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Sent via email

May 15, 2025

RE: EIB 25-11(R) – Proposed New Regulation, 11.5.7 NMAC – Heat Illness and Injury Prevention

We write today as members of the Coalition of Agricultural Workers and Advocates (CAWA) to urge the Environmental Improvement Board to adopt strong protections to keep New Mexican workers safe while working in unsafe heat conditions. CAWA is a group of individuals and organizations primarily based in Southern New Mexico working together to support agricultural workers and to promote and advocate for their rights.

Heat-related illness visits to New Mexico emergency departments nearly doubled between 2010 and 2022, with over 900 visits due to heat in 2023.[1] This number includes only heat exhaustion and heat stroke, and does not include workers who experience chronic or other acute illness due to exposure to the heat such as kidney failure, respiratory disease, and cardiac events which are not usually coded as "heat-related" illnesses.[2] Federal OSHA estimates nearly 250,000 New

[1] NM Environment Department, "Extreme Heat and Public Health Water and Natural Resources Committee." July 22, 2024. https://www.nmlegis.gov/handouts/WNR%20072224%20Item%205%20NMED%20Extreme%20Heat%20and%20Public%20Health.pdf. Accessed May 5, 2025.
[2] Id.

Mexicans work in industries at high risk of heat-related harms, including both outdoor workers and indoor workers with no or inadequate cooling.[3] The time to act on heat safety is now!

We support the petition filed by the NM Occupational Safety and Health Bureau to create new occupational safety standards which are crucial to keep workers safe from heat-related illness and injury, with modest modifications. These regulations are an important step forward to protect New Mexican workers and we are grateful for the leadership of the Environment Department and NMOSHA in bringing this matter before the board.

I. The proposed regulations contain many effective provisions that are needed immediately to protect workers from heat-related injury and illness.

The proposed regulations reflect a strong step toward safer working conditions for the thousands of individuals at risk of heat-related illness and injury at work. The following provisions are particularly important to ensure worker safety:

1) The proposed rule covers all workers with narrow and reasonable exemptions.

It is important that the regulations proposed by NMED do not include extraneous exemptions that will leave many workers without protection. The few exemptions listed are reasonable because they reflect scenarios where other more applicable safety mechanisms are already in place, such as for emergency responders actively responding to emergencies, or where it would be practically impossible for employers to provide monitoring or other safety controls, such as in the case of remote employees working from home. It is vital that any exemption from an occupational safety standard for heat is narrowly tailored to avoid unnecessarily excluding workers without other safety protections in place.

2) Acclimatization is key to worker safety in the heat.

Research has shown that allowing for a period of acclimatization is key to reducing heat related illness and injury. A report provided by the California Division of Occupational Safety and Health found that 45% of heat related injuries and illnesses happened during either the first week on the job, or the first 7 days of a heat wave, with 15% occurring on the first day alone.[4] This is especially important in the agricultural industry, as many workers are seasonal and migrant workers make up a significant proportion of the workforce.[5] These workers may be coming to New Mexico from other parts of the country or other countries with vastly different climates, and

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[3] Juanita Constible, "Occupational Heat Safety Standards in the United States." April 8, 2025. https://www.nrdc.org/resources/occupational-heat-safety-standards-united-states. Accessed May 5, 2025.

[4] State of California Department of Industrial Relations, Division of Occupational Safety and Health Research and Standards Unit, "Cal/OSHA investigations of Heat-Related Illnesses 2006." October 18, 2007. https://www.dir.ca.gov/dosh/heatillnessinvestigations-2006.pdf. Accessed May 5, 2025.

[5] According to the USDA, 16.5% of crop workers are not "settled" and work at farm locations that are remote from where they live. This includes "shuttlers," who work at a single farm location more than 75 miles from home, migrant workers, and "follow the crop" migrant workers who may work in many different states during a single growing period. https://www.ers.usda.gov/topics/farm-economy/farm-labor#:~:text=In%202014%2D16%2C%2027%20percent,percent%20held%20no%20work%20authorization. Accessed May 5, 2025.

arriving in New Mexico for the growing season, during the hottest, most brutal months of the year. Even workers who are already in New Mexico may need an acclimatization period if they are moving between parts of the state with different climates. Including requirements for workers to become acclimated to the heat is a vital safety feature in the regulation that will undoubtedly prevent many heat related illnesses and injuries.

