WILLAMETTE UNIVERSITY | LAW

Community and Environmental Justice Clinic (CEJC)
Willamette University College of Law

March 18, 2022

VIA EMAIL
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Department of Consumer and Business Services
Oregon OSHA
PO Box 14480
Salem, OR 97309

RE: Comments on OR-OSHA's Proposed Rules to Address Employee and Labor Housing Occupant Exposure to High Ambient Temperatures–OAR 437-004-1131, OAR 437-002-0156, & OAR 437-004-1120

Mr. Bunch and OR-OSHA:

The Community and Environmental Justice Clinic (CEJC) at Willamette University College of Law respectfully submits these comments to Oregon Occupational Safety and Health (OR-OSHA) concerning its proposed rules to protect employees from extreme heat.

CEJC is a legal clinic representing individuals and organizations seeking to protect themselves from pollution, improve the health of their communities, and promote justice and equity in the Pacific Northwest and beyond. Recognizing the disastrous effects of climate change, Willamette law students work alongside an experienced faculty member to advocate for sustainable practices based in research and science.

Last summer, Oregon experienced dangerously hot temperatures. During the June heat wave, temperatures in Portland reached 116 degrees Fahrenheit. Across the state, more than 500 people died from heat-related illness.[1] At least four deaths occurred at the workplace, including a farmworker who died moving irrigation lines on a farm north of Salem and a construction worker who collapsed on the job in Hillsboro.[2] Going forward, summer temperatures will continue to rise.[3] OR-OSHA's proposed rules to protect workers from extreme heat are timely and important.

Because extreme heat doesn't affect everyone equally, equity issues are raised. Some individuals are more affected than others. Outdoor laborers, lower-income people, people of color, people lacking immigration status, and people with pre-existing health issues are at an especially high risk

[1] Amelia Templeton & Monica Samayoa, *Oregon Examiner Releases Names of June Heat Wave Victims*, The Oregonian, Aug. 6, 2021 (last visited Mar. 10, 2022), https://www.opb.org/article/2021/08/06/oregon-june-heat-wave-deaths-names-revealed-medical-examiner/.
[2] Templeton & Samayoa, *supra* note 3.
[3] Meghan Dalton & Paul Loikith, *Extreme Heat*, FIFTH OREGON CLIMATE ASSESSMENT, 31 (2021).

of developing heat-related illness.[4] So too are Oregon's 174,000 farmworkers.[5] They labor outside for long hours and minimal pay.[6] Only 53 percent of farmworkers are U.S. citizens, they are overwhelmingly Hispanic, and nearly half do not have a high school diploma.[7] While it's true that extreme heat affects everyone, it's clear that farmworkers are especially susceptible. It's important OR-OSHA protect this valuable segment of our workforce.

Considering the above, CEJC commends OR-OSHA for its work on these proposed rules and recommends the following changes: First, develop training materials and provide direct training to employers and employees. Second, amend OAR 437-004-1120(24)(a) to require owners of labor housing to provide cooling areas for 100 percent of its occupants, and strike OAR 437-004-1120(24)(a)(B), thereby requiring owners of labor housing to provide occupants with indoor cooling areas. Third, create a plan to study rule effectiveness so OR-OSHA can adjust the rules going forward.

I. Develop heat-related illness training materials and provide direct training to supervisors and employees.

To effectively safeguard employees from heat-related illness, employers and employees alike need to understand heat-related illness and how to prevent it. The proposed rules require supervisor and employee training, and that the training be performed annually. The rules also define the general topics that must be covered, including the environment and personal risk factors, the employer's procedures for complying with the requirements, the importance of frequent consumption of small quantities of liquid, information about acclimatization, an overview of heat illness, the importance of reporting heat illness, and the effects of nonoccupational drugs on heat stress. These topics are essential for employers and employees to understand. But for employees to understand these rules, a specific and comprehensive training program must be developed.

