or providing shade may take more planning for some industries than others, the science is clear that access to water, shade, and rest breaks allows the body to regulate itself and avoid heat illness.[97] No matter the circumstances, these are simply the basic necessities of the human body. Almost every state with heat protections has acknowledged this by making generally applicable regulations that do not exempt an industry simply because it is more difficult to implement protections. This proposed rule should do the same.

V. WECOUNT!'S RECOMMENDATIONS TO STRENGTHEN THE FINAL RULE.

WeCount! supports OSHA's proposed rule and urges the agency to take action in implementing life-saving measures and protections for workers against the heat. In doing so, WeCount! offers the following recommendations that it deems necessary to ensure the strongest version of the rule is adopted, addressing potential loopholes that would undermine or water down the impact of the rule. These recommendations go broadly to the proper heat metric to use, ensuring the rule's applicability to all workers, enforcement (including protections from retaliation, protection for immigrant workers, the need for collaboration with worker advocacy groups), and language access.

A. Wet bulb globe temperature is the superior metric for determining heat triggers because it considers multiple atmospheric variables that impact the human body.

WeCount! supports the proposed rule using Wet Bulb Globe Temperature (WBGT) as the most accurate metric of heat. WBGT is widely accepted by multiple fields, including the U.S. Armed Forces and athletic associations, as the most precise measure of how heat feels to the human body.[98] The accuracy of WBGT is owed to the consideration of multiple atmospheric variables,[99] in comparison with the heat index, which measures only temperature and humidity. In addition to temperature and humidity, WBGT devices measure wind speed, sun angle, and cloud cover to determine a temperature that most accurately indicates the impact of heat on the

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[95] State of California Department of Industrial Relations, *California indoor heat protections approved and go into effect*, (July 24, 2024), https://www.dir.ca.gov/DIRNews/2024/2024-59.html.
[96] OR. ADMIN. R. 437-002-0156; NEV. ADMIN. CODE. § R131-24.; MD. CODE REGS. 09.12.32 § .08.
[97] OSHA, *Heat Prevention: Water. Rest. Shade*, https://www.osha.gov/heat-exposure/water-rest-shade (last visited Dec. 12, 2024).
[98] Korey Stringer Institute, *Wet Bulb Globe Temperature Monitoring*, https://koreystringer.institute.uconn.edu/wet-bulb-globe-temperature-monitoring/ (last visited Dec. 11, 2024).
[99] Nat'l Weather Service, *Wet Bulb Globe Temperature vs Heat Index*, https://www.weather.gov/ict/WBGT#:~:text=The%20Wet%20Bulb%20Globe%20Temperature,This%20differs%20from%20heat%20index (last visited on Dec. 11, 2024).

human body.[100] This is particularly significant for outdoor workers, who can face varying weather and atmospheric conditions that cause heat impacts on the body. Because heat index only considers temperature and humidity, it is a much less accurate measure of heat stress that an outdoor worker experiences.

In addition to the U.S. Armed Forces, many other entities recognize WBGT as the appropriate measure of heat, including: the National Collegiate Athletic Association (NCAA),[101] the National Federation of State High School,[102] the American College of Sports Medicine,[103] the American Pediatric Society,[104] and the National Athletic Trainers' Association.[105] Given the widespread use and acceptance that WBGT is the superior method for measuring heat for people participating in strenuous activity, it should similarly be recognized as the appropriate measure of heat in the context of this proposed rule.

In fact, OSHA's own source supports the use of WBGT over heat index.[106] The authors of a study cited in the proposed rule evaluate the use of WBGT and the heat index to determine hazard alerts for occupational heat-related illness, and determine that "WBGT-based heat stress exposure limits are highly sensitive and should be used for workplace heat hazard assessment."[107] The authors also stated that heat index should only be used when WBGT is unavailable.[108] WBGT devices have become more accessible and affordable in recent years, and while some commercial devices are less reliable than others, there is research that employers can reference to determine the best device to purchase. For example, a 2017 study evaluated six commercially available WBGT devices for accuracy and determined the Extech, QUESTemp 34, and Kestrel units provided accurate measurements for employers.[109]

WeCount! recommends that OSHA require the use of the WBGT index in its final rule, recognizing that it is the superior index for measuring heat impacts and therefore the most

