Docket No. OSHA–2021–0009

January 10, 2025

Via electronic filing

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

Re: Comment on *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* and request for an informal hearing

Dear Mr. Parker:

On behalf of the nearly 100,000 combined members of the National Apartment Association (NAA)[1] and the National Multifamily Housing Council (NMHC)[2], we appreciate the opportunity to comment on OSHA's 376-page proposed rule addressing heat as a workplace hazard, *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*.[3] In this comment, we generally refer to NAA, NMHC, and their members as the Rental Housing Industry.

The Rental Housing Industry is committed to providing affordable housing for American families while ensuring that all employees in the industry enjoy safe working conditions. Beyond providing essential housing to Americans facing inflation, high interest rates, rising property costs, and housing shortages, the Rental Housing Industry provides 1 million jobs to hardworking Americans.[4] The NAA offers online credentials and in-person

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[1] NAA serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state and local affiliates, NAA encompasses over 95,000 members representing more than 12.5 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

[2] Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing $3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

[3] 89 Fed. Reg. 70698 (Aug. 30, 2024).

[4] https://weareapartments.org/data.

training for their members through its National Apartment Association Education Institute (NAAEI), which incorporate workplace safety. In fact, every NAAEI training module for the Certificate for Apartment Maintenance Technicians (CAMT) program emphasizes the need for maintenance professionals to avoid shortcuts and reduce their individual safety risks as well as risks to residents and rental communities. Collectively, both organizations encourage our members to handle potential safety issues proactively in an individualized manner that allows each business to properly regulate their workplaces based on the safety challenges facing that location—be it extreme weather events or the regular cycles of cold and hot weather across the U.S. geography.

We appreciate OSHA's work to ensure that America's workers have safe and healthy working conditions, a goal shared by the Rental Housing Industry. But however well-intentioned, the proposed rule does not further that goal, nor does it improve the lot of workers or Americans in general.

First, we believe the proposed rule is unworkable. The country is too big and industries too varied for a single one-size-fits-all regulation to work properly. For instance, the proposed rule requires a compliance regime that depends on the weather, which is of course quite variable in many parts of the country many parts of the year. The proposed rule leaves open a host of compliance questions that inherently have no simple or clear answers, especially for the Rental Housing Industry and its many different kinds of workers. The proposed rule also imposes a heat threshold that ignores key factors like the type of work being done, the location of that work, and clothing worn.

Second, we believe the rule is not necessary at this time, and especially not at a national scale for every workplace. An incremental approach with appropriate study and refinement along the way would be a better way to proceed. The Rental Housing Industry has decades of experience successfully addressing workers' encounters with the weather—be it hot weather, cold weather, rain, snow, sleet, or hail.. The Rental Housing Industry and its workers take a variety of approaches to addressing weather that reflect the diversity of employees' tasks and the particulars of their local climate. Those variations even within the Rental Housing Industry further underscore the wisdom of an incremental approach here.

Third, we believe the rule is also unduly costly without actually achieving its goal, which is the protection of workers. The Rental Housing Industry respects its workers and wants them to operate safely and responsibly. The Industry's concern is with the substantial regulatory familiarization, paperwork, and regimentation burdens of the proposed rule, none of which directly impact workers but do considerably affect the Industry's operating costs. Further, OSHA's own data shows no significant benefit for workers in the Rental Housing Industry, and OSHA has not shown that state-level heat rules have actually made workers safer. The new costs with unclear workers benefits would be unfortunate especially in the present environment, with the United States in a housing crisis. The Administration

has made affordable housing a top priority. "President Biden and Vice President Harris believe everyone deserves to live in a safe and affordable home. Whether you rent or own, having a place to live that you can afford in a neighborhood with opportunities is the foundation for so much else in life."[5] And the President has recognized that "[r]educing regulatory barriers to housing production has been a bipartisan cause in a number of states throughout the country."[6] OSHA's proposed rule would increase costs for the Rental Housing Industry, which would in turn chill future development and redevelopment of rental housing supply—further exacerbating the housing supply crisis.

For these reasons, the Rental Housing Industry urges OSHA to withdraw the proposed rule for further study. Alternatively, given the state of OSHA's data, the proposed rule should be targeted toward industries where heat is in fact a significant risk, which would not include the Rental Housing Industry. The Rental Housing Industry welcomes the opportunity to participate in an informal hearing to more fully share industry perspectives or answer OSHA officials' outstanding questions.