Merely passing rules is not enough without an effective training program to guide employers and employees alike. Take, for example, California. In 2005, the state, via the California Division of Occupational Safety and Health ("Cal/OSHA"), promulgated rules to protect workers from extreme heat.[8] The success of the Cal/OSHA rules have yielded mixed reviews. In a cross-sectional study of Hispanic farmworkers, researchers concluded that heat illness prevention

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[4] *See* KRISTINA DAHL AND RACHEL LICKER, UNION OF CONCERNED SCIENTISTS, TOO HOT TO WORK (2021), https://www.ucsusa.org/resources/too-hot-to-work; Karin Lundgren et al., Effects of Heat Stress on Working Populations When Facing Climate Change, 51 INDUSTRIAL HEALTH 3 (2013), https://pubmed.ncbi.nlm.nih.gov/23411752/; Dahl and Licker, *supra* note 3; Jeff Goodell, *Sebastian Perez Did Not Have to Die,* ROLLING STONE (Aug. 17, 2021), https://www.rollingstone.com/politics/politics-features/heat-wave-2021-oregon-deaths-sebastian-perez-1211258/; Romanello et al., *The 2021 Report of the Lancet Countdown on Health and Climate Change: Code Red for a Healthy Future*, 398 THE LANCET 1619 (2021), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01787-6/fulltext.

[5] Vital Role of Migrants in the State Economy, Oregon Health Authority (last visited Mar. 11, 2022), https://www.oregon.gov/oha/HPA/HP-PCO/Pages/Migrant-Health.aspx.

[6] On average, farmworkers make 59 percent the average wage of non-farmworkers. Econ. Res. Serv., *Farm Labor*, U.S. DEP'T OF AGRICULTURE, (last visited Feb. 25, 2022), https://www.ers.usda.gov/topics/farm-economy/farm-labor/#demographic.

[7] *See Id.*; Econ. Res. Serv., *supra* note 8.

[8] CAL. CODE REGS. tit. 8 § 3395 (2021). Cal/OSHA's rules are similar to OR-OSHA's proposed rules.

training and hydration protocols were insufficient.[9] Of the 587 farmworkers who participated in the study, 86 percent received training in heat related illness, but only "42 [percent] correctly chose the length of time it takes a worker to acclimatize to the heat, and 42 [percent] knew how often and how much water they should consume at work."[10] The disparity is likely due to failure to understand the training. Over half of the farmworkers studied had less than a 6th grade education.[11] But even among those who did understand, many workers did not follow the protocols. This is, perhaps, because of the pay structure and power dynamics—piece rate, as opposed to hourly pay, makes it costly for farmworkers to take breaks. Regardless, this study highlights the importance of effective training and communication. Furthermore, the study shines light on the frequent disconnect between rules on paper and their implementation in the field. It's important for OR-OSHA to learn from California and plan for similar training issues here in Oregon.

Considering California's experience, OR-OSHA should proactively develop effective heat-related illness training programs. The takeaway from the California study is that to be effective the training must be communicated to employees in a way that they can understand. This means the training materials should be accessible, culturally responsive, and engaging. OR-OSHA should seek feedback from employees regarding the development and effectiveness of the training materials.

Additionally, OR-OSHA should provide this training directly to employers and employees. The current proposed rules place the burden of delivering training on the employers. It would, however, be more effective for OR-OSHA to deliver training itself. That way OR-OSHA has more control over the delivery of the information. Although this option would presumably be more expensive, virtual communication software (e.g., "Zoom" and "WebEx") makes this a feasible alternative.

Because rule are only effective if understood and followed, CEJC recommends OR-OSHA develop appropriate heat-related illness training materials and provide this training directly to employers and employees.

II. Amend OAR 437-004-1120(34)(a) to require owners of labor housing to provide cooling areas for 100 percent of its occupants; strike OAR 437-004-1120(24)(a)(B) to require cooling areas be indoors.

OAR 437-005-1120(24)(a) would require owners of labor housing to provide cooling areas if the indoor temperature cannot be maintained at 78 degrees Fahrenheit or less. CEJC commends OR-OSHA for recognizing the necessity of cooling areas. Farmworkers who spend the day laboring outside in hot weather, need a cool place to sleep at night, or else are at an elevated risk of developing a heat related illness. Yet the effectiveness of this proposed rule is significantly diminished by the overly broad definition of "cooling areas."

