

What to Do When OSHA is at Your Door

Step 1: Alert executive management, senior safety personnel, human resources, and/or legal counsel.

Step 2: Review the OSHA Compliance Safety and Health Officer's (CSHO) credentials. Discuss the purpose and scope of the inspection: complaint, accident or fatality, employee illness, programmed, imminent danger, etc. Determine whether to consent to entry or require a warrant.

Step 3: The CSHO will ask to conduct an **Opening Conference**. Ask the officer to wait while you gather your team. Have any conferences with OSHA in a private conference room. Limit involvement to as few people as possible and designate one point of contact for OSHA.

- Maintain safety protocols (during COVID, request to have conferences remotely).
- Establish the scope of the inspection before it begins. A friendly, professional discussion is reasonable and expected. Ask about areas of inspection and any allegations (what is the hazard and standard at issue?).
- Confirm the "ground rules" about the scope and details of the inspection, such as the areas to be entered, PPE requirements for the Walkaround, worker medical privacy, or any trade secrets or other confidential information that must be protected.

Step 4: During the **Walkaround**, limit the path of travel as much as possible. Stay with the CSHO at all times. Be polite. Be the CSHO's "shadow"—take the same photographs, tests, and measurements. Take extensive notes on what the CSHO observes, persons spoken to, and what has been said. Limit the information you provide to the CSHO and ask questions instead.

Step 5: Manage the scope of **Document Requests, Interviews**, and subsequent visits to the site.

- You do not have to provide documents on the spot. Ask for a written list of documents requested and agree on a reasonable deadline. The exception to this is the OSHA 300 logs and summaries. Generally, those must be provided within 4 business hours.
- Do not volunteer interviews. If the CSHO wants to interview employees, offer to arrange interviews at a mutually convenient time to accommodate work schedules. Employee and management rights during interviews are complex. Consider preparing as you would for a deposition or other sworn testimony, including obtaining advice of legal counsel.
- Do not permit use of drones, demonstrations of your equipment/procedures, or the interruption of working employees.
- Do not speculate/guess or answer questions you are not comfortable answering; say you will look into it. You are not legally required to sign a CSHO's interview notes.

Step 6: At the **Closing Conference**, you do not have to agree that any hazardous condition exists or that any particular abatement is reasonable. Do not argue with the CSHO/ try to talk him/her out of a **Citation**. Act quickly – Citations must be settled/ contested within **15 business days**.

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OSHA Regulatory and Enforcement Update: Avoiding or Minimizing Citations

Presented by:

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This Webinar

- Panel discussion ~15 min
 - Background
 - Initial thoughts
 - Impact
- Summary and analysis of the proposed rule ~ 35 min
 - Deeper dive into the proposed standard's scope, application, and requirements
- Possible actions and resources ~ 10 min

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Panel Discussion Items

- Panel has collectively handled hundreds of OSHA heat inspections, citations, and related litigation
- Thoughts and observations about heat as a workplace hazard; what employers have done to protect workers; and how OSHA has conducted inspections since April 2022
- April 2022 National Emphasis Program (NEP)
 - How did it impact inspections, citations, and regulatory focus?
- Why is OSHA pursuing this proposed rule? Why not just continue to rely upon the General Duty clause?

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Panel Discussion Items (cont'd)

- Do employers have to "comply" with this proposed standard?
- When will it go into effect?
- Will there be legal challenges that could stop the proposed standard?
- Will there be political changes that could stop the proposed standard?
- Do you think anyone will actually use the wet bulb globe temperature option to track heat?