3) Adding to the heat index to account for sun exposure is incredibly important for NM in light of the high UV indexes experienced here during the summer.

One feature of New Mexico's unique climate is that while the humidity is generally lower, the UV index is much, much higher in the summer than in other parts of the country due to our high elevation and frequent lack of cloud cover.[6] According to the EPA, a UV index reading of 8-10 means a very high risk of harm from unprotected sun exposure, and a UV index over 11 means "extreme" risk, and warns that skin can burn in a matter of minutes in those conditions.[7] In recent years, New Mexico's UV index has been 11 or higher for 85-110 days per year, and can easily reach 13 during the summer, which places us as one of the states with the highest UV index in the country.[8] The inclusion of sun exposure in the proposed regulations is an important feature that tailors this heat standard to meet the needs of New Mexico's workers.

4) The proposed regulations provide a variety of effective options, allowing businesses to create their own plans that work for their employees.

The proposed regulations call for employers to establish a Heat Illness and Injury Prevention Plan (HIIPP) which will provide detailed information to workers about the worksite-specific safety precautions that will be in place, called "control measures." These control measures are all crucial to prevent injury and illness. We appreciate that the HIIPP regulations are detailed and include a comprehensive but flexible approach.

One feature of the proposed regulations that seems particularly tailored to make it easy for businesses to comply is the inclusion of multiple options for different control measures. The control measure for employee monitoring includes many common sense tools that are likely to be in place in worksites already, such as radios and cell phones, and even includes a catch-all option, "Other equally effective means of observation and communication." For agricultural workers who are widely dispersed throughout a large agricultural operation, maintaining contact is a crucial safety feature. Similarly, the guidance for cooling areas provides a wide variety of strategies that can be used, and also make it clear that even in a scenario where shade is not feasible or safe, employers still have to take other measures such as misters or active cooling garments to make sure that workers can cool down. These regulations provide a flexible

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[6] Segarra, Curtis, "New Mexico expects the highest UV Index in the continental US." Published June 22, 2023, updated June 26, 2023. KRQE Weather. https://www.krqe.com/weather/new-mexico-expects-the-highest-uv-index-in-the-continental-u-s/#:~:text=The%20Earth's%20atmosphere%20can%20help,areas%20because%20of%20our%20elevation. Accessed May 5, 2025.

[7] National Weather Service, "Ultraviolet (UV) Index Forecasts." https://www.weather.gov/ilx/uv-index. Accessed April 30, 2025.

[8] United States Environmental Protection Agency, "Sun Safety Monthly Average UV Index 2006-2023." https://www.epa.gov/sunsafety/sun-safety-monthly-average-uv-index-2006-2023#tab-6. Accessed April 30, 2025.

framework that employers can tailor to meet the needs of their employees and worksite, with both specific examples as well as effective workarounds when necessary.

5) Employee training needs to be relevant to the work site and in language that the workers understand.

Workplace safety training is an important feature to make sure that workers know how to recognize, prevent and respond to heat-related illnesses. But training is only effective if it is relevant and accessible to all workers. The proposed rules specify that training must be in a language and vocabulary readily understood by all employees, and that the training must contain details about the specific practices in place at the workplace. These provisions will ensure that workers have the information they need to stay safe working in high heat conditions. In addition, training materials should be readily available for seasonal workers that change work sites.

6) The trigger temperatures used are tailored to prevent most heat-related fatalities and injuries.

