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January 14, 2025

ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV

Ms. Julie A. Su
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

RE: *Comments on Proposed Rule: Docket No. OSHA-2021-0009 – Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (RIN 1218-AD39)*

Dear Acting Secretary Su:

On behalf of the National Association of Home Builders of the United States (NAHB), I am pleased to submit the attached comments in response to the Occupational Safety and Health Administration's (OSHA) notice of proposed rulemaking (NPRM or proposal) on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings that was published in the Federal Register on Aug. 30, 2024 (89 Fed. Reg. 70,698). Because the proposal inappropriately applies the same requirements to employers in very different industries, fails to recognize climatic differences and ignores the standard contractor-subcontractor structure of the residential construction industry, NAHB strongly urges OSHA to withdraw the rule.

NAHB is a Washington, D.C.-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB's builder members construct about 80 percent of the new housing units built each year. As much of these construction activities occur outdoors, our members and their employees have grown accustomed to taking the weather into account when planning and carrying out their daily activities, including taking breaks, hydrating, monitoring colleagues and ensuring workers have access to places where they can cool down or warm up.

OSHA announced its intent to develop a heat injury prevention rule in the spring of 2021 and issued an advance notice of proposed rulemaking later that year. Since then, NAHB has remained engaged on the issue, providing feedback and welcoming the opportunity to collaborate with OSHA on finding sensible solutions for protecting employees working in extreme heat. Moreover, we have remained consistent in advocating for a standard that promotes flexibility and gives employers the ability to tailor their safety practices in ways that recognize the unique conditions of their industries; business structures; employees and employee needs; work tasks, flow and environments; and geographic settings, among others.

Unfortunately, many elements of the proposed rule are overly prescriptive and infeasible for businesses of any size, especially small businesses in the construction industry. Instead of allowing the construction workforce to continue to follow the best practices from OSHA's "Water. Rest. Shade." campaign, OSHA has created a standard that reaches well past these long-promoted principles, extends far beyond its legal authority, and will add costs and delays that will exacerbate the current housing crisis while doing little to

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improve jobsite safety. Likewise, NAHB remains concerned that several components of the proposed rule, including the initial and high heat trigger thresholds, worker acclimatization, rest breaks and monitoring and recordkeeping requirements, among others, are unclear and likely to result in uncertainty and additional implementation and compliance challenges.

Contrary to OSHA's proposal, a one-size-fits-all approach for a heat injury and illness prevention standard covering four disparate industries is inappropriate and ill-advised. OSHA is strongly urged to reconsider its current rulemaking, withdraw the rule as proposed, and develop a series of industry-specific regulations that meet the agency's main tenets for keeping workers safe in extreme temperatures. Absent withdrawal and reconsideration of the current proposal, NAHB urges the agency to take the actions described in greater detail throughout the attached comments prior to issuing a final rule. In addition to the scheduled informal public hearing on June 16, 2025, NAHB requests that OSHA hold a series of in-person meetings to provide multiple opportunities for stakeholders to engage the agency directly, discuss the impact this rulemaking would have on their industries and businesses and explore meaningful alternatives.

NAHB appreciates the opportunity to provide feedback to OSHA on this important issue and looks forward to continued engagement with the agency throughout this process. Please contact NAHB's Director for Labor, Safety & Health Policy, Brad Mannion, at (202) 266-8265 or via email at bmannon@nahb.org if you have any questions or require any additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Carl L. Harris".

Carl L. Harris
2024 Chairman of the Board
National Association of Home Builders
of the United States

Attachment



NATIONAL ASSOCIATION OF HOME BUILDERS

Docket No. OSHA-2021-0009 Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings;

Notice of Proposed Rulemaking

I. Introduction

The National Association of Home Builders of the United States (NAHB) appreciates the opportunity to provide feedback to the Occupational Safety and Health Administration (OSHA) on its proposed standard for heat injury and illness prevention in indoor and outdoor work settings. NAHB is also a member of the Construction Industry Safety Coalition (CISC) and Coalition for Workplace Safety (CWS) and, therefore, adopts and incorporates by reference both the CISC and CWS comment letters.

NAHB strongly supports sensible regulations that prioritize worker safety and health. Additionally, NAHB supports regulations that are clear, provide clearly defined objectives and requirements, and allow flexibility for employers in residential construction. That remains true for a heat regulation for the construction industry as long as it eliminates subjective or inconsistent compliance obligations. Unfortunately, NAHB does not believe OSHA has accomplished this goal with the proposed regulation. NAHB remains concerned that the agency has taken such a broad, one-size-fits-all approach to this rulemaking, which applies to myriad employers in general industry, agriculture, construction and maritime sectors, that it will not provide the guidance or clarity needed to improve jobsite safety.

II. About the Residential Construction Industry

A significant portion of NAHB's builder members and the residential construction industry at large are small builder and remodeler firms. The results of NAHB's 2023 annual census show that the typical NAHB builder member had medians of \$3.4 million in annual gross revenue, six housing starts and six payroll employees. Additionally, 80 percent of NAHB's builder members construct 25 or fewer homes per year, nearly two-thirds build 10 homes or fewer per year, and almost 40 percent build three or fewer homes per year.¹

Considering the makeup of the industry, business reality dictates that firms employ in-house labor only when the costs of doing so are less than the cost of contracting with another firm. In general, labor costs are lower for businesses that specialize in a particular activity than for businesses that do all tasks in-house. For most builders, there is simply insufficient internal demand to justify hiring an employee for each of the numerous specialized and limited tasks required to complete a residential project. As a result, both builders and remodelers typically subcontract a large portion of their construction work to specialty trade contractors who can more efficiently complete individual pieces of the construction process.