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[9] Chelsea Eastman Langer et al., *Are Cal/OSHA Regulations Protecting Farmworkers in California from Heat-Related Illness?* 63 J. OCCUPATIONAL & ENV'T MED. 532, 532 (2021).
[10] *Id.* at 534, 536.
[11] *Id.* at 537.

First, OR-OSHA should amend OAR 437-005-1120(24)(a) to require that the cooling areas be large enough to allow use by 100 percent of the occupants. The current proposed rule requires the cooling areas be large enough to allow use by 50 percent of the occupants. This is analogous to a rule purporting to require store employees to wear close toed shoes, yet only requiring workers to wear *one* shoe. Here, the spirit of the proposed rule is to provide employees with a cool place to sleep, recognizing how important sleep is to preventing heat related illness, yet the rules only provide a cool place to sleep for half of the occupants. Who decides who sleeps in a cooling area and who doesn't? Do they alternate every other day? The more appropriate solution is to require owners of labor housing to provide cool sleeping areas for 100 percent of its occupants.

Second, OR-OSHA should strike OAR 437-004-1120(24)(a)(B), thereby requiring cooling areas be indoors. The current proposed rules allow owners of labor housing to provide occupants with cooling areas either inside or outside. If outside, the area must be shaded and "provide water misters, cooling vests, cooling towels, or equally effective means of relief." Again, the spirit of the proposed rules is to provide labor housing occupants with a cool place to sleep, to mitigate the effects of extreme heat and prevent heat related illness. It's impractical and, quite frankly, patently absurd to expect occupants to choose between sleeping in hot temperatures inside or sleeping outside. Notably, the rules do not require any sort of bedding outside, just shade and cooling relief. Instead, CEJC recommends striking OAR 437-004-1120(24)(a)(B), thereby requiring cooling areas be indoors and following through on the purpose of this rule: providing cool sleeping places for all occupants.

To conclude, CEJC recommends that OR-OSHA amend OAR 437-005-1120(24)(a) to require that the cooling areas be large enough to allow use by 100 percent of the occupants, and strike OAR 437-004-1120(24)(a)(B), thereby requiring cooling areas be indoors.

III. Study rule effectiveness.

Lastly, CEJC recommends that OR-OSHA develop a plan for how to study rule effectiveness. Regardless of the specific rules passed, OR-OSHA should prepare for issues surrounding employer and employee training and rule enforcement.

This plan should include a means to collect and analyze the data. For example, OR-OSHA could create a task force or committee with industry stakeholders, outside researchers, and OR-OSHA staff. This would allow for flexibility in developing and delivering training, especially considering the effectiveness of the training programs may not be realized until deployed in the field.

Second, OR-OSHA should prepare for how rule effectiveness data will be collected and analyzed. Many of the comments submitted by businesses express concern over the "one size fits all" approach that sets "arbitrary" trigger temperature and work/rest intervals. Although OR-OSHA provided research supporting its adoption of these standards, as previously mentioned, the effectiveness of these rules will not be fully realized until studied in the field. CEJC recommends OR-OSHA develop a strategy for how it plans to study rule effectiveness, present its findings, and adjust as necessary.

Because rule effectiveness may not be realized until after the rules take effect, OR-OSHA should develop a plan to study rule effectiveness and, as necessary, adjust the rules going forward.

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Looking ahead, Oregonians will experience warmer summers. Employees who labor deserve protection. They labor outside, in the heat, and are therefore highly susceptible to heat-related illness. OR-OSHA's proposed rules are a necessary step in the right direction, and with a few changes, the rules will better protect these valuable employees. CEJC recommends OR-OSHA develop training materials and provide direct training to employers and employees; require owners of labor housing to provide indoor cooling areas for 100 percent of its occupants; and create a plan to study rule effectiveness.

CEJC thanks OR-OSHA for its consideration of these comments.

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