The temperatures that trigger temporary breaks in work are backed by scientific research and will be highly effective to prevent heat-related illnesses, injuries and deaths. A heat index of 80 degrees Fahrenheit captures 96-100% of fatalities and 99-100% of nonfatalities among workers. [9]

Not only will the trigger temperatures listed in the regulation prevent the vast majority of heat-related deaths and illnesses, they are also unlikely to be unduly disruptive to work practices. OSHA conducted a state-by-state analysis determining the number of "shift hours" per year that would be impacted on average when these heat triggers are implemented for day, evening and night shifts.[10] This analysis shows that the number of daytime shift hours for New Mexico is only 579 hours impacted by the initial heat trigger of 80 degrees Fahrenheit, and only 125 hours per year impacted by the high heat trigger of 90 degrees Fahrenheit. Compare this to states like Texas and Alabama, which have over 900 daytime shift hours impacted by the initial heat trigger, or Florida which has over 1,200. This is due to our lower humidity which allows heat to dissipate rapidly as the sun goes down – the difference between the daily high and low temperatures is often 25 to 35 degrees Fahrenheit in New Mexico.[11] Workers will still have enough hours in the day to be able to complete their hard work, and without risking their lives.

II. The following provisions, if amended or added to the proposed regulations, would ensure that the new heat standard is effective and responsive to the specific needs of workers in the agricultural industry.

While we are supportive of the proposed regulations, we know from both lived experience and research that agricultural workers face unique workplace challenges that should be taken into consideration in the creation of an occupational safety standard for heat. Agricultural workers are some of the workers most expected to suffer from increasing temperatures – research has shown

[9] Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70745 (Aug. 30, 2024).
[10] *Id*. at 70831.
[11] Western Regional Climate Center. "Climate in New Mexico." New Mexico State University - New Mexico Weather. https://weather.nmsu.edu/climate/about/

that ***agricultural workers are 35 times more likely to die from heat-related stress than workers in other industries.***[12] As workers who are most at risk of the harms that these regulations are meant to address, agricultural workers should be particularly centered in the development of occupational safety regulations on heat.

As community organizations from agricultural communities and advocacy organizations that work with agricultural workers, we propose the following amendments to ensure that heat standard regulations will be effective to meet the needs of agricultural workers:

1) Who is responsible? The farm labor contracting system is prevalent in agriculture and often results in no one taking responsibility for worker safety.

In the agricultural industry, disputes often arise between farm owners and farm labor contractors over who has employer obligations for agricultural workers. Growers often contract with other businesses that provide "farm labor" and handle compensation and other personnel matters for farm workers, known as "farm labor contractors." According to the most recent National Agricultural Worker Study, 22% of agricultural workers were employed by farm labor contractors.[13]

Generally, when it comes to workplace safety, farm labor contractors are often poorly situated to provide required safety trainings or create safety plans for their workers, because they are not familiar with the operations of the farm, including the location of shade structures, who will be the responsible supervisor for monitoring and development of the heat safety plan, the location of fresh water for workers, and other important details that must be included in worker safety training. In our experience speaking with agricultural workers in New Mexico, we have found that even safety trainings that are already legally required, such as for workers who may be exposed to pesticides, farm labor contractors often refuse to provide required trainings or to compensate workers for training time.

To make New Mexico's regulations strong and effective, it should be made explicit which employing entity is responsible for providing safety training, and that training time should be paid. The responsible party for the workplace should provide workers with a tailored training session that explains the safety measures being used in that specific location, in addition to generally applicable information about preventing, identifying and treating heat-related illnesses and injuries.

In Washington state, some workplace safety regulations have a definition of employ which could provide the needed clarity:

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[12] Gubernot DM, Anderson GB, Hunting KL. "Characterizing occupational heat-related mortality in the United States, 2000-2010: an analysis using the Census of Fatal Occupational Injuries database." Am J Ind Med. 2015 Feb;58(2):203-11. https://pmc.ncbi.nlm.nih.gov/articles/PMC4657558/. Accessed May 5, 2025.

[13] Fung, Wenson, et al. "Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic and Employment Profile of United States Crop Workers." September 2023. https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf. Accessed May 5, 2025.