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[100] *Id.*
[101] Jason Cates & Jenifer D. Rheeling, *Wet Bulb Globe Temperature (WBGT) – Why Should Your School Be Using It?*, NFHS (April 13, 2023), NFHS https://www.nfhs.org/articles/wet-bulb-globe-temperature-wbgt-why-should-your-school-be-using-it/.
[102] *Id.*
[103] Nat'l Weather Serv., *Wet Bulb Globe Temperature Informational Guide* https://www.weather.gov/media/safety/heat/2020-WBGT-Handout.pdf (last visited Dec. 11, 2024).
[104] Earl Cooper et al., *An Evaluation of Portable Wet Bulb Globe Temperature Monitor Accuracy,*52(12) J. ATHLETIC TRAINING, at 1167 (2017) DOI: 10.4085/1062-6050-52.12.18https://pmc.ncbi.nlm.nih.gov/articles/PMC5759700/#i1062-6050-52-12-1161-t01.
[105] *Id.*
[106] Courtney E. Morris et al., *Actual and Simulated Weather Data to Evaluate Wet Bulb Globe Temperature and Heat index as Alerts for Occupational Heat-Related Illness,* 16 (1) J. OCCUPATIONAL & ENV'T HYGIENE 54-65 (2019) https://doi.org/ 10.1080/ 15459624.2018.1532574.
[107] *Id.*
[108] *Id.*
[109] Cooper, *supra* note 104.

protective of worker safety. Alternatively, heat index should be used when WBGT is unavailable or impracticable.

B. OSHA should expand rest break requirements to reflect the increasing temperatures, specify that shade needs to be as close as practicable to the worksite, and require clean water.

1. OSHA should ensure the rule adequately encourages rest breaks and require additional rest breaks when temperatures surpass 100 degrees Fahrenheit.

Currently, section e(8) of the proposed rule states that employers "must allow and encourage employees to take paid rest breaks […] if needed to prevent overheating."[110] To effectively protect employees' rights to rest breaks, OSHA should remove the "if needed" language of the proposed rule when the initial heat trigger is reached. Such limiting language could create a situation in which employees must prove or explain to an employer that the rest break is necessary for them, which could in turn discourage workers from taking breaks if they feel too intimidated to speak up or if their employer disagrees that a rest break is a necessity.

Further, to account for temperatures routinely surpassing the initial and high heat triggers, WeCount! suggests that OSHA adjust the proposed rule to allow for additional break times as the heat index or WBGT surpass additional heat triggers, such as 95 degrees Fahrenheit, 100 degrees Fahrenheit, and 105 degrees Fahrenheit. At these high temperatures, a few degrees of difference above the body's normal temperature, which is about 98.6 degrees Fahrenheit, can have a drastic impact on the human body's ability to regulate itself.[111] As temperatures in our environment exceed the normal core body temperature, the body begins to regulate itself by sweating to cool down.[112] With every one degree increase in core body temperature, a person's heart rate increases by ten beats per minute, which causes fatigue, headaches, nausea, and the beginnings of heat exhaustion.[113] Of the unreported heat-related deaths discovered by the Tampa Bay Times investigation, the average core body temperature of the deceased was 106 degrees Fahrenheit.[114] The average heat index on the days these workers died was 100 degrees Fahrenheit.[115]As discussed in detail above, the number of days that workers experience a heat index above 100 and 105 degrees Fahrenheit are increasing every year due to climate change, and this proposed rule should account for the risks these higher temperatures will continue to pose.

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[110] *Proposed Rule*, *supra* note 1, at 71071.
[111] Aryn Baker, *What Extreme Heat Does to the Human Body*, TIME (June 13, 2022), https://time.com/6186988/extreme-heat-human-body-impact/.
[112] *Id*.
[113] *Id*.
[114] Critchfield & Chavez, *supra* note 5.
[115] *Id*.

WeCount! therefore recommends that OSHA require a gradual work-rest schedule that increases rest times as temperatures increase above the 90-degree high heat trigger, similar to the NIOSH work/rest schedule.[116] Many other states that have implemented heat stress regulations include provisions for a gradual work-rest schedule as temperatures increase. Oregon's rest break requirements gives employers the option of implementing employer-specific rest break intervals, adopting NIOSH's work/rest schedule, or implementing a simplified work/rest schedule modeled by Oregon's OSHA.[117] Maryland provides for a ten-minute break for every two hours worked where employees are exposed to temperatures between 90 and 100 degrees Fahrenheit, a 15-minute break for every hour worked in temperatures above 100 degrees Fahrenheit, or rest periods according to the NIOSH work and rest schedules.[118] Washington's regulation allows for the same work and rest schedule as Maryland.[119]All of these options account for temperature increases above the 90-degree trigger. It is imperative that this proposed rule take into account the record-breaking temperatures that workers all over the country are experiencing every year and sufficiently protect workers from these temperatures.

