



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

To Whom It May Concern:

Farmworker Justice submits these comments in response to the New Mexico Environmental Improvement Board's proposed Heat Illness and Injury Prevention regulation. Farmworker Justice (FJ) is a national organization that aims to empower farmworkers and their families to improve their living and working conditions, immigration status, health, occupational safety, and access to justice.

We applaud New Mexico's Environmental Improvement Board for moving forward on this critical regulation. Extreme heat poses both acute and long-term health risks for workers. Farmworkers, landscapers, construction workers and other outdoor and indoor workers are at significant risk for heat stress. Farmworkers are disproportionately affected by heat stress and

have a rate of heat-related death 35 times higher than the rate for all other industries.<sup>1</sup> In New Mexico, heat-related illness visits to emergency departments nearly doubled between 2010 and 2022, with over 900 visits in 2023.<sup>2</sup> It is important that a strong, enforceable standard be adopted to protect the lives and health of New Mexico’s estimated 10,000 farmworkers and other workers exposed to excessive heat.

Many of the provisions in the proposed regulation are reasonable and necessary to protect New Mexico’s farmworkers from heat-related injury and illness. Our comments highlight important provisions and provide recommendations to ensure the regulation’s maximum impact. It reflects and supports the comments submitted by the Coalition of Agricultural Workers and Advocates.

I. The proposed regulation covers all workers with narrow and reasonable exemptions

Currently, the primary option for remedy in heat stress cases has been the General Duty Clause (GDC). The GDC requires that each employer provide a workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”<sup>3</sup> However, proving that an employer violated heat standards under the GDC is a resource-intensive task requiring an almost unobtainable burden of proof. The GDC alone is insufficient to preemptively protect workers from heat-related injury, and the high standard of proof often means no remedy even after disaster. Without an employer who is actively trying to prevent heat injuries, workers are more likely to suffer heat-related injuries on the job.

Aligned with regulations enacted in other states, as well as the proposed federal heat regulations, the New Mexico proposed heat standard covers indoor and outdoor workers with narrow and reasonable exceptions. Importantly, the regulations do not exempt small employers, ensuring heat protections for workers who are not necessarily covered under federal regulations, including workers on small farms who are exempt from enforcement of workplace protections under OSHA’s small farm exemption.

II. The proposed regulation includes important protections related to acclimatization and heat index

Acclimatization is critical to prevent heat-related illness among new and returning workers. Workload increases metabolic heat that when added to environmental heat exposure, increases the total heat stress to workers. Especially for H-2A and migratory workers, who may be coming

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<sup>1</sup> 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. doi: 10.1002/ajim.22381. PMID: 25603942; PMCID: PMC4657558. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4657558/pdf/nihms738528.pdf>

<sup>2</sup> 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>.

<sup>3</sup> 29 U.S.C. 654(a)(1).

to New Mexico from other parts of the country or other countries with vastly different climates, an acclimatization schedule ensures that workers are able to work effectively and safely.

We also support the inclusion of the heat index when assessing heat exposure. New Mexico has a unique climate, with low humidity but high UV index due to its high elevation. 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.<sup>4</sup> 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 it as one of the states with the highest UV index in the country.<sup>5</sup> 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.

III. The training provided to workers needs to be linguistically and culturally relevant

FJ commends that the proposed regulation includes language accessibility for the heat safety training. Comprehensive trainings are critically important to ensure that workers are knowledgeable about heat injury illness and prevention. To ensure that workers of all literacy levels are able to fully participate in the training and are able to understand the materials presented, we recommend adding more specific requirements that the trainings are in languages and formats that are culturally and linguistically accessible to all workers.

IV. The regulation needs to create clear guidance on employer and FLC responsibility for implementation of the Heat Injury and Illness Prevention Plan

A growing number of farmworkers, especially H-2A workers, are hired by Farm Labor Contractors (FLCs). In 2022, 22% of crop workers were employer by FLCs.<sup>6</sup> Farm employers sometimes use FLCs to evade responsibility under employment laws. Farmworkers are often reluctant to assert their rights due to fear of retaliation, which can include firing and blacklisting. To make New Mexico’s regulations strong and effective, it should be made explicit which employing entity (the farm operator/owner or FLC) is responsible for providing safety training. The party who controls the conditions of 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.

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<sup>4</sup> National Weather Service, “Ultraviolet (UV) Index Forecasts.” <https://www.weather.gov/ilx/uv-index>. Accessed April 30, 2025.