> **Employ.** To obtain*, directly or through a labor contractor*, the services of a person in exchange for any type of compensation including a salary, wages, or piece-rate wages, without regard to who may pay or who may receive the salary or wages. It includes obtaining the services of a self-employed person, an independent contractor, or a person compensated by a third party, except that it does not include an agricultural employer obtaining the services of a handler through a commercial pesticide handler employer or a commercial pesticide handling establishment.[14]

In addition to clarifying which employing entity is responsible for providing training, the proposed regulations could be made clearer to ensure that training is effective. While the proposed regulations currently specify that the training session should be conducted in the language of preference of the workers and must contain details specific to the workplace practices, this section should be amended to clarify that the training should be provided in person, onsite, and should include opportunities for workers to ask questions.

2) How will mandatory breaks be paid? Piece rate workers need a rule that will protect both their safety and their productivity.

For many of New Mexico's most important crops, including chile and onions, employers commonly pay workers by the piece instead of hourly. This creates unique challenges to ensure that these workers are fairly compensated for time spent on mandatory heat safety breaks. While the proposed regulation does state that heat safety breaks should be paid, agricultural employers are likely to benefit from additional guidance on compensation to ensure workers are not penalized for taking breaks.

Piece rate work creates unique safety concerns. For some crops, large containers are stationed throughout the field and workers fill individual buckets that are dumped into the containers, which are later removed from the field. Field workers in this type of environment can often work at their own pace, and typically do take breaks when they need them, although of course required breaks for heat safety should be encouraged as per the proposed regulation. For other crops, however, workers must keep up with moving machines, which they fill as they work harvesting. This means that for many piece rate workers, taking a break not only results in losing income but also falling behind and potentially working even more rigorously to catch up, which creates an even greater danger of heat-related illness.

We recommend strongly that the guidance for employers is clear when it comes to compensating workers for paid breaks, and for ensuring that breaks are practicable for workers. Research shows that not only are breaks vital for ensuring worker safety, they also have a demonstrable positive effect on worker productivity.[15] For piece rate workers, this increase in productivity means an increase in income.

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[14] WAC 296-307-10820, emphasis added.

[15]Erik Hansson, Kristina Jakobsson, Jason Glaser, Catharina Wesseling, Denis Chavarria, Rebekah A I Lucas, Heath Prince, David H Wegman, Impact of heat and a rest-shade-hydration intervention program on productivity of piece-paid industrial agricultural workers at risk of chronic kidney disease of nontraditional origin, Annals of Work Exposures and Health, Volume 68, Issue 4, May 2024, Pages 366–375, https://doi.org/10.1093/annweh/wxae007

California's regulation provides a formula which employers can use to calculate the average hourly rate for piece rate workers on days without mandatory breaks, which can then be used to calculate compensation for safety breaks. This formula has been adopted in Washington state and was also included in the proposed federal regulations. California's regulations state:

> The rate of compensation for rest and recovery periods shall be *the higher of:*
> - An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.
> - The applicable minimum wage.[16]

Whatever method is used, it should ensure that piece rate workers will not lose out on income when they take their mandatory heat safety breaks. The employer guidance materials can and should also include specific instructions about pausing work, parking and shutting off harvest trucks, and communicating in detail to workers that their breaks will not result in a loss of income, to ensure that workers are appropriately incentivized to take mandatory safety breaks.

3) Is it safe in the shade? For outdoor workers, an effective rule needs to account for factors like distance and vehicle exhaust.

For workers in large commercial fields, providing a place to rest in the shade is both a crucial safety measure. In some parts of the country, it's a common practice to use a portable shade structure and water coolers on a trailer towed behind a truck or tractor. This is a practical approach especially in settings where workers cover a significant distance during a single shift and permanent structures are impractical. However, sitting under a portable shade structure towed behind a vehicle can create additional health risks when the shaded area is not well ventilated adding both heat and unsafe pollutants to the air in the rest area. Additionally, many agricultural workers take their rest breaks in the cab of a tractor, where they have shade but exhaust can create additional health risks, and the heat from running machinery can make it even hotter. Furthermore, workers may not want to take their rest under a shade structure if exhaust or fumes are present.

