

**Formal Public Comment in Opposition to EIB 25-11 (R) – Proposed Rule 11.5.7 NMAC
(Heat Illness and Injury Prevention)**

To: New Mexico Environmental Department

**From: The New Mexico Restaurant Association Board of Directors, and Carol Wight,
CEO**

Date: 05/06/2025

Dear Chair and Members of the Environmental Improvement Board,
I respectfully submit this letter in opposition to EIB 25-11 (R), the proposed 11.5.7 NMAC rule concerning Heat Illness and Injury Prevention.

RE: Heat Illness and Injury Prevention

The New Mexico Restaurant Association respectfully submits these comments in response to the Proposed Heat Illness and Injury Prevention Rule.

We firmly oppose the Proposed Rule in its current form. It represents an ill-conceived, one-size-fits-all regulatory approach that will impose undue and onerous burdens on restaurant businesses, especially small ones. For the reasons elaborated below, we earnestly urge NMED to withdraw the Proposed Rule and instead engage in collaborative efforts with the industry. The goal should be to promote best practices for heat safety tailored to restaurants' unique operational realities.

We respectfully request that restaurants be explicitly removed from these Heat Regulations, as our employees can access shade, cooling systems, and hydration stations.

The Rule is Unnecessary: Existing Tools Address Heat Hazard

First, it is essential to note that heat-related illnesses in restaurants are not widespread. According to the Food Industry Self-Insurance Work Comp Fund, there have been only two verified claims related to heat exposure out of approximately 4,000 over the last five years—one incident occurred during COVID-19 when an employee was wearing a mask while working outside, and the other involved a worker over a fryer in the kitchen. This data suggests that serious heat-related incidents in our industry are rare.

The Proposed Rule imposes a broad and overly burdensome mandate on multiple industries with very different business models, which is unnecessary. NMED can enforce heat safety through the General Duty Clause and National Emphasis Program (NEP). Instead of increasing the regulatory burden on businesses, NMED should partner with the restaurant industry to enhance its Heat Illness Prevention Campaign and customize existing efforts for greater efficacy in specific industries.

The General Duty Clause and NEP on Outdoor and Indoor Heat-Related Hazards

The General Duty Clause, as stipulated in Section 5(a)(1) of the Occupational Safety and Health Act of 1970, obligates employers to provide workplaces free from recognized hazards likely to cause serious harm or death [1]. This clause has been consistently interpreted to cover heat-related hazards, enabling OSHA to address heat risks on a case-by-case basis. This flexible enforcement mechanism ensures efficient resource allocation, avoiding blanket regulations that may be ineffective or unnecessary in all workplaces.

According to OSHA data [2], between 1986 and 2023, OSHA issued at least 348 hazardous heat-related citations under the General Duty Clause. This demonstrates OSHA's capacity to tackle severe heat-related risks without additional prescriptive regulations.

In April 2022, OSHA launched the NEP on Outdoor and Indoor Heat-Related Hazards[3]. This initiative targets industries with the highest risk of heat-related illnesses and injuries. The NEP takes a proactive approach, including programmed inspections triggered by National Weather Service heat advisories. Since its inception, OSHA has conducted nearly 5,000 federal heat-related inspections, further validating its ability to effectively target high-risk industries and allocate resources to address pressing heat-related hazards without rigid mandates [4].

OSHA's Heat Illness Prevention Campaign

OSHA's Heat Illness Prevention Campaign, initiated in 2011, offers robust resources for managing heat risks. It provides a flexible and practical alternative to additional prescriptive regulations [5]. The campaign equips employers and employees with tools and guidance to recognize and mitigate heat risks. Key components include awareness-building tools, training materials, and acclimatization guidance.

These resources are accessible and adaptable, capable of addressing heat-related risks in the restaurant industry without adding regulatory burdens. The campaign's smartphone app offers location-specific heat condition information and educational materials in multiple languages, enhancing its versatility.

The National Restaurant Association has a history of collaborating with the Department of Labor (DOL) on workplace safety. For example, the Association recently co-hosted a webinar with the DOL on child labor laws, focusing on teen safety in the food service industry [6]. Similar partnerships can be leveraged to develop educational materials and outreach efforts tailored to the restaurant industry for heat illness mitigation.

Expanding the Heat Illness Prevention Campaign's scope and tailoring guidance to the unique challenges of restaurant operations would enhance its effectiveness. By partnering with the industry, NMED could integrate proven industry-led strategies, such as providing portable cooling devices, upgrading ventilation and cooling systems, and promoting heat-resistant uniforms.