2. *Shade should be "as close as practicable" to the worksite and uniformly provide sufficient blockage of sunlight.*

OSHA should specify that employers must provide shade "as close as practicable" or "practical" to the worksites, as Maryland, Colorado, Oregon, Washington, and California have required in their heat regulations.[120] This will ensure that employees are able to take the shaded breaks they need and are not deterred from accessing shade due to its distance from the worksite.

Additionally, the proposed rule states that shade is "the blockage of direct sunlight" and allows for artificial shade or natural shade.[121] If allowing for natural shade such as trees, the rule should specify that natural shade must provide sufficient blockage from the sun, equivalent to artificial shade such as a tent.

3. *Water that employers provide to employees should be required to be clean.*

In addition to requiring that water be suitably cool, readily accessible, and of sufficient quantity,[122] OSHA should further require that the water be clean. WeCount! members have

[116] NIOSH, *Heat Stress Work/Rest Schedules,* https://www.cdc.gov/niosh/docs/mining/UserFiles/works/pdfs/2017-127.pdf (last visited Dec. 12, 2024).
[117] OR. ADMIN. R. 437-002-0156 § 5(e).
[118] MD. CODE REGS. 09.12.32 § .08(C).
[119] WASH. ADMIN CODE § 296-62-09547 & 296-307-09747.
[120] MD. CODE REGS. 09.12.32 § .06; COLO. CODE REGS.§ 1103-15 § 3.3; OR. ADMIN. R. 437-002-0156 § 3(c); WASH. ADMIN CODE § 296-62-09535 & 296-307-09735; CAL. CODE REGS. tit. 8 § 3395 (d)(1).
[121] *Proposed Rule*, *supra* note 1, at 71070.
[122] *Id*.

experienced instances in which employers provided water that did not appear to be clean, and it was unclear from where the water came. Providing unclean water is unsanitary and unsafe for workers, and it would in effect prevent workers from accessing a basic and life-saving necessity when laboring in the heat. To ensure that employees are given clean and safe water, OSHA should include this as a requirement in a final rule.

C. OSHA should ensure that the rule applies to all workers, especially in the context of joint or multiple employer worksites.

The proposed rule, as written, regulates employers as it relates to their employees. However, in many industries with outdoor workers, including in construction, it is common for there to be joint employer arrangements and/or multiple employer worksites. In these scenarios, a business may, for example, engage with a contractor who then subcontracts work or is the intermediate entity that directly hires workers to perform work at the job site. To ensure that employers do not create the misperception that these arrangements can exempt a large sector of workers from the protections of this rule, WeCount! recommends that OSHA clarify the rule's language as to applicability to all workers, utilizing OSHA's expansive legal definitions and frameworks for employer-employee relationships to ensure robust enforcement.

OSHA's Multiple-Employer Worksite Doctrine imposes joint responsibility among employers, including contractors, to ensure hazard-free working conditions for workers.[123] Through this doctrine, OSHA has interpreted the OSH Act to authorize imposing liability on an employer who causes a hazardous condition (a "creating employer") or a contractor or other employer with control over a worksite who should have identified and prevented a violation through the reasonable exercise of its supervisory authority (a "controlling employer").[124] Indeed, "[c]ourts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees."[125]

The Secretary of Labor has also applied the agency common law principles under *Darden*,[126] which looks to a variety of factors to assess the hiring party's control over the manner and means that a worker completes her tasks, to determine the nature of the employment relationship and, thus, multiple employer liability. *See, e.g., A.C. Castle Constr. Co. v Acosta*, 882 F. 3d 34, 37-38 (1st Cir. 2018). The Ninth Circuit has emphasized the similarities between

