“It’s getting hot [out] here…”

By Alexandra Devendra, Paul Lynd and Jeff Tanenbaum

The recent near-record heat wave Californians experienced prompted Cal/OSHA to issue another high heat advisory. This comes on the heels of the agency’s first high heat advisory of the 2014 season, which was issued just a couple of weeks ago. With a hot summer predicted, even more advisories can be expected in the coming months. Here are some issues that all employers should consider as we enter heat season.

Don’t ignore the issue just because you don’t have employees in California, or just because your employees work indoors.

California has the most comprehensive heat illness prevention regulations in the country. But that doesn’t mean heat illness is only a California issue. In states that follow the federal OSHA standards, employers could be cited under the General Duty Clause for failing to protect employees from the hazard of heat illness, and other state-OSH agencies are prioritizing this issue as well.

Additionally, although the Cal/OSHA regulations apply only to outdoor places of employment, employers must consider heat hazards that might exist within their indoor workplaces as well. Any occupational safety or health hazard needs to be addressed, even if it is not regulated by a particular standard. And in the case of Cal/OSHA’s Heat Illness Prevention standard, it specifically notes that other standards, such as the California Injury and Illness Prevention Program standards, may apply. Where no particular standard exists, determining exactly what is expected of an employer can be difficult. Under such circumstances, a practical six-step process to follow is as follows:

1. Identify the hazard.
2. Identify steps you will take to eliminate or minimize the hazard if it can’t be feasibly eliminated (taking into account government agency guidelines, voluntary consensus standards (ANSI, ASME, etc.) and industry practices).
3. Develop a written program covering these steps.
4. Train employees.
5. Supervise to ensure compliance.
If you do have an outdoor worksite in California, make sure you are following all of the requirements.

Cal/OSHA’s Heat Illness Prevention standard (8 CCR §3395) is quite detailed. It contains several basic requirements that apply to all outdoor places of employment. In addition, it provides special high-heat procedures that must be followed by employers in certain industries. These requirements are summarized below.

There are four basic requirements that apply to all outdoor places of employment in California:

1. **Water.** Employers must encourage employees to drink water frequently and must provide enough water so that each employee can drink one quart per hour for the entire shift.

2. **Shade.** Employers must provide employees with access to shade and employees must be allowed and encouraged to take a cool-down rest in the shade for at least five minutes at a time whenever they feel the need to do so to protect themselves from overheating. If the temperature exceeds 85 degrees, employers must provide a shaded area large enough to accommodate a quarter of the employees on the shift at any time. When the temperature is less than 85 degrees, employers must provide timely access to shade upon request. (The regulations also provide a few exceptions to the shade requirements, such as when it is infeasible or unsafe to have a shade structure.)

3. **Training.** Employers must provide training on the following topics to all employees who may be at risk of heat illness:
   - environmental and personal risk factors for heat illness;
   - the importance of frequent consumption of water;
   - the importance of acclimatization;
   - the common signs and symptoms of heat illness;
   - the importance of quick reporting; and
   - the employer’s procedures (see below).

   In addition, supervisors must also be trained on how to implement the employer’s procedures, how to monitor weather reports and how to respond to hot-weather advisories.

4. **Written Procedures.** Employers must have written procedures that address:
   - how to comply with the requirements of the regulations;
   - how to respond to symptoms of possible heat illness, including how emergency medical services (EMS) will be provided if necessary;
   - how to contact EMS and, if necessary, how to transport employees to a point where they can be reached by EMS; and
   - how to provide EMS with clear and precise directions to the worksite in the event of an emergency.

Additionally, employers in certain industries are also required to follow special high-heat procedures when the temperature exceeds 95 degrees. The industries subject to these additional requirements are: agriculture, construction, landscaping, oil and gas extraction and transportation or delivery of heavy materials (unless employees are in an air-conditioned vehicle and do not load or unload the materials).
The high-heat procedures require employers to:

- ensure that employees can contact a supervisor when necessary;
- observe employees for alertness and signs of heat illness;
- remind employees to drink plenty of water throughout the shift; and
- closely supervise new employees for the first 14 days of employment (unless the employee has the requisite amount of recent experience doing similar work).

When reviewing these various requirements, employers must also consider practical challenges to compliance. As examples: How will water be provided? Will ice also be needed? If so, how will it be provided? How will shade be provided? How will you monitor and ensure compliance?

**And don’t forget what’s new for 2014: penalties for failure to provide heat recovery periods.**

The Heat Illness Prevention standard requires that employees be allowed and encouraged to take a cool-down rest in the shade for at least five minutes at a time when they feel the need to do so to protect themselves from overheating.

New in 2014, if an employer fails to provide an employee with a heat recovery period, it must pay the employee a premium (Cal. Labor Code §226.7). Similar to meal- and rest-break premiums, the recovery period premium is equal to one hour of pay at the employee’s regular rate of compensation for each workday that the recovery period is not provided.

This new law will undoubtedly result in claims in 2014 and beyond. Employers should review their practices and take steps to ensure compliance with the heat recovery break requirements. Unfortunately, some questions have not yet been answered, including how many breaks may be required and for how long. Another unresolved issue is whether employers who pay exclusively on piece rate must pay wages separately for heat recovery break time, as they do for ordinary rest periods.

As the 2014 heat season progresses, employers, particularly in certain industries deemed high-risk by OSH agencies (agriculture, construction, landscaping, etc.), can expect inspections focused on heat illness prevention. If you need assistance writing or reviewing your heat illness prevention program, contact your Nixon Peabody attorney or:

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