1. THE PROPOSED RULE IS UNWORKABLE.

The proposed rule, which by its very nature is a federal, nationwide rule, is unfortunately unworkable. While we appreciate OSHA's intentions to protect workers who operate in warm weather, the proposed rule shows how that condition is unsuitable to centralized federal regulation.

This unsuitability manifests itself in the most fundamental component of the proposed rule: its trigger for application. The proposed rule's protections would apply to any employee exposed to a temperature of 80° for over 15 minutes in any 60-minute period.[7] When that trigger is met, the regulatory framework requires many things to then occur, including a site-specific heat injury and illness prevention plan (HIIPP),[8] continuous monitoring of indoor and outdoor temperatures,[9] evaluations of workspaces where there is a "potential" to increase heat exposure because of a change in "production, processes, equipment, controls . . . or outdoor temperature,"[10] access to "suitably cool" water,[11] break areas with

[5] *See* White House, The President's Budget Cuts Housing Costs, Boosts Supply, and Expands Access to Affordable Housing (Mar. 11, 2024), https://t.ly/zOVBO.

[6] *See* White House, President Biden Announces New Actions to Ease the Burden of Housing Costs (May 16, 2022), https://t.ly/uL6qF.

[7] *See* 89 Fed. Reg. at 71069 (proposed 29 C.F.R. § 1910.148(a)(2)(ii)).

[8] *See id.* at 71069-70 (proposed 29 C.F.R. § 1910.148(c)).

[9] *See id.* at 71070 (proposed 29 C.F.R. § 1910.148(d)(2)-3(ii)).

[10] *See id.* at 71070 (proposed 29 C.F.R. § 1910.148(d)(3)(iii)).

[11] *See id.* at 71070 (proposed 29 C.F.R. § 1910.148(e)(2)(ii)).

artificial shade or natural shade, air-conditioning, or fans with humidity monitoring,[12] and acclimatization protocols and tracking.[13] Those requirements require constant monitoring and a great deal of expense and preparation to successfully execute. Yet the regime depends on particulars of the daily weather, which makes it extremely challenging to anticipate when and where the proposed rule would need compliance.

To comply with the proposed rule, businesses would need to have trained heat safety coordinators ready to dispatch based on the forecast or hourly temperature readings, and ready to set up shaded areas, water stations, observers, two-way communications and enforce a buddy system at a moment's notice.[14] And those contingencies will need to be deployed depending on the weather. But as we all know, temperatures vary day to day, weather changes quickly, and the weather forecast is infamously often wrong.