<sup>5</sup> 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.

<sup>6</sup> Emp. & Training Admin., U.S. Dep’t Lab., Findings from the National Agricultural Workers Survey (NAWS) 2021-2022, Research Report no. 17, Sept. 2023, <https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf>.

V. Mandatory paid rest breaks must include guidance on compensation for piece-rate workers and workers wearing Personal Protective Equipment (PPE)

We commend the inclusion of paid rest breaks however, the work/rest schedule in the proposed regulation does not include calculations for piece-rate workers. Many of New Mexico's farmworkers, including those working in chile and onions, are paid on a piece rate rather than hourly. Farmworkers paid on a piece rate are less likely to take a rest break because their compensation is directly tied to their productivity. 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 strongly recommend that the final regulation include guidance on compensation of rest breaks for piece-rate workers. New Mexico can look to the heat regulations promulgated in California and Washington for a compensation formula that can be used to calculate an average hourly rate for piece-rate workers for rest and recovery periods. For example, 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.<sup>7</sup>

Further, the final regulations must clarify that the paid rest break does not include the time to don or doff Personal Protective Equipment (PPE). The proposed regulation includes guidance for clothing adjustment factors. Similarly, the final regulation should include clothing adjustment factors for paid rest breaks. The donning and doffing of PPE can take several minutes and its removal is necessary to ensure that workers are able to adequately cool down to prevent heat-related illness.

VI. There should be enhanced protections for children (under 18), pregnant, and elderly workers

Children, pregnant, and elderly individuals have enhanced vulnerabilities to heat-related illness and injury. In 2008, a 17-year-old pregnant farmworker woman died of a heat stroke while

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<sup>7</sup> 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](https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.htm#PieceRate)

working in the fields in California.<sup>8</sup> According to the National Agricultural Workers Survey, 7% of workers are 14 to 19 years old and 18% are 55 or older.<sup>9</sup> There are approximately 300,000 child farmworkers in the U.S.<sup>10</sup> The proposed regulation does not provide any enhanced protections for these populations of workers. We encourage the New Mexico Environmental Improvement Board to specify protections for children, pregnant, and elderly workers in the final regulation. Some recommendations for these populations include a lower heat trigger, additional mandatory rest breaks, and other accommodations as appropriate.

VII. The final regulation must include information about whistleblower and retaliation protections

Retaliation in agriculture is well-documented. Legal services providers and other community partners regularly share incidents of workers who were fired or blacklisted because they asserted their workplace rights. Given the well-documented prevalence of health and safety related retaliation, we recommend that the inclusion of an enforceable provision that expressly prohibits employer retaliation for workers who assert their rights under this standard. These protections should also be a mandatory topic of the heat safety training outlined in section 11.5.7.12 of the proposed regulation. Workers are more likely to assert their rights if the employer tells them that they have these rights and that they will not retaliate against them if they report violations. Such provisions will provide an effective means for protecting affected workers when they seek to access these rights, over and above other protections that may be otherwise available to them under the law.

We appreciate the opportunity to comment on these proposed regulations to address the growing risk of excessive heat exposure. New Mexico's farmworkers and other workers urgently need these protections. Heat-related illness is preventable, yet workers continue to die because in the absence of regulations, workers must rely on their employer to provide proper protections. We hope that these proposed regulations are adopted with the recommended modifications outlined in these comments and the comments of other worker advocates, including the Coalition of Agricultural Workers and Advocates. With these recommendations, we can ensure that New Mexico's heat standard is strong and impactful for farmworkers and other workers.

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<sup>8</sup> Maricela De La Cruz, *How farm workers' rights have strengthened since the 2008 death of a pregnant 17-year old Maria Isavel Vazquez Jimenez*, KCRA (Aug. 23, 2022), <https://www.kcra.com/article/farm-workers-rights-pregnant-17-year-old-death-2008-maria-isavel-vasquez-jimenez/40950637>.

<sup>9</sup> NAWs, *supra* note 6.

<sup>10</sup> Taylor J. Arnold et al., *Understanding Latinx Child Farmworkers' Reason for Working: A Mixed Methods Approach*, 38(6) J. Adolescent Rsch. 1142 (2022), <https://journals.sagepub.com/doi/10.1177/07435584221144956>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alexis Guild". The signature is fluid and cursive, with the first name "Alexis" and the last name "Guild" clearly distinguishable.

Alexis Guild  
Vice President of Strategy and Programs  
Farmworker Justice