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The Proposed Rule

- Scope and application
- Key terms
- Heat Injury and Illness Prevent Plan (HIIPP)
- Identifying heat hazards
- Requirements at the initial heat trigger of 80°F heat index
- Additional requirements at the high heat trigger of 90°F heat index
- Emergency response and planning
- Training
- Recordkeeping
- No cost to employees
- Dates, severability



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Scope and Application

- Applies to all industries regulated by OSHA
 - General, construction, shipyard, marine terminals, long shoring, agriculture
- Applies to all employers, except:
 - Organizations whose primary function is the performance of firefighting and certain emergency response activities
- Does not apply to certain work activities:
 - No reasonable expectation of exposure at or above the **initial heat trigger**
 - Short duration employee exposures at or above the initial heat trigger of 15 minutes or less in any 60-minute period
 - Indoor work areas or vehicles where air-conditioning consistently keeps the ambient temperature below 80°F
 - Telework (employee chooses work location)
 - Sedentary work activities at indoor work areas

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Key Terms

- **Heat index** – combines ambient temperature and humidity (NWS)
- **Initial heat trigger** – heat index of 80°F or a wet bulb globe temperature equivalent
- **High heat trigger** – heat index of 90°F or the wet bulb globe temperature equivalent
- **Work site** – a fixed or mobile physical location where the employer's work or operations are performed
- **Work area** – an area where one or more employees are working within a work site
- **Wet bulb globe temperature (WBGT)** – combines ambient temperature, humidity, radiant heat from sunlight or artificial sources, and air movement

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Heat Injury and Illness Prevention Plan (HIIPP)

- Site-specific
- Include a comprehensive list of the types of covered work activities
- Identify the heat metric used (HI or WBGT)
- Evaluation of vapor-impermeable clothing and alternatives
- Written, if employer has more than 10 employees
- Designate one or more **heat safety coordinators**
 - Implement and monitor the HIIPP
 - Authority to ensure compliance
- Seek input and involvement of non-managerial employees and their representatives, if any, in the development and implementation of the HIIPP

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HIIPP (cont'd)

- Review and evaluate the HIIPP's effectiveness after a heat-related incident, and at least annually
- Readily available at the work site to all employees
- Available in a language each employee, supervisor, and heat safety coordinator understands

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Identifying Heat Hazards - Outdoor

- Monitoring all outdoor work areas with sufficient frequency to determine with reasonable accuracy employees' exposure to heat by
 - Tracking the NWS local heat forecasts (or other reputable source); or
 - Measuring the HI or WBGT at or near the work areas
- **Exemption from monitoring:** the employer can assume the temperature at the work area is at or above the initial heat and high heat triggers and implement those requirements



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Identifying Heat Hazards - Indoor

- Identify each work area(s) where there is a reasonable expectation that employees are or may be exposed to heat at or above the initial heat trigger
- Develop and implement a monitoring plan, including measuring at or near the identified work areas using HI or WBGT
- Update the plan when there are process and other changes
- Seek input and involvement of non-managerial employees
- **Exemption from monitoring:** the employer can assume the temperature at the work area is at or above the initial heat and high heat triggers and implement both of those requirements



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80°F



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Initial Heat Trigger Requirements (HI 80°F)

- **Drinking water**
 - Readily accessible to employees
 - Suitably cool; and
 - Sufficient quantity to provide access to 1 quart of drinking water per employee per hour
- **Break areas** at outdoor work sites
 - Readily accessible and can accommodate the number of employees on break
 - Shade (natural or artificial; but not from equipment) – that blocks direct sunlight and is open to outside air; **OR**
 - Air-conditioning in an enclosed space, such as a trailer, vehicle, or structure

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Initial Heat Trigger Requirements (cont'd)

- **Break areas** at indoor work sites
 - Readily accessible
 - Air-conditioned or has increased air movement (and maybe de-humidification)
- **Indoor work area controls**
 - Increased air movement, such as fans or comparable natural ventilation and, if appropriate, de-humidification;
 - Air-conditioned work area; or
 - If radiant heat sources, other measures that effectively reduce employee exposure to radian heat in the work area (e.g., shielding / barriers, isolating heat sources)
- **Evaluation of fan use**
 - At ambient temperatures above 102°F, if the employer is providing fans for indoor work areas, the employer must also evaluate whether use is harmful (humidity)

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Initial Heat Trigger Requirements (cont'd)