¹ Paul Emrath, Ph.D., National Association of Home Builders, *Who Are NAHB's Builder Members?* (Aug. 12, 2024) (available at <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2023/special-study-who-are-nahb-builder-members-august-2023.pdf>) (accessed Oct. 28, 2024).

Specialized subcontractors, who also comprise a large portion of NAHB's membership, perform much or all the actual labor associated with most new home construction and renovation work.² In fact, in 2020, 69 percent of builders used between 11 and 30 subcontractors to build a typical detached single-family home, resulting in 24 subcontractors retained on average for these projects.³ Additionally, more than 90 percent of builders subcontract for security systems, HVAC, technology (structured wiring, home theater, etc.), carpeting, electrical wiring, plumbing, masonry work, fireplaces, foundations, drywall and concrete flatwork.⁴ Similarly, between 80 and 89 percent of builders reported their standard practice is to subcontract for roofing, kitchen countertops, ceramic tiles, flooring (except carpet and tile), painting and wall covering, landscaping, kitchen cabinets and exterior doors and windows.⁵

This trend of specialization within the residential construction industry has significantly accelerated over the past several decades. In 2020, 77 percent of builders subcontracted 75 percent or more of the construction, whereas in 1959, only 31 percent of them subcontracted that percentage.⁶ The trend toward specialization is primarily due to the increasing complexity, features and amenities supplied with new and remodeled homes. The ubiquitous nature of subcontracting labor not only reaffirms the prevalence of small businesses throughout residential construction, but also illustrates the uniqueness of the residential construction industry compared with other industries impacted not only by this proposed rulemaking, but also by rules that do not distinguish a much-needed defining line to establish employer responsibilities and can ultimately harm this longstanding practice.

III. NAHB's Engagement Throughout the Rulemaking Process

In the years since OSHA initiated this rulemaking, NAHB and its members have remained active in providing information about the residential construction industry and advocating for sensible policies that provide safe workplaces for employees while minimizing burdens on employers and promoting flexibility. For example, NAHB has routinely promoted the OSHA Heat Illness Prevention campaign's main tenets of "Water. Rest. Shade." by including the principles in many of its publicly available resources.⁷ With each opportunity to provide feedback to the agency, NAHB has consistently called for the principles outlined in the agency's own campaign.

² According to member census data, 45 percent of NAHB's 70,000 associate members (approximately 31,500) are independent specialty trade contractors. Eric Lynch, National Association of Home Builders, *Who Are NAHB's Associate Members?* (Aug. 1, 2024) (available at <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2024/special-study-who-are-nahb-associate-members-august-2024.pdf?rev=c5804ed96983413fad69c8dc91a99c3b>) (accessed Oct. 28, 2024).

³ Paul Emrath, Ph.D., National Association of Home Builders, *Average New Home Uses 24 Different Subcontractors*, Dec. 2, 2020, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2020/special-study-average-new-home-uses-24-different-subcontractors.pdf> (accessed Oct. 28, 2024).

⁴ *Id.*

⁵ *Id.*

⁶ Paul Emrath, Ph.D., National Association of Home Builders, *Average New Home Uses 24 Different Subcontractors*, Dec. 2, 2020, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2020/special-study-average-new-home-uses-24-different-subcontractors.pdf> (accessed Nov. 7, 2024).

⁷ Occupational Safety and Health Administration, *Annual Summer Campaign to Prevent Heat-related Illnesses Launched by US Labor Department*, May 22, 2014, <https://www.osha.gov/news/newsreleases/national/05222014> (Accessed Oct. 28, 2024).

In October 2021, when the agency issued its advance notice of proposed rulemaking (ANPRM) on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, NAHB joined both CISC⁸ and CWS⁹ in calling for a standard, if a standard is created, that is consistent with OSHA’s prior approach to preventing heat-related injuries or illnesses through its “Water. Rest. Shade.” campaign. These coalition responses stressed the need for flexibility in allowing the regulated community latitude to address a wide range of circumstances, whether they are predictable, industry-wide conditions or focused on a particular business’ unique environment. Further, both coalition responses recognized the need for a separate standard for construction because of the “unique setting[s] and hazards posed at construction sites.”¹⁰

Additionally, an NAHB remodeler member served as a small entity representative during the agency’s 2023 Small Business Advocacy Review (SBAR) panel, where he offered his personal experience preventing heat-related injuries and illnesses as a small employer and his concerns with elements of the then-proposed standard.¹¹ During his participation, and in his response following the SBAR panel, he urged the agency to implement a flexible approach that would allow his business and other regulated businesses to continue using their proven methods of keeping workers safe without adding needlessly prescriptive, overly burdensome requirements.