Many restaurants are already implementing such measures. For instance, some have improved ventilation with air conditioning and industrial fans, adopted personal cooling methods, or provided regular access to cold beverages. Leveraging the existing campaign to amplify these efforts would protect workers without onerous mandates.

Onerous Administrative and Operational Disruptions

The Proposed Rule imposes rigid and prescriptive requirements that fail to account for the restaurant industry's operational diversity and realities. While the industry is committed to employee safety, this one-size-fits-all approach creates impractical challenges for employers. Flexibility, which the Proposed Rule lacks, is essential for restaurant operators to address heat hazards effectively.

Mandated Breaks and Acclimatization Requirements

The mandated breaks and acclimatization requirements in the Proposed Rule are overly prescriptive and appear to be rules for outdoor work. They disregard the unique operational challenges of the restaurant industry, where efficiency and coordination are crucial. Under the rule, employees must receive paid resting breaks every two hours when the heat index reaches a specific temperature. This rigid requirement based on outdoor temperatures is irrelevant to restaurants and other indoor environments. It would disrupt restaurant workflows, especially during peak service periods.

In smaller establishments with limited staff, the absence of one worker can halt operations. For example, a missing line cook during a dinner rush can delay food preparation and service. Larger establishments are also affected due to the interdependence of roles.

The restaurant industry is facing a severe labor shortage. According to the 2024 State of the Industry Report, 70% of operators struggle to fill job openings, and nearly half lack sufficient staff to meet customer demand [8]. Imposing mandatory breaks exacerbates the strain on existing staff. Hiring additional workers is not a viable solution for many operators due to the industry's low profit margins of 3 - 5%.

Acclimatization requirements further complicate matters. The rule mandates a gradual increase in heat exposure for new and returning employees, starting at 20% of a normal shift on the first day and increasing over a week [9]. These requirements are extremely expensive and incompatible with the restaurant industry's low profit margin, high turnover, and seasonal hiring practices. New hires are often needed to meet peak demand, and delaying their full integration leaves restaurants understaffed.

The rule's lack of regional variability adds complexity. Restaurants in New Mexico routinely operate in high-heat conditions, and employees are often acclimated. Applying uniform acclimatization protocols and mandated breaks in these regions is unnecessary and burdensome.

Administrative, Recordkeeping, and Training Burdens

The Proposed Rule introduces significant administrative and compliance requirements for restaurant operators. These obligations are particularly challenging for an industry with tight margins and workforce challenges. By imposing rigid mandates for recordkeeping, training, and heat safety plans, the rule diverts resources from core operations.

The rule mandates extensive recordkeeping. All employers under this standard must keep the following records for a minimum of five years: an accurate record of the heat acclimatization schedule and procedures for all new and returning employees. The employer must keep a record of Heat Illness training, including a list of attendees. A record of all heat illness or related injuries, including those that only require first aid. Heat index and working conditions at the time of illness or injury. The monetary and regulatory cost of this requirement alone, especially for small restaurants that do not have HR departments, is untenable.

Training obligations further strain employers. The rule requires comprehensive heat safety training for all employees and managers, with annual refresher and supplemental training for changes in heat hazard exposure, policies, or incidents [10]. These recurring requirements are burdensome in an industry with high turnover.

The combined demands of creating and maintaining plans, recordkeeping, training, and acclimatization protocols introduce significant administrative challenges that may overwhelm even well-resourced operators.

Compliance Costs Are Significantly Underestimated

The Proposed Rule significantly underestimates the compliance costs for restaurants. While OSHA projects annual expenses of \$1,940 per establishment, the actual financial burden, including infrastructure upgrades, labor adjustments, and operational disruptions, is much higher [11]. These challenges are exacerbated by inflationary pressures, with food costs up 29%, labor costs up 31% since 2019, and rising utility, occupancy, and credit card processing fees [12]. Given the industry's thin profit margins of 3 - 5%, the rules' costs threaten the viability of many restaurants.

Discrepancies Between OSHA's Estimates and Real-World Costs

OSHA's projected compliance costs fail to consider the unique challenges restaurants face. The NMED has no estimated costs in its rule. The rule mandates measures such as temperature monitoring, creating break areas, and providing employee breaks during peak hours, which require significant investments in infrastructure, staffing, and operational adjustments.

The rule requires employers in indoor work areas to implement heat mitigation measures, such as increasing air movement, providing air conditioning, or reducing radiant heat exposure. Installing or upgrading HVAC systems or ventilation controls can cost tens of thousands of dollars, far exceeding OSHA's estimates. Larger or older establishments may face even higher expenses or feasibility issues.

Though individually inexpensive, monitoring tools result in significant aggregate costs over time. Creating compliant break areas is challenging due to financial and spatial constraints, especially in older or densely built environments.