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[123] OSHA, *Multi-Employer Citation Policy*, Directive No. CPL 2-00.124 (1999) https://www.osha.gov/sites/default/files/enforcement/directives/CPL_2-0_124.pdf ("Directive No. CPL 2-00.124"). *See also* Occupational Safety & Health Admin., CPL 02-00-160, Field Operations Manual 4-5 (2016).
[124] *See* Directive No. CPL 2-00.124, *supra* note 123, at 3-4, 8-13.
[125] *Sec'y of Lab. v. Trinity Indus., Inc*., 504 F.3d 397, 402 (3d Cir. 2007).
[126] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

the *Darden* test and the "economic realities" test,[127] utilized under the Fair Labor Standards Act (FLSA) and the Migrant Seasonal Agricultural Worker Protection Act (MSPA).[128] The economic realities test, which looks to the totality of circumstances to determine the nature of an employment relationship, supports a broad and expansive interpretation of an employment relationship and joint employment.[129] Given that the Secretary of Labor has looked to the *Darden* factors in OSHA enforcement, which is similar to the expansive economic realities test utilized in the FLSA and MSPA context, OSHA has broad authority under its own Multi-Employer Worksite Doctrine, as well as *Darden* and the economic realities test, to ensure this rule is broadly applicable and that companies cannot disavow responsibility for implementing the requirements of this rule.

Thus, WeCount! believes it is necessary to clarify in the rule that the heat safety standard applies to all workers at a worksite; that the statutory definition of employer may be broadly defined for enforcement purposes, in line with the Multi-Employer Worksite Doctrine and related standards; and that it is the responsibility of all employers, including general contractors and subcontractors, to implement this rule and ensure protections from heat hazards.

D. Effective enforcement requires expanded rights and protections for whisteblowers and better collaboration with workers and worker advocacy groups.

1. Access to information for whistleblower and retaliation claims

While the proposed rule does require employers to include in their training materials that they cannot discriminate against an employee for exercising their rights under this proposed rule, employers should also be required to educate their employees on the process for reporting any violations of this standard and affirm that they will not be retaliated against for doing so.

Furthermore, OSHA should fortify its whistleblower framework by ensuring access to information so that employees are aware of their rights and recourse in the event of retaliation. The short statute of limitations period for retaliation complaints—30 days from the act of

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[127] *Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n*, 20 F.3d 938, 941-42 (9th Cir. 1994).

[128] *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939, 40946 (July 30, 2021) (rescinding the Trump era joint employment rule and reverting to the economic realities test employed by the courts). *See also* 29 C.F.R.§ 500.20(h)(4); 29 U.S.C. 1802(5) ("The term "employ" [under MSPA] has the meaning given such term under section 3(g) of the [FLSA].").

[129] *See* Administrator's Interpretation No. 2016-1, "Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" (Jan. 20, 2016) ("The expansive definition of 'employ' as including 'to suffer or permit to work' rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.").

retaliation[130] —prevents many workers from seeking OSHA intervention. If employees are not informed of their rights, they may not act in time to file a complaint, thus weakening the enforcement framework for this proposed rule. Such a short limitations period may also embolden employers to take adverse action against whistleblowers and create the perception that workers do not have any recourse if they do speak up.

Additionally, there is no private right of action for employees to sue their employer under the OSH Act. Only OSHA can sue the employer for a retaliation claim, which leaves whistleblowers unprotected if OSHA does not bring suit.[131] These shortcomings in the whistleblower framework led the Government Accountability Project to advocate for "amendments to the OSH Act to allow for a private right of action and to address the short statute of limitations for filing complaints[.]"[132] Since such a legislative fix is beyond the scope of this rulemaking process, it is therefore crucial for employers to properly educate their employees on how to report violations of this standard and any retaliatory actions by employers, through sufficient funding and training. OSHA could require employers to post signs advising workers of their right to report without retaliation, provide flyers to workers, include this information in trainings, and otherwise include it in their HIIPP.

2. Protections for immigrant workers in the whistleblower context

OSHA should further consider protections to address the unique vulnerabilities of immigrant workers in the whistleblower context. The Department of Labor's (DOL) issuance of statements of interest can provide some protections through DHS's deferred action program, providing relief from deportation.[133] However, deferred action is a discretionary administrative remedy that may not always be available. Also relevant to enforcement of this standard is the importance of maintaining DOL rules, effective March 30, 2023, authorizing OSHA to provide U and T visa certification to victims of workplace-based crimes or labor trafficking, including when