Throughout our years-long participation, NAHB has highlighted several other concerns, including:

1. Due to the differing characteristics between the industries intended to be covered by the proposed heat standard, a “one-size-fits-all” rule is not feasible;
2. Using the same heat triggers nationwide fails to recognize the climatic conditions for different geographic regions;
3. The responsibilities and liability of employers on multi-employer worksites¹² must be clearly defined under any heat illness prevention standard. The current language used to enforce OSHA regulations is already ambiguous and establishing a standard that follows the same level of ambiguity may be detrimental to worker safety; and
4. Regulated entities are already confused by the varying state heat injury prevention requirements that are currently in force and that confusion will be exacerbated by the forthcoming federal regulation – particularly if the state standards are not viewed as “at least as effective” as the federal rule.¹³

⁸ <https://www.regulations.gov/comment/OSHA-2021-0009-0748>.

⁹ <https://www.regulations.gov/comment/OSHA-2021-0009-0778>.

¹⁰ See page 2 of Coalition for Workplace Safety submission, dated Feb. 4, 2022, <https://www.regulations.gov/comment/OSHA-2021-0009-0778> (accessed Nov. 4, 2024).

¹¹ Report of the Small Business Advocacy Review Panel on OSHA’s Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, dated Nov. 3, 2023, see page 72, <https://www.osha.gov/sites/default/files/Heat-SBREFAPanel-Report-Full.pdf> (accessed Nov. 4, 2024).

¹² NAHB does not agree that OSHA’s multi-employer citation policy was legally promulgated as OSHA never engaged in rulemaking addressing its interpretation of the OSH Act. Given the U.S. Supreme Court’s recent decision overruling *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837 (1984), OSHA’s multi-employer citation policy is not entitled to deference and is indefensible. See, *Loper Bright Ent. v. Raimondo*, ___ U.S. ___, 144 S. Ct. 2244 (2024).

¹³ Similarly, OSHA has never explained or defined what it considers meeting the “at least as effective as” requirement. Despite calls from various stakeholders and the Department of Labor’s own Office of Inspector General’s office to define this term, OSHA has never done so. See Office of Inspector General—Office of Audit, U.S. Dep’t of Labor, Report No. 02-11-201-10-105, *OSHA Has Not Determined if State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health as Federal OSHA’s Programs*, March 31, 2011, <http://www.oig.dol.gov/public/reports/oa/2011/02-11-201-10-105.pdf> (Accessed Dec. 9, 2024).

Finally, NAHB was disappointed in the brief amount of time in which this proposal was under review with the U.S. Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). In accordance with Executive Order (EO) 12866 on Regulatory Planning and Review, interested parties can request a meeting with OIRA to discuss pending regulations. While NAHB was able to participate in offering feedback as part of CISC's meeting with OIRA in June 2024, for many employer and employee groups, as well as private citizens, these EO 12866 meetings may be the only opportunity to offer feedback to a federal agency before a rulemaking at any stage is published. Interestingly, OMB chose to expedite the review process of this proposal at the cost of potentially denying important and meaningful public feedback.

The decision to rush the rulemaking process concerns NAHB for several reasons. First, at the time of writing, OIRA has 63 regulatory actions that have been under review by the agency for more than 90 days, with 15 of those actions having been received in 2023 (the earliest received action under current review is from February 2023). However, the review process for this rulemaking lasted from June 11 to July 1, 2024. NAHB believes the time dedicated to the review of his significant regulatory action was not sufficient and denied organizations and individuals the opportunity to engage the administration on its concerns before a proposed rulemaking is published. The Fifth U.S. Open Government National Action Plan issued by the Biden-Harris Administration,¹⁴ which "reflects the United States' longstanding commitment to open government at home and abroad," included an effort from OMB to broaden public engagement. By giving a relatively short time for the public to offer feedback, especially for such a dense, sweeping regulation that is set to impact 36 million workers,¹⁵ OMB's actions contradict the administration's commitment to increasing public participation.

Further, OIRA concluded its review of the proposed rulemaking on July 1, less than three weeks from the date of receiving the regulatory action. At the same time, the proposal was not officially published in the Federal Register until Aug. 30, 2024. The period in which the review concluded and the public received an officially published version of the proposal lasted more than eight weeks, a significant amount of time in which OIRA could have allowed the public to offer additional feedback.

IV. The Impact of OSHA's Proposal on the Housing Affordability Crisis

Safe, decent, affordable housing provides fundamental benefits that are essential to the well-being of families, communities, and the nation. Unfortunately, owning or renting a suitable home is increasingly out of financial reach for many households. In fact, almost a third of the nation's households are cost burdened and pay nearly 40 percent of their income for housing.¹⁶

¹⁴ *Fifth U.S. Open Government National Action Plan*, December 2022, <https://open.usa.gov/national-action-plan/5/> (Accessed Nov. 14, 2024).

¹⁵ 89 Fed. Reg. at 70,740.

¹⁶ National Association of Home Builders, *Families Must Spend 38% of Their Income on House Payments*, Nov. 21, 2024, <https://www.nahb.org/news-and-economics/press-releases/2024/11/families-must-spend-38-percent-of-their-income-on-house-payments> (Accessed Nov. 22, 2024).

The cost of housing is determined by a complex combination of factors, including labor and materials prices; interest rates and financing costs; federal, state and local regulations; and supply and demand. In today's market, a limited supply of land, a shortage of skilled labor and rising fees all contribute to higher prices. Focusing on regulatory burden, NAHB analysis shows that regulatory requirements alone account for almost 25 percent of the cost of constructing a single-family home,¹⁷ and more than 40 percent of the cost of a multifamily unit.¹⁸ Regulations make it difficult to increase the supply of affordable housing that meets the needs of increasingly diverse households.

