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OSHA CAMPAIGN TO PROTECT EMPLOYEES FROM HEAT HAZARDS

MULTIPLE LEGAL LIABILITIES

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INTRODUCTION

As seasonal temperatures climb along with OSHA's aggressive enforcement efforts, employers must consider their potential liabilities for not protecting employees against the hazard of heat. This week OSHA announced its **Campaign to Prevent Heat Illness in Outdoor Workers**. The campaign includes a website, public service announcements, and materials for both workers and their employers. In announcing this Campaign, Hilda Solis, U.S. Secretary of Labor, remarked that heat "can be a real danger for workers in jobs ranging from agriculture and landscaping to construction, road repair, airport baggage handling, even car sales." Thus, OSHA can be expected to enforce this agenda across the entire spectrum of industries where heat is a factor in the workplace.

OSHA's agenda regarding heat illness is also focused upon what OSHA believes to be a disproportionate number of Latino worker injuries and fatalities due to outdoor heat exposure in certain occupations. For this reason, it is especially important for employers to evaluate their work sites and conditions for heat hazards and to implement a program to address any such hazards--and to provide training and information to employees in a language they understand.

The hazards of heat exposure can involve employer legal duties under many laws, including:

- **OSHA (Occupational Safety and Health Act), State OSHA regulations**
- **Americans with Disabilities Act**
- **Criminal Law**
- **Worker's Compensation**
- **Third-Party Liability (Outside Contractors)**

OSHA LIABILITY

FEDERAL

While federal OSHA does not have a standard relating to the hazard of heat, it regulates the hazard of heat exposure in the workplace under the General Duty Clause (Section 5(a)(1)). Heat is a “recognized” hazard to human safety and health. Its impact on employees ranges from nausea to death, depending upon exposure. OSHA requires that employers evaluate whether a heat hazard exists by evaluating the temperature and humidity conditions within the workplace. If a heat hazard exists, employers must develop means and methods to protect employees from heat hazards. These range from changes in work practices (rest breaks, job rotation), to personal protective equipment (cooling vests) to engineering controls (ventilation, cooling rooms). Employers who fail to take such steps are subject to citations and monetary penalties.

When an employee becomes incapacitated by heat and requires medical treatment, loses consciousness, has days away from work or restricted duty -- or dies -- this information must be recorded on the OSHA 300 Log. Widespread heat related illnesses may prompt an employee to contact OSHA, resulting in an on-site inspection.

Heat-related illness can temporarily diminish an employee’s mental capacity and physical coordination and excessive heat can cause employees to lose focus or muscle control injuring themselves or co-employees. This is a particularly acute problem when operating mechanized equipment or working around hazardous machinery.

OSHA also mandates there be adequate First Aid assistance to provide emergency medical assistance to heat stricken employees which must either be provided by the employer or reasonably available from third party responders (e.g., EMTs, fire department) within three to five minutes after the emergency occurs.

The likelihood of OSHA enforcement in this area is very high--OSHA has recently issued citations and/or notices of alleged hazards to employers in both the manufacturing and outdoor landscaping industries. These recent efforts, in conjunction with the newly announced Campaign to Prevent Heat Illness in Outdoor Workers as well as OSHA’s enforcement directive on training non-English-speaking workers, issued in May 2010, mandate that employers take immediate steps to address the potential hazards posed by heat exposure.

STATE REGULATION - CALIFORNIA

California has promulgated a regulation for Heat Illness Prevention (T8 CCR §3395) which contains extensive requirements to protect employees who may be exposed to the hazard of heat illness. The regulation was initially intended to apply to agricultural employment but the Division of Occupational Safety and Health has attempted to expand its application beyond such employment activities. Federal OSHA has also looked to the California OSHA heat illness standard as a framework for general duty clause enforcement. In announcing the Campaign, Secretary Solis stated that California OSHA’s “efforts to address this issue have provided a

valuable platform for federal OSHA – an agency at the U.S. Department of Labor – to launch a nationwide campaign to prevent heat illnesses, injury and death.” Thus, even employers outside of California should consider and implement, to the extent feasible, the requirements of the California standard.

The regulation includes requirements for the following:

- potable drinking water, at least one quart per hour per employee for drinking for the entire shift
- access to shade at all times if an employee is suffering from heat illness or believes that a period of preventative recovery is needed
- extensive requirements for training of supervisory and non-supervisory employees on the hazards of heat illness, reporting illness to the employer, signs and symptoms of heat illness
- providing of emergency medical services
- specific training for supervisors regarding procedures the supervisor must follow when an employee exhibits symptoms of heat illness, including emergency response

PERSONAL PROTECTIVE EQUIPMENT - A HEAT HAZARD

OSHA regulations require that employees in many workplaces wear personal protective equipment (PPE). Often overlooked is that PPE can create a heat hazard. For example, employees in a foundry may be required to wear flame retardant clothing or painters in a spray booth may wear protective clothing. Either of these activities can prevent the release of an employee’s body heat thereby causing the employee’s internal temperature to become elevated. In developing a heat illness program, the employer must consider the possibility that PPE will create heat hazards.