Compliance with mandatory breaks and acclimatization protocols exacerbates staffing needs. Restaurants with low profit margins cannot afford to hire additional personnel to cover shifts during peak hours. For example, a small diner in New Mexico estimated a 20% annual increase in payroll costs, which would make the business unsustainable.

The rule also introduces hidden costs, such as training requirements in high-turnover environments and administrative compliance costs, including temperature monitoring, log-keeping, and acclimatization tracking. These indirect costs far exceed OSHA's estimations.

Ripple Effects on Local Economies

The financial impact of the Proposed Rule extends beyond individual restaurants to local economies. Higher operating costs threaten the sustainability of restaurants, especially small and independent ones, which are major employers in their communities. Restaurant closures can lead to job losses and affect local suppliers, farmers, distributors, and delivery services.

Restaurants play a crucial role in regional economies by providing jobs and driving commerce in rural and urban areas. Closing even a few establishments can disproportionately harm rural and underserved areas.

The Undue Impact on Small Businesses

Small businesses are the backbone of the restaurant industry, with nine in ten restaurants employing fewer than 50 people and seven in ten operating as single-unit establishments [13]. However, they often lack the resources to navigate complex regulatory requirements like those in the Proposed Rule. Without exception, many small businesses face the risk of closure due to unsustainable compliance costs.

The SBA Office of Advocacy agrees that the rule disproportionately burdens small businesses and fails to account for their unique challenges. They urged OSHA to reassess the rule and consider alternatives tailored to small businesses [14]. We echo these concerns and urge NMED to adopt more flexible, scalable measures.

Small business owners lack the legal and regulatory expertise of large corporations. The administrative requirements of the rule, such as recordkeeping, acclimatization tracking, and maintaining HIIPPs, are beyond their capabilities. Hiring additional staff or consultants is unaffordable for already stretched-thin businesses.

Many small businesses operate in older or compact facilities where creating compliant break areas or installing advanced cooling systems is impractical or impossible. The costs of retrofitting or relocating could exceed annual profits, forcing closures.

Given these factors, if NMED proceeds with the Proposed Rule, small businesses with fewer than 250 employees must be exempt. Instead, OSHA should expand its Heat Illness Prevention Campaign with industry-specific guidance on heat risk mitigation.

Conclusion

Instead of imposing one-size-fits-all strict regulations, we urge the New Mexico Environment Department to consider promoting voluntary guidelines, best practices, and training for heat illness prevention. Providing resources and support for businesses to implement safety measures can achieve the desired outcomes without heavy-handed regulations that could hinder economic growth and compliance for small businesses.

In conclusion, while the intent behind the Heat Illness and Injury Prevention Rule is commendable, the proposed requirements would negatively affect the restaurant industry and small businesses throughout New Mexico. We respectfully request that restaurants be explicitly removed from these Heat Regulations, as our employees can access shade, cooling systems, and hydration stations. The rules appear to be designed for businesses with workers exposed to outdoor heat, and we believe that restaurants should be explicitly carved out of this regulation.

[1] <https://www.osha.gov/laws-regs/oshact/section5-duties>

[2] <https://www.federalregister.gov/documents/2024/08/30/2024-14824/heat-injury-and-illness-prevention-in-outdoor-and-indoor-work-settings#p-139>

[3] https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf

[4] <https://www.osha.gov/news/newsreleases/national/05082024-0#:~:text=The%20agency%20continues%20to%20conduct%20heat%2Drelated%20inspections,has%20conducted%20nearly%205%2C000%20federal%20heat%2Drelated%20inspections>

[5] <https://www.osha.gov/heat>

[6] <https://restaurant.org/events-and-community/events-calendar/child-labor-law-compliance-in-the-foodservice-industry-keeping-teens-safe-this-summer/>

[7] <https://www.federalregister.gov/d/2024-14824/p-2933>

[8] <https://restaurant.org/events-and-community/events-calendar/child-labor-law-compliance-in-the-foodservice-industry-keeping-teens-safe-this-summer/>

[9] https://www.env.nm.gov/occupational_health_safety/wp-content/uploads/sites/12/2025/03/NMED-Heat-Illness-and-Injury-Prevention-Rule.pdf

[10] https://www.env.nm.gov/occupational_health_safety/wp-content/uploads/sites/12/2025/03/NMED-Heat-Illness-and-Injury-Prevention-Rule.pdf

[11] <https://www.federalregister.gov/d/2024-14824/p-1478>

[12] <https://restaurant.org/research-and-media/research/inflation/>

[13] <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/>

[14] <https://www.osha.gov/smallbusiness/sbrefa>