The ability to compete in the residential construction industry and optimally price a home depends on the degree to which overall costs are certain and predictable. Cost stability is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low- to moderate-income homebuyers who are more easily priced out of the market.

Home builders have seen a year-over-year decrease in housing production resulting from increased regulatory burden, worker shortages and lasting supply chain issues. These factors directly contribute to the nation's housing affordability crisis. As of March 2024, more than 75 percent of households could not afford a median priced new home (\$412,505). NAHB's latest estimates from November 2024 show that the problem is growing worse rapidly, with 103.5 million households nationally, or roughly 77% of all U.S. households now unable to afford a median-priced new home. Further, a \$1,000 increase in the price of that median-priced new home will price an additional 106,031 U.S. households out of the market. Based on their incomes and standard underwriting criteria, these households would have been able to qualify for a mortgage to purchase the home before the price increase, but not afterward.¹⁹

In an effort to better identify and quantify the challenges of the proposed rule, NAHB recently included a set of special questions regarding the proposed rulemaking in its monthly industry Housing Market Index (HMI) survey.²⁰ Responses were collected in November 2024, and the questions focused on many of the proposal's requirements, most notably the recordkeeping, indoor work controls, acclimatization, and paid rest breaks. The survey results indicated builders are concerned with the substantial cost increases associated with implementing these requirements as they are described in the proposed standard, as well as additional costs for employee and supervisor training, identifying heat hazards, establishing two-way communication, and more.

¹⁷ Paul Emrath, Ph.D., and Caitlin Sugrue Walter, Ph.D., National Association of Home Builders and National Multifamily Housing Council, *Regulation: 40.6 Percent of the Cost of Multifamily Development*, 2022, <https://www.nmhc.org/globalassets/research--insight/research-reports/cost-of-regulations/2022-nahb-nmhc-cost-of-regulations-report.pdf> (Accessed Nov. 22, 2024).

¹⁸ Paul Emrath, Ph. D., May 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf> (Accessed Nov. 22, 2024).

¹⁹ Na Zhao, Ph.D., National Association of Home Builders, *Nearly 77% of U.S. Households Cannot Afford a Median-Priced New Home*, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2024/special-study-households-cannot-afford-a-median-priced-new-home-april-2024.pdf?rev=cb6f4f7d507341cb9ece97b90b6709c3> (accessed Nov. 11, 2024).

²⁰ See National Association of Home Builders, Housing Market Index (HMI) Survey, (Nov. 18, 2024), attached as Appendix A.

When asked what effect this proposal will have on their businesses, survey respondents noted the following:

- **75 percent** indicated the requirements would create delays or difficulty completing projects on time;
- **69 percent** stated they would raise home prices;
- **53 percent** stated they would have difficulty hiring subcontractors, while 32 percent stated the requirements would make it more difficult to hire construction employees;
- **37 percent** stated some projects would be unprofitable; and
- **31 percent** stated the requirements would cause their businesses to turn down projects they would otherwise accept.

Especially concerning are the responses indicating difficulty hiring and the need to turn down projects due to the increased burdens proposed by this rule. U.S. Bureau of Labor Statistics data estimated there were 276,000 job openings in construction in November 2024. However, this falls well below the expected number of construction workers that need to be hired to meet current demand at approximately 723,000 per year.²¹ Additionally, the latest data on new home sales indicates an increase in sales in almost every region of the United States,²² thereby requiring additional skilled labor to meet current and rising demand without exceeding project budgets and timelines.

NAHB does not disagree with the agency's action to implement a standard that protects workers from the dangers of working in extreme heat. However, any standard must identify the unique needs of the regulated industries, not place prescriptive requirements that do not actually affect positive change in workplaces, as is the case of the burdensome "one-size-fits-all" requirements found in this standard. For these reasons, NAHB strongly urges OSHA to abandon its current rulemaking and instead issue clear, concise recommendations for employers to keep their workers safe in high-heat conditions. Absent this approach, NAHB urges the agency to undertake a new rulemaking that considers the recommendations explained below.

V. OSHA Must Create a Separate Standard for the Construction Industry

Nearly every construction environment is fluid and unique in its operations. Where industries such as agriculture or manufacturing may have a more predictable, controlled environment from beginning to end and more consistent work processes, activity on construction sites varies greatly. Importantly, there can also be significant differences from construction site to construction site regardless of perceived similarities such as location, project type (*i.e.*, residential, commercial building, road and bridge construction, etc.) and phase of construction. Given these realities, any rule must be sufficiently flexible to accommodate the rapidly changing conditions associated with construction. Unfortunately, rather than doing so, OSHA has cobbled together four unlike industries and created a blanket rule that fails to

²¹ The Home Builders Institute, *Construction Labor Market Report: Spring 2024*, <https://hbi.org/wp-content/uploads/2024/06/Spring-2024-CLMR-HBI-NAHB-FINAL.pdf> (Accessed Nov. 21, 2024).

²² Jing Fu, National Association of Home Builders, *New Home Sales Improve in September*, Oct. 24, 2024, <https://eyeonhousing.org/2024/10/new-home-sales-improve-in-september/> (Accessed Nov. 21, 2024).

differentiate between these disparate industries and their unique needs. In doing so, the proposed rule fails to improve the safety of workers.

