LOCAL 777
INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, AFL-CIO
MEMBERS IN ILLINOIS, INDIANA, WISCONSIN, AND REMOTELY THROUGHOUT THE NATION
COLIN C. SMALLEY, PRESIDENT • PRESIDENT@IFPTE777.ORG • 312-450-0838

December 31, 2024

Mr. Stephen Schayer
Occupational Health and Safety Administration (OSHA)
via www.regulations.gov

Re: Docket OSHA-2021-0009

Dear Mr. Schayer:

I am writing to express the views of Local 777, a local union affiliated with the International Federation of Professional and Technical Engineers (IFPTE), AFL-CIO. We represent workers in the federal sector at the U.S. Army Corps of Engineers, Chicago District. We are a "wall-to-wall" union representing all non-management workers. We represent workers exposed to heat hazards including:

- Floating plant workers and scientists on boats, barges, and tugboats;
- Equipment operators and mechanics at flood control reservoirs, confined disposal facilities, and navigation lock and dam facilities; and
- Scientists and engineers at land-based environmental remediation/restoration sites, dams, levees, wetlands, and construction sites.

We are writing to offer comments on the proposed *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings.*

In section V.B.V.A. of the NPRM, OHSA requested comments on the proposed initial and high-heat triggers. We generally agree with OSHA's proposed approach and support simple, easy to apply triggers rather than triggers tailored to specific geographic areas. With respect to the effect of clothing adjustment factors, we would generally oppose such factors, unless such clothing is provided by employers as PPE. Put another way, if employers want to have lower triggers, they need to provide at no cost to the workers the clothing that would support such adjustments – and put the opposite way, workers who cannot afford certain clothing types should not be required to obtain them simply so the employer can justify a clothing adjustment factor.

In section VII.A.I. of the NPRM, OSHA requests comments on the applicability of exemptions to the Standard. Regarding the air conditioning exemption in (a)(2(iii), we believe that OSHA should specify that outages reasonably expected to last longer than 10 days with ambient temperatures over the initial trigger temperature would result in the exemption no longer applying. We recommend this because this is the time in which an acclimatization plan could be created and implemented, and so it is reasonable to expect compliance with the Standard in circumstances such as a prolonged outage.

In section VII.C.I. of the NPRM, OSHA requests comments on the role of non-managerial workers and their representatives. We strongly urge OSHA to retain the requirement for worker and representative involvement; as we believe this will result in the best HIIPP products.

Further, we believe that OSHA should define “employee representative” consistent with the definition contained for inspections, found at 29 CFR 1903.8(c), which would allow both non-employee union representatives, but also experts hired or otherwise obtained by workers.

We further urge OSHA to incorporate by reference much of the preambulatory language from the April 1, 2024 *Worker Walkaround Representative Designation Process* Rule to ensure that employers and workers and their representatives can more easily understand the process and requirements for naming a representative. Many of the same considerations will hold true for developing a HIIPP as would apply to inspections.

In section VII.E.II.A. of the NPRM, OHSA requests comments regarding drinking water. As a representative of federal government employees, we urge OSHA to include a requirement not only to provide potable water, but also to provide water at an adequate temperature. Because of a general GAO fiscal law finding that “[b]ottled water is ordinarily considered a personal expense of the government employee... As a general rule, without specific statutory authority, appropriated funds are not available for personal expenses.” See B-310502,*Department of the Army--Use of Appropriations for Bottled Water*, February 4, 2008, citing B-303920, Mar. 21, 2006, and B-302548, Aug. 20, 2004; 68 Comp. Gen. 502 (1989).

Including these requirements in the Standard is important to federal employees because GAO has said that “an agency may use appropriated funds to purchase bottled water when an agency's work site has no available potable drinking water *or when the available drinking water poses health risks if consumed*.” See B-310502, *Department of the Army--Use of Appropriations for Bottled Water*, February 4, 2008, citing B-247871, Apr. 10, 1992 (emphasis added). Inclusion in this standard would help federal agencies avoid scenarios where fiscal law decisions endanger worker health and safety.