The proposed regulation should specify that the shade structure should be free from pollutants or other well-known health hazards, and there should not be running machinery or heat-generating structures yielding additional heat in the shaded area. The heat standard regulations in Oregon specify: "Shade may be provided by any natural or artificial means that does not expose employees to unsafe or unhealthy conditions, and that does not deter or discourage access or use."[17] Colorado's regulations state: "A shaded area is not adequate if any source, such as exhaust, running machinery, heat-radiating structures, or heat in a non-air-conditioned vehicle (including a bus), yields additional heat in the shaded area."[18]

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[16] CA Labor Code §226.2(a)(3). A detailed description of California's approach, including employer guidance with formulas and examples, can be found on the California Department of Industrial Relations website: https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.htm#PieceRate

[17] OAR 437-002-0156

[18] 7 CCR 1103-15, Rule 3.3(A).

New Mexico's standard should be amended to account both for air pollutants and heat-generating machinery which could undermine the safety and efficacy of shade provided.

4) What if the minimum isn't enough? Taking care of workers with health conditions that are particularly exacerbated by high heat conditions.

We know that not all workers face equal risks due to the heat. Workers who suffer from certain medical conditions, including pregnancy, as well as younger and older workers, and workers taking certain prescription medications, face elevated risks from working in high heat conditions.[19] Employers may not be aware of these medical conditions in many situations due to the importance of confidentiality around personal health information.

We recommend that the required worker training should include information about elevated health risks for individuals with pre-existing medical conditions, to ensure that workers receive information that can help them determine their own risk factors, without having to divulge their own personal health information to their employers. Additionally, since risks are not equal between workers, workers should be encouraged to request additional breaks or longer breaks, additional drinking water, or other accommodations as needed even at lower temperatures than indicated on the chart provided, without fear of retaliation.

5) How can workers get vital information to first responders? Farm maps and medical information cards can help first responders know where to go and how to treat workers in rural settings.

For some agricultural workers, a call to 911 might become an exercise in futility due to the nature of the worksite. In New Mexico's large commercial farming operations, workers may be transported miles between fields or farm locations once they arrive, and may not be familiar with the layout or locations where they are working. They may report to work in one central location and then spend their day miles away in a different part of the agricultural operation. The only address they may have for the farm might be the business office or the mailing address, which could be located miles away from where an agricultural worker actually experiences a heat related injury or illness.

A farm map can be a lifesaving tool to make sure that workers can completely and accurately describe where they are located and how to get there, so that first responders don't waste valuable time trying to locate workers onsite. The proposed regulations should be amended to ensure that workers can accurately describe their location to emergency responders, and that any logistical challenges that could potentially prevent an emergency responder from reaching a sick or injured worker are fully addressed in HIIPPs. This is especially true for workers located in cellular "dead zones."

Furthermore, first responders need access to crucial health information for workers in the event that the worker loses consciousness or becomes delirious due to the heat, or simply speaks a

[19] Centers for Disease Control, "Heat and Chronic Conditions." June 25, 2024. https://www.cdc.gov/heat-health/risk-factors/heat-and-chronic-conditions.html. Accessed May 5, 2025.

different language than the first responder who arrives on the scene – according to the National Agricultural Workers Survey, 57% of agricultural workers are most comfortable in Spanish, and only 37% described themselves as being able to speak English "well."[20]

While it's important to safeguard the privacy of workers' health-related information, workers should be encouraged to have the information needed available in writing in the event of a heat-related illness or injury. Workers could be issued a "personal medical information card" that lists the worker's age, relevant medical conditions and medications, primary care doctor, and emergency contact information, that they could keep on their person. This kind of card would communicate the most important information quickly and effectively to first responders. This is especially vital for workers who are at elevated risk of heat related illness and injury, such as workers who are older or younger, pregnant, who have certain existing health conditions or who take certain medications.