Moreover, NAHB questions OSHA's authority to promulgate such a broadly applicable rule given the U.S. Supreme Court's rejection of the agency's emergency temporary standard for COVID-19.²³ In that case, the Court concluded the agency lacked the authority to implement such a "blunt instrument[]" that failed to distinguish between industries or risk. While the current proposal does not apply to COVID-19, the principle from that Court decision applies equally here because OSHA fails to draw any distinction between general industry and construction, nor between agriculture and construction, nor between construction and maritime. Like the COVID case, OSHA's indiscriminate approach fails to distinguish between occupational risk and general risk. In other words, one size does not fit all and at a minimum, the agency must rework its proposal.

NAHB strongly supports the development of a separate standard for construction with a tailored set of requirements that recognize the needs and concerns of the construction industry. This approach would allow OSHA to consider unique environmental factors, including fluctuating weather patterns, lack of shade, or the infeasibility of providing easily accessible shade without creating a greater hazard, as well as the varying and ever-changing tasks and degrees of physical exertion among workers. Applying industry-specific standards will ensure workers are better protected in a setting where temperature extremes are unpredictable and pervasive.

A. The Frequency of Multi-employer Worksites in Construction

The proposed standard fails to consider the historical practice of the construction industry and exacerbates the existing issue of regulating jobsites with multiple independent employers. Home builders employ individuals whose primary functions are to supervise and manage the process of constructing homes, contractor relationships, and many of the administrative tasks associated with the construction process. Home builders and remodelers typically subcontract a large portion of their construction work to trade contractors who can more efficiently perform components of the construction process. Specialty trade contractors perform much or all of the actual labor associated with most new home construction and renovation work.

As NAHB has explained, the myriad types of specialty trade contractors working on a residential construction jobsite at any given time means that compliance could be extremely difficult unless OSHA clarifies how it will approach this issue. NAHB notes that in the ANPRM, OSHA specifically sought feedback on this issue.²⁴ Under the proposed standard, paragraph (c)(2)(i) sets requirements for employers to include a "comprehensive list of the types of work activities covered by the plan."²⁵ Further, OSHA states any HIIPP must be adaptable to fit the characteristics of the work site and the job tasks and hazards identified by the employer. The work performed on residential construction sites can change by the hour, with different employers and work crews performing different tasks. Because the language in the proposal does not discuss liability, general contractors could be punished for failing to include every single work

²³ *National Federation of Independent Business v. Dep't of Labor*, 595 U.S. 109, 115 (2022).

²⁴ 86 Fed. Reg. at 59,320.

²⁵ 89 Fed. Reg. at 71,069.

activity performed on a site in their HIIPP or found responsible for issues affecting subcontractors but not their own employees. While NAHB does not agree that OSHA has the authority to hold general contractors liable for subcontractors' management of the subcontractors' employees, NAHB does urge the agency to clarify how, in practical terms, OSHA envisions multi-employer worksites handle HIIPP requirements and other obligations contained in the proposed rule.

B. Existing Industry-specific OSHA Standards

Since its inception, OSHA has promulgated multiple industry-specific standards for hazards commonly found in construction, general industry and other covered sectors. The way in which workers interact with these hazards and the way in which these hazards are presented vary from industry to industry, which justifies substantially different regulations that recognize the nuances of the industries to which they apply.

The agency's standard for respirable crystalline silica in construction (§ 1926.1153), for example, recognizes the specific hazards posed by silica on construction sites, where tasks like cutting, grinding and demolition create high levels of airborne dust. Similarly, the lead standard (§ 1926.62) is tailored to address the specific risks posed by lead exposure during construction and renovation activities, such as sanding or removing lead-based paint. Both standards are distinct from general industrial guidelines because they address conditions unique to construction.

If the reasoning for separate silica standards was partially attributed to the number of affected workers among the different industries (2.0 million in construction; 0.3 million in general industry),²⁶ then OSHA should apply the same thoughtful approach and application to this proposed heat rulemaking. According to the proposed rule, OSHA estimates that roughly 4.35 million construction workers would be affected under this heat standard, which represents nearly four times the number of affected workers in agriculture (1.14 million) and almost 20 percent more than manufacturing (3.62 million).²⁷ Lumping general industry, agriculture, and maritime into the exact same standard as construction ignores workplace differences and fails to address the needs and capabilities of each industry. OSHA has missed a significant opportunity to protect workers from the hazards of working in high heat conditions; by failing to appreciate the differences between industries and work environments, OSHA misses the techniques which may be the most effective at protecting workers because those techniques do not work in all industries. Separate standards would better protect workers in separate industries.

VI. NAHB's Response to the Proposed Rulemaking

Throughout its 331-page report to OSHA, the SBAR panel called for two key elements of any forthcoming standard: 1) it promotes flexibility; and 2) it contains "reasonable" efforts to protect workers from heat.²⁸ Generally, the panel recommended developing a standard that would easily allow employers to tailor the requirements to their workplace and, more specifically, called for flexibility with provisions such as heat monitoring methods, rest breaks, acclimatization and controls, among others.

²⁶ 81 Fed. Reg. at 16,418.

²⁷ 89 Fed. Reg. at 70,817-18.

²⁸ Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, dated Nov. 3, 2023, see page 72, <https://www.osha.gov/sites/default/files/Heat-SBREFA-Panel-Report-Full.pdf> (Accessed Nov. 4, 2024).