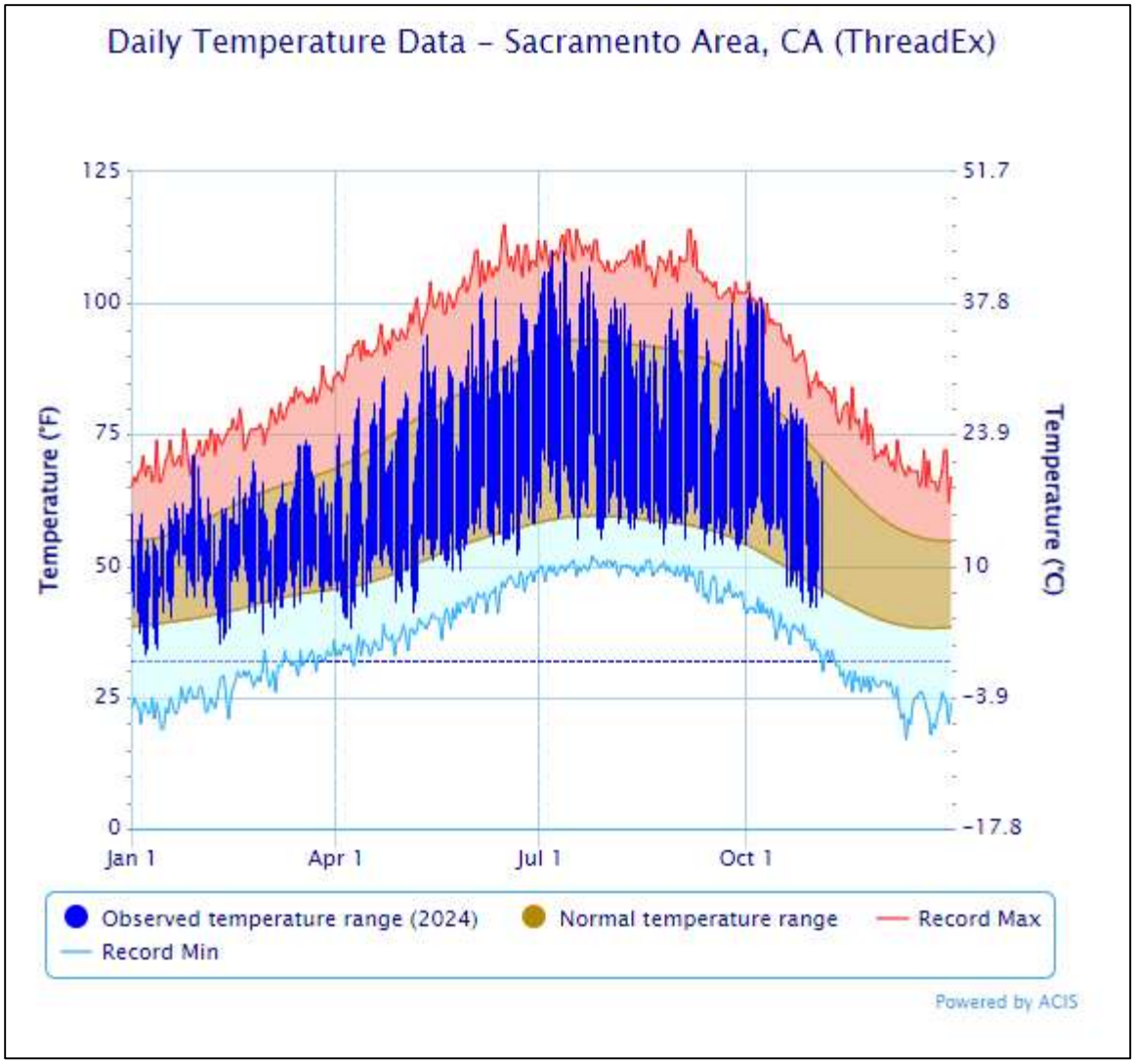
The proposed rule is thus unworkable in climates where temperature varies dramatically, which it can even within the day. In Sacramento, California, as one example, the average temperature within a day typically varies by 30°, and temperatures at or above 80° can occur anywhere from February to November:[15]

[12] *See id.* at 71070 (proposed 29 C.F.R. § 1910.148(6)).