AMERICANS WITH DISABILITIES ACT (ADA)

Employees react to heat in a unique fashion. This reaction depends upon the individual’s physical characteristics or health. For example, an employee’s ability to tolerate heat can depend upon a combination of some or all of these factors:

- medication
- obesity
- cardiovascular conditions
- diabetes
- use of alcohol or drugs
- other medical conditions.

Under the ADA, employees who have physical impairments that can be considered “disabilities” may be protected from discrimination and entitled to workplace accommodations to be able to continue to work in a workplace where they are exposed to heat. It is likely that employers are unaware of a number of these conditions because of restrictions imposed by the ADA. The Equal Employment Opportunity Commission (EEOC) has recently issued extensive regulations regarding an employer’s duty to accommodate employees who may have disabilities. For a description of the major life activities see 29 CFR 1630, section 1630.2(i), on page 23 of the following link (<http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf>). A program to protect employees against heat illness must be designed to determine whether employees require assistance at work because of their personal health conditions, without violating the ADA. In this regard, the employer has a right to inquire as to whether employees may need assistance to protect them against hazards to their health in order to comply with OSHA. The employer may, in fact, have a legal duty to make such inquiry if it can objectively observe that the employee is showing signs or symptoms of heat illness.

In the event an employee actually sustains a heat-related illness, the employer may have the right to require the employee to undergo a fitness-for-duty evaluation to determine whether the employee can continue to perform the essential functions of the job with or without an accommodation. In addition, the employee’s inability to tolerate the heat may create a “direct threat” to the employee’s safety or health, as well as to the safety or health of other employees who may sustain injury by reason of the affected employee’s inability to operate machinery or perform critical plant operations, which may require the employer to disqualify the affected employee from performing the particular job.

CRIMINAL LIABILITY

An employer also faces criminal liability for failing to protect employees against heat hazards. For example, in Illinois, an employer was criminally prosecuted because employees were exposed to high levels of heat resulting in injury. In People v. Chicago Magnet Wire Corporation, 126 Ill.2d 356 (1989), the Illinois Supreme Court held a corporation and its officers and agents could be indicted for aggravated battery and reckless conduct for exposing employees to inadequate ventilation and dangerously overheated working conditions. In this case, employees were utilizing steam and chemicals to clean electric motors. Temperatures in the plant reached 140° F and employees became nauseated and ill from the exposure.

WORKERS’ COMPENSATION

In the event an employee sustains a heat-related illness, the employer will face worker’s compensation liability. The gravity of the claim may be substantially enhanced if the employee is overcome while operating machinery and sustains additional injury by falling into or off of equipment.

**THIRD-PARTY LIABILITY
(OUTSIDE CONTRACTORS)**

An employer's liability may extend to employees of third-parties on the worksite if they are exposed to heat hazards. If these employees can establish that the employer was in a position to control the hazard to which they were exposed and failed to take appropriate action, liability may attach. This derivative liability can arise under OSHA's multi-employer workplace doctrine or under state law premises liability doctrines.

COMPLIANCE RECOMMENDATIONS

Heat illness can be very insidious. For example, an employee who is sweating heavily can lose up to 6 quarts of water in a workday -- approximately 13 pounds! In high heat atmospheres, normal heat responses, like thirst, are inadequate. By the time the body signals its thirst, the individual is already partially dehydrated.

In order to prevent heat illnesses, the employer should develop a program which includes the following elements:

- Hazard Identification -- Identify potential heat hazards (job functions, equipment, etc.) Employees should be consulted in this process.
- Hazard Correction - Correct, or reduce the heat hazards identified.
- Employee Training to encompass
 - description of various types of heat illness
 - information on how heat illness occurs, including
 - a) environmental conditions
 - b) working conditions
 - c) individual employees health conditions or work practices (e.g. failure to consume adequate water or to acclimatize to heat)
 - how to recognize the common signs and symptoms of heat illness
 - duty to promptly report to a supervisor if the employee or co-employee is experience the signs and symptoms of heat illness and to obtain assistance
 - documentation of the training
 - training must be provided in the employees' native language
 - in indoor environments (where feasible), implement an acclimatization program that gradually increases employee exposure to heat over time.
- Supervisor Training
 - Train supervisors to recognize the signs and symptoms and how to respond
 - Explain employer's program and how to implement it
- First Aid - Adequately train and provide readily available first aid services, using either in-house or outside providers.
- In outdoor environments, consider where and how fresh cool water and shade or air conditioning is available in the event an employee exhibits signs of heat stress illness.

- Though they are not standards that are strictly enforceable by OSHA, the National Institute of Occupational Safety and Health (NIOSH) and the U.S. Environmental Protection Agency, (EPA) provide additional guidance regarding heat stress hazards. Available at: <http://www.cdc.gov/niosh/topics/heatstress/> and <http://www.epa.gov/oecaagct/thel.html>. OSHA also plans to introduce a Heat Illness Lesson Plan, along with a Smartphone application. Employers should evaluate the tools provided by OSHA as well as those provided by their industry/trade associations in formulating a heat stress program that best suits their workplaces.

CONCLUSION

If the employer follows these recommendations, it will substantially reduce its potential liability associated with heat illness.