Finally, the regulations and the required safety training should make it clear that any employee has authorization to call emergency services if the designated person is unavailable.

6) Can workers report violations without fear of repercussions? Retaliation information should be part of the required safety training and come directly from the employer.

As with any occupational safety and health standard, the regulation is most helpful when workers can confidently report violations. New Mexico's statutes already create a right to file complaints as well as freedom from retaliation for workers reporting occupational safety and health violations.[21] However, many workers are not aware of the existence of whistleblower laws and may feel reluctance to report violations of safety standards due to fears about retaliation. To be as effective as possible, workers should be fully informed of their rights to file complaints without fear of retaliation. Information about whistleblower protections should be included in the mandatory safety training provided by the employer.

New Mexico can take the lead in protecting our workers, their families and communities now. The proposed rule will ensure that New Mexicans are better protected from heat at work. As documented by the NM Department of Health, heat waves and higher temperatures are increasing, leading to more heat-related hospitalizations and deaths and related health problems such as long-term kidney, heart and lung diseases. By adopting a state standard, New Mexico will give employers a clear road map for reducing the dangers of heat. This standard will also provide workers with the training and procedures they need to safeguard themselves and their co-workers.

While the federal government has proposed occupational safety regulations on this topic, the future of those proposed regulations is uncertain due to the recent change in federal

[20] Fung, Wenson, et al. "Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic and Employment Profile of United States Crop Workers." September 2023. https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf. Accessed May 5, 2025.
[21] NMSA Section 50-9-25.

administration. But regardless of the status of federal regulations on this issue, New Mexico workers deserve occupational safety regulations that are tailored to New Mexico's unique climate, which features high summer temperatures and intense UV radiation. Regulations tailored to New Mexico's unique needs should also account for the prevalence of traditional cooling systems like evaporative cooling, which can create a complicated safety scenario for indoor workers in our region due to their varying and often unreliable effectiveness in extreme temperatures.[22] We need a New Mexico heat standard, and we need it as soon as possible to protect workers from preventable illness and injury.

Agricultural workers are a critical part of the New Mexico economy and identity, providing essential labor that grows our local economy while addressing food insecurity and supporting our rich agricultural culture.[23] As these workers face extreme risks of heat-related illness and injury compared to other workers, they should be at the center of the conversation about occupational safety standards about heat.

For these reasons, the members of Coalition of Agricultural Workers and Advocates (CAWA) listed below support the adoption of the regulations proposed by the NM Occupational Safety and Health Bureau, with the modifications discussed above to ensure that it is effective for agricultural workers. Please contact Emma O'Sullivan at emma@nmpovertylaw.org if you have any questions.

Sincerely,

Stephanie Welch, Workers Rights Director, NM Center on Law and Poverty
Emma O'Sullivan, Workers Rights Attorney, NM Center on Law and Poverty
Yvonne Diaz, Farmworker Advocate and Founding Farmer at De Colores Farms & Foods
Kenneth J. Ferrone, Executive Director, Catholic Charities of Southern New Mexico
Rosalba Ruiz Reyes, Binational Breastfeeding Coalition
Cynthia Bejarano, Ph.D., Farmworker Advocate
Rose Garcia, Executive Director, Tierra del Sol Housing Corporation
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Barbara Webber, Executive Director, Health Action New Mexico
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Ismael Camacho, Farmworker Attorney, Las Cruces, NM

[22] Albuquerque Public Schools, "APS Working Hard to Cool Schools Amid Major Heat Wave." August 3, 2023. https://www.aps.edu/news/news-from-2023-2024/aps-working-hard-to-cool-schools-amid-major-heatwave. Accessed May 5, 2025.
[23] U.S. Department of Homeland Security. Advisory Memorandum on Identification of Essential Critical Infrastructure Workers during COVID-19 Response. U.S. Department of Homeland Security; March 28, 2020. https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_1.pdf