

Occupational Safety & Health Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington DC, 20210
800-321-6742
www.OSHA.gov

November 29, 2021

Re: Occupational Safety and Health Administration’s Advance Notice of Proposed Rulemaking on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (Docket No. OSHA-2021-0009)

To whom it may concern:

On October 27, 2021, the Occupational Safety and Health Administration (OSHA) published an advance notice of proposed rulemaking on heat injury and illness prevention in outdoor and indoor work settings. The Sabin Center for Climate Change Law of Columbia Law School commends OSHA on this initiative, which will be critical in combatting extreme heat, the most lethal climate disaster of our time.¹

The Sabin Center submits these comments to encourage OSHA to utilize this rulemaking to ensure that its workplace heat protections extend to incarcerated workers in federal prisons and federal corrections officers. As the Sabin Center documented in a 2015 report written by Daniel W. E. Holt, prison inmates and correctional officers are particularly vulnerable to heat stress.² Correctional facilities—including federal prisons—are frequently overcrowded, leading to increased heat and humidity.³ Furthermore, risk factors for succumbing to heat-related illness—including advanced age, poor mental and physical health, and the use of medications—are common among U.S. inmates.⁴

Per a 2014 report in the American Prospect, the United States prison system houses roughly 870,000 working inmates, which equates to about half of the population currently incarcerated in prison.⁵ Outside of several limited exceptions, all able-bodied federal prisoners are required to do some work.⁶ Many federal inmates perform industrial work

¹ See Michael B. Gerrard, *Heat Waves: Legal Adaptation to the Most Lethal Climate Disaster (So Far)*, 40 UALR L. REV. 515 (2018).

² DANIEL W. E. HOLT, HEAT IN US PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf.

³ *Id.* at 11–13.

⁴ *Id.* at 18–20

⁵ Beth Schwartzapfel, *The Great American Chain Gang: Why Can’t We Embrace the Idea that Prisoners Have Labor Rights?*, AMERICAN PROSPECT (May 28, 2014), <https://prospect.org/justice/great-american-chain-gang/>.

⁶ General Accounting Office, *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage*, May 1993 GAO/GGD-93-98, p. 19, <https://www.gao.gov/assets/ggd-93-98.pdf>.

for UNICOR,⁷ also known as Federal Prison Industries,⁸ a government corporation that operates eighty-three prison factories across the country,⁹ but which the DOJ Office of the Inspector General has reported does “not sufficiently value worker safety and environmental protection.”¹⁰ These inmates perform an array of jobs that includes cooking, cleaning, laundry, maintenance, manufacturing, agriculture, construction, and firefighting.¹¹ Critically, many federal inmates perform jobs that place them within OSHA’s jurisdiction.

As OSHA has previously stated, “when inmates are required to perform work similar to that outside of prisons, e.g., farming, industries, machine operations, etc., the applicable protections open to anyone else in similar situations should apply.”¹² OSHA has additionally confirmed that, “[b]ecause the Federal Bureau of Prisons is part of the Department of Justice, an Executive Branch agency, Federal prisons must comply with OSHA standards . . . wherever applicable.”¹³ As a result, OSHA’s workplace heat standard should account for and seek to correct the disproportionate heat exposure of incarcerated workers and correctional officers.

Extreme heat exposure among incarcerated workers and correctional officers is relevant to several questions that OSHA raises in its advanced notice of proposed rulemaking, namely:

- Are there industries, occupations, or job tasks that should be considered when evaluating the health and safety impacts of hazardous heat exposure in indoor and outdoor work environments?¹⁴
- In addition to traditional work arrangements, are there specific types of work arrangements or multi-employer work arrangements that should be considered when evaluating the health and safety impacts of hazardous heat exposure in indoor and outdoor work environments?¹⁵

⁷ *Id.* at 19–20.

⁸ See *UNICOR*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor.jsp (last visited Dec. 7, 2021).

⁹ Safia Samee Ali, *Federal Prison-Owned ‘Factories With Fences’ Facing Increased Scrutiny*, NBC NEWS (Sept. 4, 2016, 2:22 PM), <https://www.nbcnews.com/news/us-news/federal-prison-owned-factories-fences-face-scrutiny-n639791>.

¹⁰ OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT AND REVIEW DIVISION, *A REVIEW OF FEDERAL PRISON INDUSTRIES’ ELECTRONIC-WASTE RECYCLING PROGRAM* at xiii (2010), <https://oig.justice.gov/reports/BOP/o1010.pdf>.

¹¹ Andre Montoya-Barthelemy, *The Occupational Health of Prison Inmates: An Ignored Population and an Opportunity*, 61 J. OCCUPATIONAL AND ENVIRONMENTAL MEDICINE e74, e74 (2019).

¹² OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS WITH THE BUREAU OF PRISONS*, U.S. DEPARTMENT OF JUSTICE (FAP 01-00-002) (1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002>; see also GOVERNMENT ACCOUNTABILITY OFFICE, *FEDERAL PRISON INDUSTRIES: ACTIONS NEEDED TO EVALUATE PROGRAM EFFECTIVENESS* at 18 (GAO-20-505) (2020), <https://www.gao.gov/assets/gao-20-505.pdf> (“According to Labor Department officials, OSHA sets and directly enforces occupational safety and health standards for federal agencies and FPI. Where inmates are employed in work similar to that outside prisons, OSHA protections, open to employees in similar situations, apply.”).