The very purpose of the SBAR is for the agency to hear small entity concerns, obtain input from those small businesses that are likely to be directly affected by the regulation in question, and explore potential alternatives to minimize adverse impacts. Unfortunately, rather than hear the concerns voiced by these entrepreneurs NAHB believes OSHA has failed to implement the level of flexibility supported by the panel and has laid out vague requirements that would leave regulated entities confused about their compliance obligations. Therefore, NAHB strongly urges the agency to incorporate the following recommendations into any final standard.

A. Exemptions

i. Short Duration Activities

Workers performing high-exertion work in high-heat conditions should have protections in place to minimize their risk of heat-related injuries or illnesses. OSHA's blanket approach to exemptions for short-duration exposure workers, however, greatly limits and overlooks various categories of workers that spend a limited amount of time in high-heat conditions but would be under the proposal's limit of only 10 minutes of exposure within any 60-minute period. Two common examples in residential construction include material delivery workers and project supervisors.

While both roles likely exceed the 15-minute exposure threshold on a day-to-day basis, a large portion of their responsibilities involve periods of travel throughout the day. In the case of project supervisors, their primary duties are to oversee day-to-day operations, making sure projects stay within budgets and meet safety, code, and quality standards, among other responsibilities. In completing these responsibilities, these employees coordinate with contractors, workers and vendors to ensure timely deliverables and resolve issues that arise. A typical day for a project supervisor involves a walkaround of the site and meeting with subcontractors or vendors that are present that day. In many cases, these activities necessitate supervisors to be on site, and their duties may take them to multiple sites each day. Each site visit may last between 15 minutes and one hour, and the project manager has travel time between sites. Materials delivery workers also participate in the same day-to-day aspect of visiting multiple sites, but driving consumes most of their working time.

Some aspects of the proposed rule, such as the acclimatization requirements at the initial heat trigger or mandatory rest break requirement at the high heat trigger, would affect employees that spend half of their work shift in an environment kept below 80 degrees Fahrenheit, as is the case for employees who drive air-conditioned vehicles. For example, consider a new project supervisor who spends one hour each at four work sites that are all roughly 30 minutes apart. If the heat index is at or above the initial heat trigger of 80 degrees Fahrenheit (or equivalent wet bulb globe temperature level) during that work shift, the project supervisor would be allowed to work only 20 percent of the total time. If the heat index is at or above 90 degrees Fahrenheit (or equivalent wet bulb globe temperature level), a project supervisor would have to park his/her car, even if it was air-conditioned, or find a shaded or air-conditioned location to rest for at least 15 minutes every two hours because driving their vehicle may be considered work and therefore would not contribute to the mandated rest break time. As proposed, the acclimatization and mandatory rest requirements are illogical for an employee who spends the majority of his or her time in a

climate-controlled environment and only performs non-strenuous activities while in a high-heat environment.

Importantly, the exemption should not be limited to construction project supervisors/managers and materials delivery drivers, as job duties, not job titles, must be the driving factor when determining exemption eligibility. There are many examples of construction workers that do not have similar job titles, yet their responsibilities involve short periods of exposure followed by extended periods of no exposure to high heat conditions. Therefore, NAHB urges OSHA to revise §1910.148(a)(2)(ii) to exempt workers who spend at least 10 minutes in an area that is reasonably expected to be below the initial heat trigger during any 60-minute period. This exemption should apply to the examples provided, as well as other occupations where workers can cool down as part of their day-to-day operations.

ii. Emergency Response

Home builders and specialty trade contractors play a vital role in disaster response and recovery efforts. Trade contractors may travel to assist with emergency operations such as road clearing and repair and restoring utilities, communication services and other critical infrastructure. In its statewide heat prevention regulation, Oregon, exempts from the heat safety requirements emergency operations that are “directly involved in the protection of life or property,” and the standard continues to reference utilities among the essential services covered under this exemption.²⁹ While home builders may not participate in the first wave of emergency response and recovery efforts, they play an important role throughout the recovery efforts.³⁰ In disaster response, time is of the essence. Enforcing the proposed rule for emergency response will delay efforts to save and salvage homes and buildings, rebuild communities, and endanger the public which needs those services.

Given the widespread devastation of these disasters, the agency should not further hinder efforts to return communities to their pre-disaster states. As currently written, OSHA’s proposed standard would result in delays and increased costs to provide housing and other goods and services that were destroyed or severely damaged. Additionally, its definition of disaster is far too restrictive. OSHA must not follow only federal declarations, but also declarations made by states severely impacted by disasters. According to the Federal Emergency Management Agency (FEMA), in 2023, 114 federal emergency declarations were declared³¹ and 47 emergency declarations were declared by states.³² FEMA’s searchable database

²⁹ Oregon Admin. Code § 437-002-0156 – Heat Illness Prevention, <https://casetext.com/regulation/oregon-administrative-code/chapter-437-department-of-consumer-and-business-services-oregon-occupational-safety-and-health-division/division-2-general-occupational-safety-and-health-rules/section-437-002-0156-heat-illness-prevention> (Accessed Nov. 20, 2024).