[130] 29 U.S.C. § 660(c)(2).
[131] 29 U.S.C. §11(c).
[132] Andrea Meza & Dana Gold, Gov't Accountability Project*, Raising Voices, Protecting Lives: Whistleblowers at the Intersection of Oversight Failures in the Immigration System and Food Production Industry* 11 (2023) https://whistleblower.org/wp-content/uploads/2023/06/Raising-Voices-Protecting-Lives-Whistleblowers-at-the-Intersection-of-Oversight-Failures-in-the-Immigration-System-and-Food-Production-Industry-1.pdf .
[133] U.S. Citizenship & Immigr. Services*, DHS Support of the Enforcement of Labor and Employment Laws,* https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws (last visited on Dec. 12, 2024); U.S. Dep't of Labor, Process for Requesting a Statement of US DOL Interest During Labor Disputes, *Frequently Asked Questions For Workers and Their Representatives* https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-DOL-Support-FAQ-English.pdf (last visited on Dec. 12, 2024).

employers commit obstruction of justice or witness tampering in the court of OSHA investigations or subsequent litigation.[134]

3. The importance of collaboration with worker advocacy groups

For successful enforcement of the heat safety standard once adopted, WeCount! also recommends that OSHA takes steps to institutionalize the presence of worker centers, labor unions, community organizations, and workers' rights organizations in OSHA stakeholder meetings and through the signing of OSHA Alliance Agreements.[135] Minutes from an OSHA whistleblower meeting in 2023 reflect the presence and participation of many large employers and labor unions, but not other stakeholders.[136] Outreach to and institutionalizing participation of varied stakeholders in discussions with OSHA/DOL leadership could facilitate greater responsiveness to workers' concerns as it relates to heat safety and implementation of this heat standard.

Additionally, OSHA should continue to support employees who choose to exercise their rights in accordance with the DOL's Walkaround Final Rule.[137] The Walkaround Rule allows employees to designate a third-party representative including labor unions and workers' centers, to accompany the Compliance Safety and Health Officer during an inspection.[138] This protection can enhance the efficacy of OSHA's investigations and make employees feel safer raising violations of the proposed rule. Requiring employers to educate employees on the Walkaround Rule while explaining where they can report violations of the proposed rule will help ensure that OSHA can enforce the proposed rule to the greatest extent possible.

Along these lines, it is crucial that OSHA continue to collaborate directly with workers, worker committees, labor unions, and workers' centers, such as WeCount!. Such collaboration can "help increase the likelihood of a thorough investigation by proactively providing additional information and worker contacts to investigators and maintaining consistent communication by

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[134] *See* OSHA, Whistleblower Protection Program, *U & T Visa Certifications* https://www.whistleblowers.gov/ut_visa (last visited on Dec. 12, 2024); NDLON, Press Release, *BREAKING: Department of Labor Designates U-Visa & T-Visa Certifying Authority to OSHA* (Feb. 13, 2023) https://ndlon.org/breaking-department-of-labor-designates-u-visa-t-visa-certifying-authority-to-osha; Meza & Gold, *supra* note 132 at 12-13 (describing protective value of new rules).
[135] OSHA, *Region 4- Alliance Agreement* (Mar. 31, 2023), https://www.osha.gov/alliances/regional/region-4/alliance-agreement_20230331.
[136] *See* OSHA, *Whistleblower Stakeholder Meeting Minutes* (Oct. 24, 2023) https://www.whistleblowers.gov/sites/wb/files/2023-10-24-stakeholder-meeting-minutes.pdf.
[137] 29 C.F.R. § 1903.8(c).
[138] *Id*.

asking for updates."[139] Moreover, workers are often too intimidated to speak up when agencies conduct on-site interviews,[140] and the involvement of worker organizations can foster trust and security among workers, along with bridging language barriers, discussed in further detail below.[141]

E. Trainings, HIIPPs, hazard alerts, and investigations must allow for language access for workers with limited English proficiency and must account for differences in literacy levels.

WeCount! would like to highlight the importance of workplaces providing heat stress trainings, administering their HIIPPs, and issuing any hazard alerts or warning signs in the languages that employees can understand. This language access should be a requirement in the final rule. As of 2022, there are an estimated 46.2 million foreign-born individuals in the United States (or 13.9% of the total population),[142] and foreign-born workers represent a growing proportion of the U.S. workforce.[143] A large number of foreign-born individuals are limited English proficient (LEP) and may have limited education, yet they often work in the most dangerous industries with the highest number of fatalities.[144] As a result, LEP and foreign-born workers have disproportionately high injury and fatality rates within these industries.[145] It is imperative that trainings and materials, including workplace HIIPPs, are presented in languages and dialects that workers can understand.