- **Acclimatization for new employees** during their first week
 - Use all the measures required by the high heat trigger; **OR**
 - Gradual acclimatization with lower workloads: 20% on 1st day; 40% on 2nd day; 60% on 3rd day; 80% on 4th day
- **Acclimatization for returning employees** who have been away more than 14 days
 - Use all the measures required by the high heat trigger; **OR**
 - Gradual acclimatization with lower workloads: 50% on 1st day; 60% on 2nd day; 80% on 3rd day
 - Unless employee consistently worked under the same or similar conditions as the employer's working conditions within the prior 14 days
- **Exception:** if employer can demonstrate employee consistently worked under the same or similar conditions at work site within the prior 14 days

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Initial Heat Trigger Requirements (cont'd)

- Rest breaks if needed
 - Allow and encourage employees to take paid rest breaks in the break area if needed to prevent overheating
- Effective communication
 - Maintain a means of effective, two-way communication with employees and regularly communicate with employees
- Personal Protective Equipment (PPE)
 - If the employer provides cooling PPE, the employer must ensure the cooling properties of the PPE are maintained at all times during use

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90°F

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High Heat Trigger Requirements (HI 90°F)

- These are *in addition to* the requirements for the initial heat trigger
- Mandatory rest breaks
 - Employer must provide a minimum 15-minute paid rest break at least every two hours in the break area
 - A meal break may count as a rest break, even if it is not otherwise required by law to be paid
 - Donning and doffing periods do not count
 - Time for walking to and from the break areas does not count

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High Heat Trigger Requirements (cont'd)

- **Mandatory observation methods**
 - Mandatory buddy system in which co-workers observe each other; or
 - Observation by a supervisor or heat safety coordinator, with no more than 20 employees observed by each person
 - For employees alone at a work site, the employer must maintain effective two-way communications and make contact at least every two hours
- **Mandatory hazard alerts**
 - Importance of drinking plenty of water
 - Employees' right, at the employee's election, to take rest breaks if needed and the mandatory rest breaks in this section
 - How to seek help and the procedures for an emergency
 - For mobile work sites, the location of break areas and drinking water
- **Excessively high heat indoor work areas**
 - Warning signs required if ambient temperatures regularly exceed 120°F

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Emergency Response and Planning

- Employers must include a heat emergency response plan as part of their HIIPP that includes:
 - Emergency phone numbers
 - Description of how employees can contact a supervisor or emergency medical services
 - Individuals designated to ensure that heat emergency procedures are invoked when appropriate
 - Description of how to transport employees to a place where they can be reached by an emergency medical provider
 - Clear and precise directions to the work site
 - Procedures for responding to an employee experiencing signs and symptoms of heat-related illness or heat stroke

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Emergency Response and Planning (cont'd)

- **If an employee is experiencing signs and symptoms of heat-related illness, the employer must:**
 - Relieve them from duty;
 - Monitor them;
 - Ensure they are not left alone;
 - Offer them on-site first aid or medical services before ending monitoring; and
 - Provide them with the means to reduce their body temperature.
- **If an employee is experiencing signs and symptoms of a heat emergency, the employer must:**
 - Take immediate actions to reduce the employee's body temperature before emergency medical services arrive;
 - Contact emergency medical services immediately; and
 - All of the above actions with heat-related illness signs and symptoms

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Training

- Initial
- Supervisor
- Annual refresher
- Supplemental

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Initial Training	Supervisor	Annual Refresher
<ul style="list-style-type: none"> • Heat stress standards • Heat-related injuries and illnesses • Risk factors • Signs and symptoms • Removing PPE during rest breaks • Taking rest breaks • Drinking water • Break areas • Reporting signs and symptoms • HIPP • Identity of heat safety coordinators • Employee's rights 	<p>Initial Training subjects, plus:</p> <ul style="list-style-type: none"> • Policies and procedures developed to comply with the standard • Procedures the supervisor or heat safety coordinator must follow if an employee exhibits signs and symptoms of heat-related illness 	<p>For all employees, supervisors, and heat safety coordinators</p> <p>For outdoor worksites, must be one before the start of the heat season.</p> <p>SUPPLEMENTAL Required when changes occur that affect employees' exposure to heat at work (e.g., new job tasks); the employer changes policies or procedures; there is an indication an employee has not retained the necessary understanding; or a heat-related illness or injury occurs resulting in death, days away from work, medical treatment beyond first aid, or loss of consciousness.</p>
<p>Presentation: Must be in a language and at a literacy level each employee, supervisor, and heat safety coordinator understands and must provide employees an opportunity for questions and answers about the training material.</p>		

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Other Requirements

- Recordkeeping – only for on-site measurements at indoor work areas; must maintain for six months
- No cost to employees – including paying employees their normal rate of pay when compliance requires employee time

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What's missing?