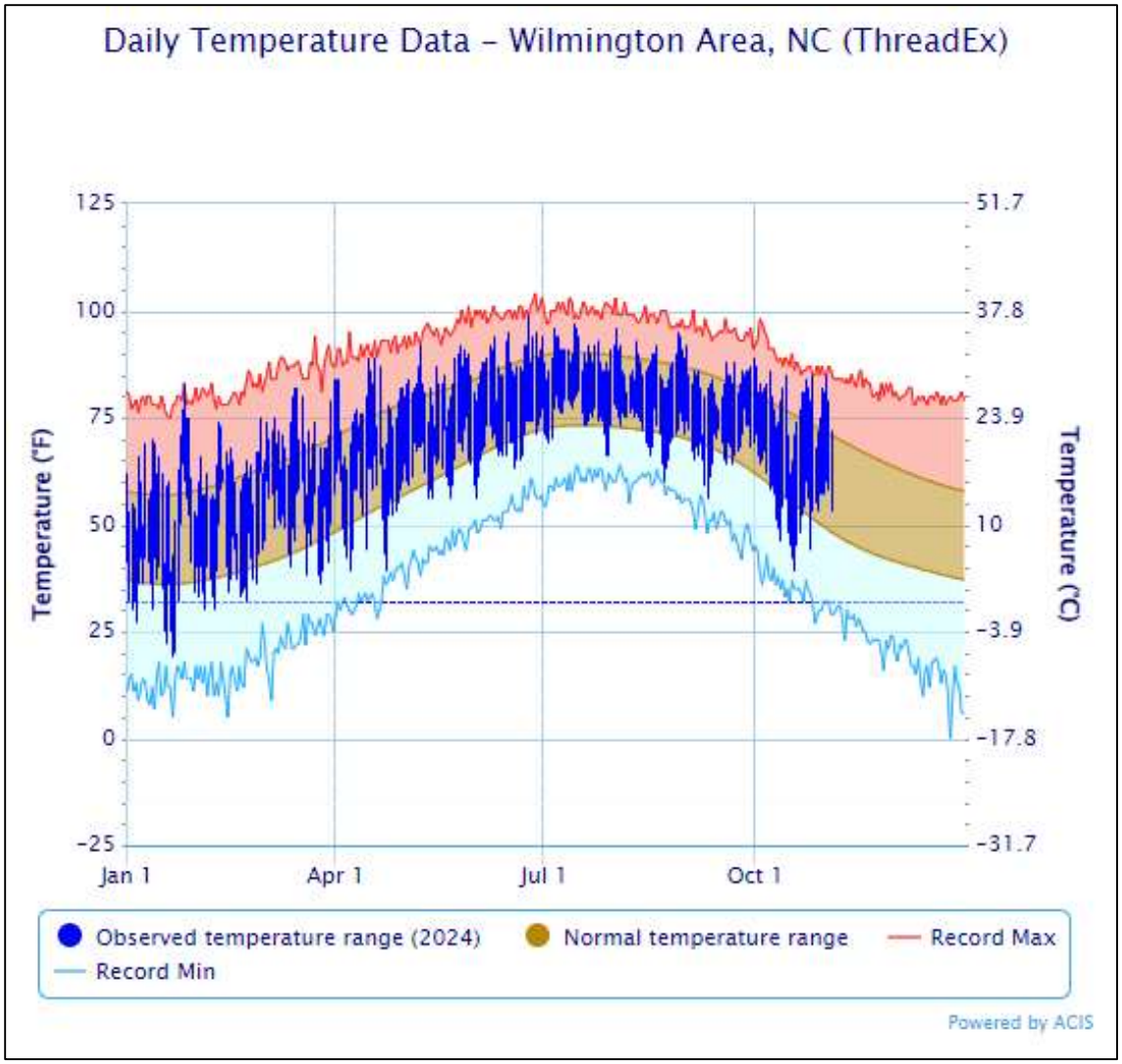
[13] *See id.* at 71071 (proposed 29 C.F.R. § 1910.148(7)).

[14] *See id.* at 71070-71 (proposed 29 C.F.R. § 1910.148(e)).

[15] *See* Nat'l Weather Serv., *Sacramento, CA: Climate* (Product: Temperature graphs, Period of interest: Annual), https://t.ly/r1Eox.



Perhaps even more difficult for determining the proposed rule's applicability are *stable* climates—if they stabilize with a peak around 80°. Charleston, South Carolina, has a climate where virtually any day of the year could hit 80°, but many days will not:



Also unworkable, especially for the Rental Housing Industry, is compliance for workers who travel. Application of the proposed rule relies on the weather, which changes not only day to day and hour by hour, but also place to place. Some Rental Housing Industry members have onsite teams of property managers and maintenance professionals that cover sprawling garden-style communities or multi-site territories within their company's portfolio. On any given day, onsite teams are performing walkthrough inspections and maintenance tasks that are highly variable depending on the season, fulfilling a mix of preventative maintenance and service requests, and addressing specific compliance responsibilities for individual communities. The Rental Housing Industry struggles with how it could reliably determine when the proposed rule's requirements would apply in this scenario, much less how its members could prepare a meaningful HIIPP with "site-specific information."

OSHA's 80° threshold is likewise unworkable. This is a temperature that most people tolerate adequately. The threshold is, after all, only four degrees higher than OSHA's recommended office temperature.[16] Further, the proposed rule defines that "initial heat trigger" as a "heat index" or "wet bulb globe temperature" of 80°, both of which take into account humidity, making the trigger temperature likely to occur more often. OSHA's proposed threshold is more expansive, more burdensome, and less flexible than all but one of the seven state-level proposed or final rules, despite those state rules regulating a much smaller and less diverse territory.[17] California's outdoor standard uses an *ambient* temperature of 80° for outdoor work, not a heat index, and its proposed indoor standard raises the threshold to an ambient 82°. Colorado's standard applies only to agriculture, and again uses only an ambient 80°. Washington's standard applies only outdoors, and it too uses an ambient 80° threshold. Minnesota's standard applies only indoors, and permits a wet-bulb temperature of 86°, adjusted downward from there depending on work done, and only at a two-hour weighted average rather than as a trigger. Only Maryland and Oregon use an 80° heat index temperature, but even those regimes do not include OSHA's additional feature of mandatory rest breaks at 80°, and Oregon's standard largely does not apply to workers who with only "rest" or "light" workloads unless the temperature exceeds 90°.[18]