WeCount!'s members have seen many instances where English and Spanish are the only language translations provided to employees, but WeCount! has many members who speak languages indigenous to Mexico and Central America and who do not understand English or Spanish. These other common languages include Mam, Ixil, Q'anjob'al, Chuj, K'iche', Mixteco, and more. It is imperative for language access via document translation and in-person interpretation to be a top priority for all employers implementing this proposed rule. Many of these trainings would be meaningless if not carried out in languages that all workers can speak and understand.

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[139] Bliss Requa-Trautz, et al., *Deferred Action Protections for Labor Enforcement: A Guide for Worker Advocates*, NELP (Oct. 2023), at 40, https://www.nelp.org/app/uploads/2023/10/Deferred-Action-Protections-for-Labor-Enforcement-_-A-Guide-for-Worker-Advocates.pdf.
[140] *Id*.
[141] Amir Khafagy, *New OSHA Rule Could Allow Workers to Bring Advocates Onto Work Sites,* Documented (Feb. 22, 2024) https://documentedny.com/2024/02/22/osha-workplace-advocates-safety/
[142] Shabnam Shenasi Azari, et al., U.S. Census Bureau, *The Foreign-Born Population in the United States: 2022*, American Community Survey Briefs (April 2024) https://www2.census.gov/library/publications/2024/demo/acsbr-019.pdf.
[143] *Ensuring Language Justice*, *supra* note 83.
[144] *Id*.
[145] *Id*.

Additionally, to account for differences in literacy levels among employees, OSHA should require employers to use best efforts to ensure workers' understanding of any trainings and materials, including using alternative and accessible teaching strategies in their heat safety trainings. Alternative teaching strategies can include using photographs or hands-on activities such as trainings that require teamwork and problem solving about scenarios workers could encounter at their worksite.[146] Trainings should also include comprehension checks to improve workers' understanding and allow employers to determine areas where more targeted education could be beneficial.[147] While this is not a replacement for proper translation of training materials to a language employees understand, these alternative teaching strategies can ensure that all employees understand the HIIPPs, no matter their educational background or literacy level.

It is also imperative that all hazard alerts are similarly translated and effectively communicated to all employees. Without this effective communication, employees will remain unaware of the increased risk to which they are exposed. Additionally, OSHA should require hazard alerts to be issued when the initial heat trigger is reached, and not just when temperatures surpass the high heat trigger. Employees should be informed of the increased risks once temperatures reach 80 degrees Fahrenheit so that they can begin taking preventative measures to reduce their chances of heat illness.

Regarding investigations and enforcement of the heat safety standard, the Walkaround Rule remains important for employees who speak a language other than English, if they can ensure that someone can accompany them who is able to provide interpretation during the investigation. While OSHA should ensure proper resource allocation and staffing to provide for language interpretation, the Walkaround Rule is another avenue to bridge barriers related to language access.

F. OSHA should require additional protections for the most vulnerable outdoor workers, including children, older people, and pregnant people.

OSHA's final rule should account for the most vulnerable groups among outdoor workers. Experts have warned that children, older people, and pregnant people are most at risk of enduring health complications from extreme heat caused by climate change.[148] The risks of heat-related illness and injury only increase when members of these groups labor in the heat.

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[146] *Id*.
[147] Chelsea Eastman Langer et al., *Are Cal/OSHA Regulations Protecting Farmworkers in California from Heat-Related Illness*, 63(6) J. OCCUPATIONAL & ENV'T MED. 532-539 (June 2021) DOI: 10.1097/JOM.0000000000002189 https://pmc.ncbi.nlm.nih.gov/articles/PMC8893044/#S14.
[148] World Health Organization, *Experts Warn of Serious Health Impacts from Climate Change for Pregnant Women, Children, and Older People* (June 5, 2024), https://www.who.int/news/item/05-06-2024-experts-warn-of-serious-health-impacts-from-climate-change-for-pregnant-women--children--and-older-people.