- The proposed rule does not address situations in which an employee may have an unknown pre-existing condition.
- But, what should employers consider doing to address that possibility?

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Possible Actions and Resources

- What are your possible actions in response to the proposed standard?
- Should employers just wait and see if the proposed rule ever becomes effective?

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History Of The Walkaround Rule

- **2013:** OSHA issues the "Fairfax Memo" - an interpretation letter stating that workers at a nonunion worksite could designate a person affiliated with a union to act on their behalf during an OSHA inspection.
- **2017:** Fairfax Memo policy is challenged in federal court by the National Federation of Independent Business. The Trump administration rescinds the Fairfax Memo later that year.
- **January, 2023:** Biden administration announces intent to publish a notice of proposed rulemaking amending 29 C.F.R. §1903.8(c).
- **April 1, 2024:** OSHA publishes its final rule amending §1903.8(c), which goes into effect on May 31, 2024.

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29 C.F.R. §1903.8(c) - Final Rule

- The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, In the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is **reasonably necessary** to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant **knowledge, skills, or experience** with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

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Two Key Revisions In Final Rule

- Authorized Employee Representative ("AER") may be:
 - An employee of the employer **OR**;
 - A 3rd Party.
- 3rd Party AER no longer limited by formal credentials (i.e.: industrial hygienist or safety engineer).
 - AER may authorized based upon knowledge/skills/experience in:
 - Processes/hazards/conditions present at the workplace (or similar workplaces);
 - Language and communication skills;
 - To facilitate better communication between CSHO and employees.

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How an AER Is Designated

- Collective Bargaining Agents ("CBA")
 - If employees represented by a certified/recognized CBA → the highest ranking union official or employee representative at worksite designates the AER.
- Complaints
 - AER designated when authorized to file complaint on behalf of employees.
- Established safety committee or employees at large designate.
- Directly inform CSHO
 - Done by either employees or AER.

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Considerations When Designating AER

- CSHO cannot designate AER, must be done by employees.
- No vote required to designate AER.
- No set number of employees required to designate AER.
 - No need for unanimous agreement, or even majority agreement.
 - Minimum → in worksites with more than >1 employee, then >1 employee needed to authorize AER.

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How Many AERs Allowed?

- Under §1903.8(a), generally one employee and one employer representative accompanies CSHO on inspection.
- CSHO has authority to permit additional AERs:
 - Multi-Employer Worksite → different employer may have different AER.
 - Multi-Phase Physical Inspection → different AER for different phase.
 - Especially when specific knowledge/skill/experience required.
- Additional AER does not have to affiliated with union representing employees.

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How Does CSHO Know AER Designated?

- CSHO will ascertain whether AER designated at worksite.
- Possible methods:
 - Receipt of complaint referring to AER;
 - During opening conference;
 - CSHO asks if worksite represented by union or if employees have AER.
 - During walkaround inspection;
 - During employee interviews;
- If multiple AERs identified, then CSHO considers particular knowledge, skill, or experience of each and whether multiple AERs would further aid inspection.

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CSHO's Role In AER Designation

- If AER is employee of employer → no issue.
- If AER = 3rd party → CSHO must determine that **good cause** has been shown that the 3rd party is **reasonably necessary** to an **effective and thorough inspection**.
- CSHO will inquire about AER's knowledge/skill/expertise, such as:
 - Specialized safety and health experience;
 - Familiarity with equipment/processes/industry/hazards/etc. In workplace;
 - Language/communication skills.
- CSHO not expected to get more info from AER than would request from other employer or employee representative.
- 3rd party AER considered to be "reasonably necessary" when they will make a positive contribution to an effective and thorough inspection.