The data confirm these difficulties with an across-the-board 80° heat threshold. OSHA states that "workload, PPE, and acclimatization status" and "workers' abilities to self-pace" all affect an individual's risk of having a heat related health injury or illness.[19] However, the studies OSHA evaluated to create the initial heat trigger "did not account specifically for workload, PPE use, acclimatization status, or *other relevant factors*."[20] *Id.* (emphasis added). OSHA must consider these factors.[21]

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[16] *See* OSHA, Memorandum, OSHA Policy on Indoor Air Quality: Office Temperature/Humidity and Environmental Tobacco Smoke (Feb. 24, 2003) ("OSHA recommends temperature control in the range of 68-76° F and humidity control in the range of 20%-60%").

[17] *Cf.* 89 Fed. Reg. at 70707.

[18] *Cf.* Code Md. Reg. 09.12.32-04(d)(8) (written plan must address how "employees will be *encouraged* to take rest breaks as needed to prevent heat-related illness" (emphasis added)); Ore. Admin. R. 437-002-0156(1)(b)(A), *id.* 437-004-1131(1)(b)(A).

[19] 89 Fed. Reg. at 70743.

[20] *Id.* (emphasis added).

[21] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Some of these factors matter tremendously. These include an employee's duties. Although the proposed rule carves out sedentary indoor work,[22] it does not distinguish among roofers, gardeners, maintenance professionals, superintendents, doormen, construction workers, sign spinners, inspectors, office staff, utility workers, and many other types of work that vary in sun exposure, location on the property (e.g., pavement, grass, indoors), and physical strenuousness. As one example, a member of the Rental Housing Industry may employ a maintenance professional who works outside for thirty minutes fixing an outdoor pipe or blowing leaves—but that employee will not be affected by heat in the same way a roofer would, much less a construction worker on a freeway. Likewise, Rental Housing Industry maintenance teams might spend the day in and out of the trees while mulching or raking. 80° in a garden feels very different than 80° in a parking lot, as does 80° touring prospective residents versus 80° indoors servicing boilers and furnaces. But the proposed rule ignores those fundamentally distinct factors.

It likewise ignores the factors considered in the National Institute for Occupational Safety and Health (NIOSH) recommended standard, including the strenuousness of work and clothing worn. NIOSH's sample work/rest schedule, based on its criteria for a recommended standard, does not recommend breaks for light work until an ambient air temperature of 106°, and not for heavy work until 94°.[23] (The sample schedule contains adjustments for cloud cover and humidity, but the basic point remains that workload matters for heat tolerance.)

The realities of maintenance work in the rental housing context would create special challenges for the Rental Housing Industry to comply with the proposed rule. The proposed rule requires tracking employees in 15-minute increments, but Rental Housing Industry maintenance teams respond to problems in real-time, problems that are often unexpected but involve air-conditioning or plumbing malfunctions that need to be repaired quickly. These employees operate inside and outside apartments, painting, checking and fixing damage, and doing many different jobs per day. The proposed rule does not explain how the temperature of these different spaces and any possible change in "production, processes, equipment or controls"[24] can be monitored when these individuals work alone and in teams, on small and large projects, and often with autonomy regarding what tools and methods to use to get a problem fixed and when they will perform their work.

The requirements of the proposed rule are also unworkably vague. For example, the rule does not define what it means to "monitor with sufficient frequency," what a "suitabl[y] cool" water temperature is, or what "humidity" is high enough to make fan use

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[22] *See* 89 Fed. Reg. at 71069 (proposed 29 C.F.R. § 1910.148(a)(2)(ii)).

[23] *See* NIOSH, *Heat Stress: Work/Rest Schedule* (2017), https://t.ly/Lx7QY.

[24] *See* 89 Fed. Reg. at 71070 (proposed 29 C.F.R. § 1910.148(d)(3)(iii)).

"harmful."[25] Nor would the monitoring requirements work well in the Rental Housing Industry, where an individual apartment may be over 80° degrees for many reasons—because of the resident's preference, a power outage, or a broken air conditioner—but the worker is called in to do work in the apartment without any knowledge of its ambient temperature. For the same reason, the proposed "excessively high heat areas" provision requiring warning signs at indoor areas with an ambient temperature that "regularly" exceeds 120° is problematic in the Rental Housing Industry.[26] What does "regularly" mean in this context?