¹³ OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *CLARIFICATION ON WHETHER AN EMPLOYER WITH MULTIPLE FACILITIES NEEDS A SEPARATE WRITTEN ECP FOR EACH FACILITY* (2011), <https://www.osha.gov/laws-regs/standardinterpretations/2011-12-13>.

¹⁴ 86 Fed. Reg. 59309, 59312 (2021).

¹⁵ *Id.*

- Are there specific populations facing disproportionate exposure to or outcomes from hazardous heat in indoor or outdoor work settings?¹⁶

Since incarceration in the United States disproportionately affects people of color and low-income individuals,¹⁷ extreme heat in prisons likely disproportionately impacts those same populations. Yet there is a dearth of data on the occupational health on inmates, including data pertaining to the health and safety risks of extreme heat.¹⁸ For example, many key data sources that factor into the Center for Disease Control’s National Institute for Occupational Safety and Health’s (NIOSH) Worker Health Charts clearly announce that they are limited to non-institutionalized populations.¹⁹ In addition, the Environmental Protection Agency’s recent report on the relationship between climate change, social vulnerability, and labor, titled *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, used American Time Use Survey data to calculate the percentages of all workers, weather-exposed workers, and workers in specific weather-exposed industries that have characteristics associated with social vulnerability.²⁰ As the sample of workers included in the American Time Use Survey is “composed of the civilian, noninstitutional population residing in occupied households in the United States,” incarcerated workers were left out of the data undergirding EPA’s report.²¹ OSHA should utilize this rulemaking process to ensure that data pertaining to the extreme heat exposure of working inmates is gathered in a way that is administratively actionable.

One key to doing so will be to more rigorously inspect federal prisons and associated workplaces, such as Federal Prison Industries facilities. Current OSHA guidance limits meaningful inspection of workplace conditions in several important ways, including by allowing facilities to refuse OSHA actions, disallowing cameras during inspection, excluding inmates from safety discussions, and permitting facilities to dismiss OSHA representatives at any time and complete the inspection themselves.²² OSHA’s workplace heat standard should include

¹⁶ *Id.* at 59313.

¹⁷ *See, etc., U.S. Incarceration Rates by Race and Ethnicity, 2010*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/graphs/raceinc.html> (last visited Dec. 7, 2021); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

¹⁸ *See* Montoya-Barthelemy, *supra* note 11, at e75 (“My own literature review has revealed precisely zero medical and public health articles dealing with inmate occupational health”).

¹⁹ *See, etc., Behavioral Risk Factor Surveillance System*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-WHC/source/BRFSS> (last visited Dec. 7, 2021); *Bureau of Labor Statistics*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-WHC/source/BLS> (last visited Dec. 7, 2021); *National Health Interview Survey (NHIS 2004 - 2013)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-WHC/source/NHIS> (last visited Dec. 7, 2021); *National Health Interview Survey (NHIS 2015)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-WHC/source/OHS> (last visited Dec. 7, 2021).

²⁰ ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS, APPENDIX F: LABOR at F-8 (EPA 430-R-21-003) (2021), https://www.epa.gov/system/files/documents/2021-09/appendix-f_labor.pdf.

²¹ AMERICAN TIME USE SURVEY USER’S GUIDE: UNDERSTANDING ATUS 2003 TO 2020 at 11 (2021), <https://www.bls.gov/tus/atususersguide.pdf>.

²² OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS WITH THE BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE (FAP 01-00-002) (1995), <https://www.osha.gov/enforcement/directives/fap-01-00-002>.

inspection mechanisms that apply to federal prisons and associated workplaces, to ensure that OSHA can track and enforce violations of the standard.

As mentioned above and detailed in the Sabin Center’s 2015 report, the Bureau of Prison’s 17,064²³ correctional officers are also disproportionately impacted by extreme heat exposure.²⁴ That said, much like the dearth of information pertaining to incarcerated workers’ occupational health, there is a “paucity of information on [correctional officers’] physical health, particularly as it relates to their susceptibility to heat stress, [that] makes it difficult to gauge what adaptive measures may be needed to ensure their wellbeing.”²⁵ OSHA’s workplace heat standard should thus include mechanisms for gathering such information and incorporating adaptive measures tailored to U.S. prisons and jails.

Thank you for the opportunity to submit the above comments as OSHA begins to develop its critically important workplace heat standard. Please feel free to contact the Sabin Center with any questions.

Sincerely,



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²³ GOVERNMENT ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: OPPORTUNITIES EXIST TO BETTER ANALYZE STAFFING DATA AND IMPROVE EMPLOYEE WELLNESS PROGRAMS at 9 (GAO-21-123) (2021).

²⁴ HOLT, *supra* note 2, at 28-30.

²⁵ *Id.* at 30.