³⁰ A 2009 report from the U.S. Department of Homeland Security’s Office of Inspector General highlights the “critical” nature of housing stock levels in regard to disaster housing operations, stating, “The repair and restoration of housing stocks is one of the most important challenges FEMA and its response and recovery partners face following a catastrophic housing disaster. All other housing decisions and programs hinge on this single variable.” See *Management Advisory Report: FEMA’s Housing Strategy for Future Disasters*, September 2009, https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_09-111_Sep09.pdf (Accessed Dec. 10, 2024).

³¹ Federal Emergency Management Agency, Disaster Declarations for States and Counties (available at <https://www.fema.gov/data-visualization/disaster-declarations-states-and-counties>).

³² <https://www.fmcsa.dot.gov/emergency/archive-emergency-declarations-2023>.

indicates 179 disasters were declared between Jan. 1, 2024 and Dec. 5, 2024.³³ NAHB believes home and community repair for areas struck by natural or man-made disasters should be exempt from any final heat standard, and the exemption must coincide with the length of time disaster-stricken areas are under federal and/or state emergency declarations. Specifically, NAHB urges OSHA to add the following language at the end of proposed §1910.148(a)(2)(iii):

And construction, alteration, or repair of buildings or public works in areas experiencing a state of emergency, as acknowledged by presidential or gubernatorial declaration.

B. Definitions

i. Initial and High Heat Triggers

A key consideration within the proposal is the temperature at which certain requirements related to heat injury and illness prevention must be practiced on jobsites. NAHB believes OSHA's suggested trigger of a heat index of 80 degrees Fahrenheit, otherwise known as the initial heat trigger, is virtually impracticable in some regions of the country and would disproportionately impact home building efforts in places where this heat index is routinely reached almost year-round, such as the coastal Southeast and Southwest.

A sample of 2023 data from the National Weather Service illustrates the frequency at which these areas reached temperatures near, at, or above the initial heat threshold set by the agency. Figures 1 and 2 show the date range of varying cities in distinct climatic conditions when the temperature first and last reached or exceeded 80 degrees Fahrenheit in 2023 and 2024.^{34, 35}

³³ See, e.g., Disaster Declarations for States and Counties (available at <https://www.fema.gov/data-visualization/disaster-declarations-states-and-counties>) (last visited Dec. 5, 2024).

³⁴ Of note, this data concerns temperature ranges and not heat index, yet common relative humidity in Arizona, for instance, is between 15 and 55 percent, and the corresponding temperatures to reach a heat index of 80 degrees Fahrenheit range as low as 80 to 85 degrees Fahrenheit. Arizona Department of Health Services, *Heat Index Chart with Health Effects and Safety Recommendations*, 2011, <https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/extreme-weather/heat/Heat-Index-Chart.pdf> (Accessed Nov. 20, 2024).

³⁵ Available at <https://www.weather.gov/wrh/climate>.

First/Last Occurrence Summary for Temperatures at or Above 80 Degrees Fahrenheit, 2023			
Location	First Date > or = 80°F	Last Date > or = 80°F	Total Range
Boise	April 10	Oct. 20	194 Days
Houston	Jan. 7	Dec. 9	337 Days
Kansas City	April 4	Oct. 23	203 Days
Miami	Jan. 1	Dec. 26	360 Days
Philadelphia	April 6	Oct. 28	206 Days
Phoenix	March 12	Dec. 17	281 Days

Figure 1

First/Last Occurrence Summary for Temperatures at or Above 80 Degrees Fahrenheit, 2024			
Location	First Date > or = 80°F	Last Date > or = 80°F	Total Range
Boise	April 13	Oct. 15	186 Days
Houston	Feb. 24	Dec. 30	311 Days
Kansas City	March 3	Oct. 30	242 Days
Miami	Jan. 6	Dec. 31	361 Days
Philadelphia	April 15	Nov. 6	206 Days
Phoenix	Jan. 29	Dec. 20	327 Days

Figure 2

Because reaching 80 degrees is so prevalent in the listed cities and others, NAHB members who perform work in the southwestern and southeastern United States are concerned about having to comply with these requirements for most of the year. Microclimates add another challenge across the board. Created by weather patterns, geography, manmade structures and other phenomena, microclimates can cause temperatures to fluctuate widely within relatively small areas, creating further uncertainties, making monitoring difficult, and causing compliance and recordkeeping problems.

A consistent, nationwide standard should exercise some form of parity among its regulated entities, yet it is clear that some employers will have to comply with this proposal's more strenuous requirements for a significantly longer portion of the year, which directly translates to additional cost and burden simply based on location. These and other related factors demonstrate why OSHA should not adopt temperature triggers that are the same across the country: the proposed temperature triggers do not consider the

climatic differences across regions, nor does OSHA acknowledge that workers in those areas may already be acclimatized to the climate where they live and work. Unfortunately, when completing the economic analysis for this proposed rulemaking, OSHA failed to release a “cost per employer” breakdown as part of its general economic analysis, which would have further supported the need to establish heat thresholds by industry and region. To place such strict requirements on employers using a heat index threshold as the trigger, OSHA must first recognize the inequitable and disparate costs placed on businesses operating in various geographic regions.