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CSHO's Authority

- CSHO has final say/ultimate authority in designation of 3rd party AER
 - 1903.8(c): "...in the judgment of the Compliance Safety and Health Officer..."
- CSHO has discretion to determine whether good cause has been shown as to why 3rd party AER is reasonably necessary to inspection.
- If employer objects to AER designation → CSHO has authority to resolve all disputes.
- CSHO can also limit/prevent AERs participation if AER's conduct interferes with a fair and orderly inspection.
- Just as with employer representative, CSHO can allow reasonable time for 3rd party AER to travel to worksite (usually 1 hour).

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AER's Role During Inspection

- AER present to accompany CSHO and aid physical inspection of workplace in multiple ways:
 - Explaining equipment/processes/operations/policies/procedures;
 - Interpretation (during informal interviews);
 - Facilitate communication between CSHO and employees.
- AER can also participate in opening and closing conferences.
- May act as interpreter during informal interviews.
- Not present for private interviews unless employee requests.
- May ask clarifying questions to ensure understanding of a topic/issue.
- Because CSHO already takes pictures and measurements, AER typically will not, unless given express permission by employer or entity controlling worksite.

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AER's Limitations During Inspection

- AER may not disrupt or interfere with a fair and orderly inspection.
- Examples of prohibited behavior include:
 - Preventing CSHO from taking essential photographs, video recordings, or testing;
 - Preventing CSHO from interviewing employees in private;
 - Interfering with employee or employer representative involvement in the inspection;
 - Failing to stay with CSHO during walkaround (i.e.: wandering, unauthorized areas);
 - Taking unauthorized photographs or videos;
 - Solicitation, such as handing out union authorization cards:
 - No limitation on AER wearing clothing promoting a union, however.
 - Distributing or handing out any material without the CSHO's review and consent;
 - Discussing matters unrelated to inspection with employees during inspection;
 - Failing to comply with the ground rules of the inspection.

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Employer Rules

- Employer may have rules that apply to employees and visitors.
- CSHO will typically inquire about these rules during opening conference.
- 3rd party AER generally must comply with rules including:
 - Completing safety orientation/briefing;
 - PPE use;
 - Following precautions and/or security measures for sensitive areas/trade secrets;
 - Sign reasonable confidentiality agreement, so long it does not restrict AER's right to discuss info with OSHA or affected employees, or participate in OSHA proceeding.
- Caveat: rules must be lawful and apply equally to all visitors.
 - Can't be enforced to interfere with AER's right to accompany CSHO.

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Potential Concerns

- "Authorized Representative" → NLRA/NRLB vs. OSH Act
- 3rd party AER may have ulterior motives → union organization
- Who provides PPE?
- Liability waiver?
- Consistent application of visitor protocols.

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OSHA'S WALKAROUND RULE

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Firm Templates

Template Package available to assist with compliance includes:

- Heat Injury and Illness Prevention Program
- Work Site-Specific Plan Appendix
- Training PowerPoint Deck
- Hazard Assessment
- Notices

Available for \$1,000 a la carte or at no additional cost as part of an *Advanced* or *Premium Client Portal* Subscription.

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Ogletree Blogs

July 8, 2024

[DOL Unveils Proposed Heat Illness Prevention Rule as Federal Agency Authority Faces Questions](#)

By [Phillip B. Russell](#), [Karen E. Tynan](#), [Dee Anna D. Hays](#), and [Zachary V. Zagger](#)

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Ogletree Podcasts

July 12, 2024

[Dirty Steel-Toe Boots, Episode 25: OSHA's New Proposed Heat Standard and What It Means for Employers](#)

By [Phillip B. Russell](#) and [Dee Anna D. Hays](#)

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Ogletree Events

- **ALWAYS SELL OUT!!! REGISTER EARLY!!!**
 - [National Workplace Safety Symposium](#) December 4-6, 2024
 - > New Orleans Marriott Warehouse Arts District

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Thank you!

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