The acclimatization provisions are likewise unworkable. Particularly difficult for Rental Housing Industry compliance would be tracking workers' pre-hire activities to determine whether and how much acclimatization is needed.[27] Maintenance professionals, for instance, are in high demand and typically move from job to job frequently. It would be very challenging for the Rental Housing Industry to properly document these workers' previous activities. The alternative is to phase them into the work over a period of days, but that has costs as well: the professional cannot fully engage as rapidly as he or she might prefer, and residents receive limited service in the meantime.

2. The Proposed Rule is Not Needed.

The Rental Housing Industry is committed to developing policies and practices for its employees to reduce health risks on the job, so they thrive alongside residents at our communities. This is why heat protections are managed by individual members on the ground and who are better suited to providing the commonsense protections needed.

From the Rental Housing Industry's experience, those arrangements have worked well both for members and their workforces. Maintenance professionals and other employees are accustomed to the weather and rhythms of the particular places they work and the tasks they do, and they are trusted with the discretion to take breaks as needed, drink water, stay cool, arrange work hours, and otherwise deal with the heat. And they do so on a property-by-property basis in ways that work for them while still ensuring that deadlines are met and jobs got done. All this is accomplished without a complex and costly federal standard.

The lack of need for OSHA's proposed standard is shown in OSHA's data. Only 2–4 workers per 100,000 per year suffer even a non-fatal occupational heat-related injury or illness, and that number has been steadily declining.[28] That is a worker injury rate of 0.002–0.004%. While any on-the-job injury or illness is unfortunate, these injury rates are

[25] *Id.* at 71070-71 (proposed 29 C.F.R. § 1910.148(d)(2), (e)(2)(ii), (e)(6)).

[26] *Id.* at 71071 (proposed 29 C.F.R. § 1910.148(f)(5)).

[27] *Id.* at 70785.

[28] *See* 89 Fed. Reg. at 70964 (Table VIII.E4).

exceedingly low and do not justify a nationwide, economy-wide regime estimated to cost $7.8 billion.[29]

The proposed rule is so overbroad that unfortunately we must question whether it is within OSHA's authority. It is likely foreclosed by the Supreme Court's decision in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*.[30] As OSHA knows, in that case the Supreme Court granted a stay of OSHA's COVID-19 vaccination standard because it exceeded OSHA's mandate to regulate "*workplace* safety standards, not broad public health measures."[31] The Supreme Court noted that although COVID-19 is a "risk that occurs in many workplaces," it is a "universal risk [that] is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."[32] "Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[33] Here, too, we believe there are legal concerns that OSHA's attempt to regulate heat, including outdoor heat, goes beyond OSHA's authority.

Even if the rule were appropriate, OSHA has not proffered data suggesting it would actually help workers. OSHA has the benefit of studying six states that have promulgated occupational heat rules: California, Maryland, Minnesota, Oregon, Washington, and Colorado. Yet while OSHA discusses these states' regulations in depth, it never discusses their efficacy.[34] OSHA even cites studies about heat-related workers-compensation claims from California and Washington, but OSHA does not discuss what those studies show, if anything, about the effects of those states' heat rules.[35] And the proposed rule goes even further than the state-level laws that are targeted towards specific industries—even though OSHA has presented no evidence that broader regulations are necessary and effective.

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[29] *See id.* at 70824.

[30] 595 U.S. 109 (2022).

[31] *Id.* at 117 (emphasis in original).

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, *id.* at 70707. We acknowledge that Maryland's rule was finalized after OSHA's rule was proposed.

[35] *See id.* at 70734–35.

3. THE PROPOSED RULE'S COSTS SUBSTANTIALLY OUTWEIGH ITS PURPORTED BENEFITS.

The White House recognizes that America is facing a housing shortfall.[36] "This shortfall burdens family budgets, drives up inflation, limits economic growth, maintains residential segregation, and exacerbates climate change."[37] The proposed rule would be counterproductive to the Administration's efforts to "boost the supply of quality housing" and decrease "housing costs [that] have burdened families of all incomes."[38] The proposed rule would increase the regulatory burden on the Rental Housing Industry. The Administration has recognized that regulatory barriers constrain housing supply and increase costs.[39] Compliance with the proposed rule would be costly. Members of the Rental Housing Industry would need to, among other things, employ administrators to monitor temperature fluctuations in 15-minute increments; create HIPPs for every worksite; implement training for supervisors and workers; monitor the location of their employees; prepare shade, fans, and air conditioning access in case the temperature goes above the initial heat trigger; monitor humidity in rooms cooled by fans; monitor time off and sick leave taken by current employees; and determine the previous job locations of new employees. The proposed rule would add yet another compliance burden to the Rental Housing Industry. These compliance costs unfortunately do come with a price, whether through discouraging future construction and redevelopment, or foregoing greater opportunities and benefits for current workers and residents.