Children in the United States are allowed to work in agricultural settings at the age of 16.[149] In certain circumstances, children under the age of 16, and even under the age of 12, may work in non-hazardous agricultural settings, if proper parental consents, requirements for working outside of school hours, and other requirements are met.[150] Additionally, children between the ages of 16 and 17 may be allowed to work at certain construction sites.[151] As for older workers, approximately 19% of farmworkers in the United States are over the age of 55,[152] while in the construction industry, about one in five workers are over the age of 55.[153] While it is difficult to determine an exact number of pregnant outdoor workers at any given time, an estimated 26% of the 2.5 to 3 million agricultural workers in the United States are women,[154] and about 10% of the approximately 10.8 million construction workers in the United States are women.[155]

Children are more vulnerable to heat-related morbidity and mortality, in part because of smaller body mass and because they lose fluid more quickly than adults and are therefore more likely to become dehydrated more quickly.[156] Older adults are more at risk for developing heat-related illness when exposed to extreme temperatures because of their higher potential for other chronic health conditions, skin changes resulting from normal aging, and likelihood of taking other medications that may prevent the body from cooling down.[157] For people who are pregnant, being exposed to extreme heat for even one day can increase the risk of high blood pressure disorders and other pregnancy complications, and they also experience heat exhaustion, heat

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[149] DOL, *Fact sheet # 40: Overview Youth Employment (child labor) Provisions of the Fair Labor Standards Act for Agricultural Operations*, https://www.dol.gov/agencies/whd/fact-sheets/40-child-labor-farms#:~:text=What%20are%20the%20Minimum%20Age,or%20operated%20by%20their%20parents (last visited Jan. 12, 2025).
[150] *Id*.
[151] OSHA, *Young workers- construction: build a safe work foundation,* https://www.osha.gov/young-workers-construction/appropriate-jobs#:~:text=/state_of.htm.-,Appropriate%20Jobs,construction%20sites%2C%20in%20limited%20capacities (last visited Jan. 12, 2025).
[152] *Facts about Agricultural Workers*, *supra* note 33.
[153] Zachary Phillips, *Construction's Age Problem: A Foreboding Exodus of Experience*, Construction Drive https://www.constructiondive.com/news/construction-labor-retirement-recruiting-dei/651184/.
[154] National Center for Farmworker Health, Inc.*, Maternal and Child Health*, Agricultural Worker Data, https://www.ncfh.org/maternal-and-child-health-fact-sheet.html (last visited Jan. 13, 2025).
[155] OSHA, *Women in Construction*, https://www.osha.gov/women-in-construction (last visited Jan. 13, 2025).
[156] EPA, *Protecting Children's Health During and After Natural Disasters: Extreme Heat, Children Susceptibility to Extreme Heat*, https://www.epa.gov/children/protecting-childrens-health-during-and-after-natural-disasters-extreme-heat#Children%20Susceptibility%20to%20Extreme%20Heat (last visited Jan. 13, 2025).
[157] National Institute on Aging, *Hot Weather Safety for Older Adults*, https://www.nia.nih.gov/health/safety/hot-weather-safety-older-adults (last visited Jan. 13, 2025).

stroke, or other heat-related illness more easily than people who are not pregnant.[158] People who are pregnant also require more liquids to remain hydrated, increasing the risk of dehydration in the heat.[159] Because children, older people, and pregnant people have an increased risk of harm from laboring in the heat, OSHA should require employers to provide additional rest breaks and sufficient shade and water to workers in these groups. Enhanced monitoring of these workers for signs of heat stress should also be required.

IV. CONCLUSION

Thank you for your time and consideration of these comments. For the reasons explained above, OSHA should promulgate a final rule with WeCount!'s recommendations to further strengthen the protections for workers who labor in the heat. There is a critical need for preventative measures to protect workers from heat-related illness, injury, and death, especially for outdoor workers who are on the frontlines of the climate crisis and who are disproportionately impacted by the record-breaking temperatures that are becoming worse year after year. OSHA's current mechanism for regulating heat stress is not adequate, because it requires the harm to take place before OSHA can act. Meanwhile, only a small handful of states have implemented heat protections, while others, like Florida, have taken steps to actively block localities from protecting workers from the heat. WeCount! requests that you closely consider the testimonials and firsthand accounts of its members who labor in the heat, and it welcomes the opportunity to provide any additional information at a public hearing on this rule.

Sincerely,

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[158] EPA, *Heat and Pregnancy*, https://www.epa.gov/children/heat-and-pregnancy (last visited Jan. 13, 2025). *See also* CDC, *Heat and Pregnancy*, https://www.cdc.gov/extreme-heat/risk-factors/index.html (last visited Jan. 12, 2025).
[159] *Id*.

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