In section VII.E.VIII.A of the NPRM, OSHA requested comments on the appropriateness of the heat-related breaks being paid. We strongly urge OSHA to include a requirement for paid, employee-scheduled heat breaks in the final Standard. We believe that as with all safety and health analyses, the specific mix of options to lower risk will vary by the job at hand. If, for example, a particular job were to preclude use of other strategies to mitigate hazards, rest breaks and shade may be the only remaining option to preserve worker health. In that case, workers should not be expected to use their own personal time to compensate for an employer’s lack of implementation of other safeguards. Relatedly, if an employer cannot tolerate paid, worker-scheduled breaks, it should provide other safeguards to ensure OSHA’s proposed language (“...unscheduled rest must be heat-related...”) would be applicable.

In section VII.E.X.A. of the NPRM, OSHA requested comments on whether there are any scenarios in which wearing cooling PPE is warranted and feasible and OSHA should require its use. As an initial matter, we believe that to the extent cooling PPE is included and relied upon by an employer in a heat injury and illness prevention plan required by the Standard, it should be considered to be “required” by OSHA.

We also offer several points about the federal government agencies’ ability to purchase and provide cooling PPE, and how the Standard could be clarified to ensure that agencies’ ability to provide such PPE is not hobbled by fiscal law rulings.

Within the federal government, the General Accounting Office ("GAO") has ruled that there are primarily three statutory permissible ways for an agency to purchase clothing that has protective qualities. The first is as part of a uniform, which for DoD employees is authorized by 10 U.S.C. § 1593. This Standard has no bearing on this type of purchase.

The second is the provision of 5 U.S.C. § 7903 that provides for purchases that in the view of GAO, meet a three-prong test: (1) the item must be "special" and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. See 32 Comp. Gen. 229 (1952); B-193104, Jan. 9, 1979.

However, the GAO has stated that "[a]n agency may provide protective clothing regardless of whether the purchase satisfies the three tests of section 7903 if the agency determines that the clothing is necessary to satisfy Occupational Safety and Health Act (OSHA) requirements." See *Matter of Purchase of Insulated Coveralls, Vicksburg, Mississippi*, B-288828 (October 3, 2002), citing 57 Comp. Gen. 379, 382 (1978).

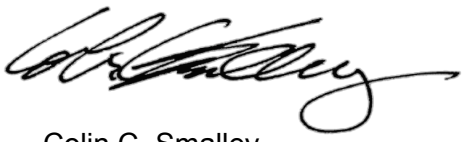
To be responsive to this financial requirement that would allow federal agencies to provide cooling PPE that could be considered "ordinary" or "usual," we believe OSHA should provide in the Standard for a clear statement that the decision as to whether cooling PPE is "necessary" may be made on a job-specific or position-specific basis (e.g., in a job hazard analysis or position hazard analysis) or as part of a collective bargaining agreement; but in any case once made in writing, cooling PPE relied upon to comply with this Standard would be deemed "necessary."

The third type of statutory authorization to provide clothing that has protective benefits is pursuant to 29 U.S.C. § 668, which requires agencies to "establish and maintain an effective and comprehensive occupational safety and health program consistent with standards" such as this proposed Standard. We recommend that OSHA make a clear statement that with respect to this duty of agencies, providing federal employees cooling PPE is "consistent with" this Standard and that such statement be clearly a "payment provision[]" of this Standard that may override the general exception to OSHA's Employer Payment for Personal Protective Equipment Rule at 29 CFR 1926.95(d) for "[o]rdinary clothing, skin creams, or other items, used solely for protection from weather."

In section VII.I.A. of the NPRM, OSHA requested comments on whether 6 months is appropriate and feasible for retaining records of monitoring data. We urge OSHA to lengthen this amount of time to three years. While six months is the limit of time for an OSHA investigation (and is also the time limit for filing, for example, an unfair labor practice charge with the Federal Labor Relations Authority); three years is the limit (for willful violations) for remedies under the Back Pay Act. Because provisions of the proposed Standard could result in overtime or other pay benefits (such as improperly withheld pay for heat-related breaks), it would be more difficult to reconstruct a record if monitoring data were disposed after only six months. We believe that with modern electronic devices, it is feasible to retain this data for 3 years.

We appreciate the opportunity to provide the views of our members, and we appreciate OHSA's diligence on this well-crafted rule and hope to see it implemented at the earliest possible opportunity.

Sincerely,



Colin C. Smalley
President