The proposed rule would result in additional compliance burdens specific to the Rental Housing Industry. For instance, Rental Housing Industry operators will have tremendous difficulty complying for purposes of maintenance teams. These teams perform their duties indoors and outdoors, undertaking a wide variety of tasks, and move about dense or sprawling rental communities every day. It would be extremely difficult to monitor their work to determine if they ever spend more than 15 minutes in a space that is hotter than 80°.

The proposed rule would also result in special burdens for Rental Housing Industry members with rental communities in both warmer and cooler areas. Members with rental homes in warmer climes typically have in place commonsense protocols for dealing with hot weather. Rental Housing Industry members have expressed concern that requiring the

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[36] *See* White House, *President Biden Announces New Actions to Ease the Burden of Housing Costs* (May 16, 2022), https://t.ly/jnOLC.

[37] *Id.*

[38] *Id.*

[39] *Id.* (discussing how local zoning and land use laws and regulations constrain housing supply and production).

extension of such protocols to cooler areas will cause these members to cross-absorb those costs, raising rents or reducing investment in their warm-state properties so that the costs are not fully borne by the cool-state properties. In short, the economic challenges will be felt by residents and employees across the United States, not just at properties where more compliance activity takes place.

4. THE PROPOSED RULE SHOULD BE WITHDRAWN OR LIMITED TO EXCLUDE THE RENTAL HOUSING INDUSTRY.

For the reasons stated above, we urge OSHA to withdraw the proposed rule. If OSHA does not withdraw the proposed rule, it should proceed incrementally, implementing a standard surgically targeted toward industries with the highest heat safety risks.

The rule certainly should not be extended to the Rental Housing Industry. According to OSHA's own data, only 1.7% of heat-related injuries and illness occur in real estate and rental and leasing.[40] We discussed above how overall occupational injury and illness rates from heat are already very low; they would be even lower in this sector of the economy.[41] And as OSHA acknowledges, industries like agriculture, construction, waste management and remediation, transportation and warehousing, and, unsurprisingly, fire protection, have higher rates of heat-related adverse worker effects.[42] Yet OSHA has not considered the relative efficacy of its rule in different industries, including whether to restrict, at least for now, its rule to certain industries.

If OSHA proceeds, it would do better to consider state models which have, for the most part, proceeded in a targeted fashion. Only two states, Oregon and Maryland, have a rule on the books covering both indoor and outdoor work. California covers only the outdoors, and Minnesota only the indoors, while Colorado covers only agriculture. Individual states, which are geographically smaller and more homogenous, are yet still regulating one step at a time. And nearly 90% of states have seen no need for regulation at all, including the vast majority of OSHA State Plan states. OSHA should follow the surgical, incremental approach of the states, including giving due weight to the many states that have decided against regulation at this time. An occupational heat rulemaking should not attempt to cover, in one project, every workplace from Alaska to Alabama. Further study and a healthy respect for the wide variations in weather, workplace duties, and local practice all counsel against an overbroad rule under present conditions.

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[40] *See* 89 Fed. Reg. at 70965.

[41] *Compare id.*, *with* BLS, *Employment Projections: Employment by Major Industry Sector*, Table 2.1 (Sept. 3, 2024), https://t.ly/OUTlm.

[42] *See* 89 Fed. Reg. at 70733.

Most respectfully, the Rental Housing Industry believes the Proposed Rule requires a great deal more consideration. The Proposed Rule as it stands today is unhelpful, and will do more harm than good to employees, workers, and Americans needing a safe and affordable home. At the very least, any finalized rule should not include the Rental Housing Industry.

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We thank you for your consideration of these comments and would be happy to discuss these issues further. Once again, the Rental Housing Industry respectfully requests an informal hearing if OSHA proceeds with this rulemaking project.

Sincerely,

Robert Pinnegar
President & CEO
National Apartment Association

Sharon Wilson Géno
President
National Multifamily Housing Council