Moreover, heat triggers alone should not determine whether certain requirements must be met. Heat hazards can exist outside of a set temperature trigger and to best protect workers, it is important to also consider the worker; the task(s) involved; and the options and precautions that are available. In most instances, it is the employer, working with the employee, who is in the best position to determine the most effective steps to take to prevent heat injuries and illnesses. While a plumber or painter could be working outdoors, the level of physical exertion and potentially increased body temperatures that result from performing the activities within those occupations as compared to roofers or those who pour concrete, for example, will likely be significant. Clearly, the level of exertion must be used to help determine which workers should be subject to compliance obligations. Likewise, because conditions could vary based on the individual workers within those job functions, their overall health, and other personal risk factors unknown to the employer, NAHB strongly recommends allowing employers the flexibility to determine the best methods for providing “reasonable care” to their workers. This flexibility would allow employers to focus their resources on protecting higher-risk workers based on the conditions that are known and/or within the control of the employer while minimizing the costs associated with compliance for lower-risk workers.

ii. Indoors

The proposal defines an indoor work environment as one with “an area under a ceiling or overhead covering that restricts airflow and has along its entire perimeter walls, doors, windows, dividers, or other physical barriers that restrict airflow, whether open or closed[.]”³⁶ The proposed rule defines construction activity as activity that is “performed inside a structure after the outside walls and roof are erected.”³⁷

Yet many residential construction activities do not fit into this definition. For instance, during remodeling projects that involve removal of an entire wall or a significant section of the roof and/or walls of a home, as is the case with home additions, the remodeling contractor may install a temporary wall or, depending on the expected weather conditions and project timeframe, leave the opening exposed. Another example is that of a garage door that OSHA offers in the preamble. The agency states that “[p]ossible examples for indoors include work in a garage, even if the garage door is open[.]”³⁸ But if the door is open, then there is no wall. Yet the agency views this as “indoor” for purposes of the proposed rule even though this rationale is directly contrary to the agency’s definition of an indoor work environment. OSHA’s view and the public’s understanding does not improve with the next example, “the interior of a warehouse, even if

³⁶ 89 Fed. Reg. at 71,069.

³⁷ 89 Fed. Reg. at 70,771.

³⁸ 89 Fed. Reg. at 70,771.

multiple doors are open on the loading docks[.]”³⁹ Without better clarity on what actually constitutes “indoor/indoors,” continuing to cite these examples could compel employers to unnecessarily implement indoor work controls, heat measurements and take other measures to comply with the proposal’s recordkeeping requirement of maintaining these indoor measurements even through the spaces may not squarely meet the agency’s definition of “indoor/indoors”.

NAHB urges OSHA to revise its definition for indoor work to address these inconsistencies and insert flexibility for employers. If the agency chooses not to provide a revised definition of indoor work, NAHB urges it to develop guidance to clarify this and other issues that require further explanation. These examples further illustrate why it is important to have a construction industry-specific heat standard.

C. Requirements at or Above the Initial Heat Trigger

i. Water

Many NAHB members already provide cool water to their employees where appropriate, and these methods range from providing shared water dispensers for refilling reusable bottles, bottled water in coolers containing ice, drinking water from a plumbed source, and more. While NAHB encourages employers to provide cool, drinkable water to employees, we believe OSHA should not establish a set amount of one quart of water per worker per hour for employers to provide. Instead, OSHA should adopt requirements that follows concerns discussed in the SBAR final report – specifically, requiring a specific quantity of water per worker – so that employers have the flexibility to provide a reasonable amount of water to employees.⁴⁰

As proposed, OSHA places the onus on employers to provide water to employees, but there is no clear responsibilities for employees who refuse to drink water or do not drink enough to prevent a heat-related incident. In any final rulemaking or post-regulatory guidance, OSHA must state expressly that, while employers are required to provide water, they are not liable for injuries which occur because employees neglected or refused to drink what was provided.

Further, additional complications regarding water availability and intake arise on those residential construction jobsites that have workers employed by different contractors or have multiple subcontractors on the site at one time. As is the case for providing water, OSHA must not only explicitly state that the responsibility of providing water to employees falls on the employer, but also if and how the agency will apply its multi-employer citation policy⁴¹ to cite a general contractor if a subcontractor fails to provide water to his or her respective workers, even though the contractor has no obligation to the subcontractor. The agency must consider and account for these types of situations.

³⁹ *Id.*

⁴⁰ Report of the Small Business Advocacy Review Panel on OSHA’s Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, dated Nov. 3, 2023, see page 24, <https://www.osha.gov/sites/default/files/Heat-SBREFA-Panel-Report-Full.pdf> (Accessed Nov. 4, 2024).

⁴¹ The U.S. Supreme Court’s recent decision overruling *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837 (1984), calls into question OSHA’s multi-employer citation policy the agency’s assertion it can continue to enforce this policy. NAHB contends OSHA is not entitled to deference and its policy is indefensible. See, *Loper Bright Ent. v. Raimondo*, ___ U.S. ___, 144 S. Ct. 2244 (2024).

ii. Rest Breaks as Needed

In determining when to compensate employees during non-mandatory rest breaks, OSHA has overstepped its statutory authority by attempting to mandate pay, which is governed by the Fair Labor Standards Act (FLSA), not OSHA. The FLSA governs wage and hour standards, including when workers must be compensated. Past enforcement guidance issued by the Wage and Hour Division of the Department of Labor (WHD) states that short breaks of 5-20 minutes are compensable. Moreover, DOL clearly states on its website that extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time.⁴² By propagating a paid break requirement aimed to raise the “bad actors” of employers to the agency’s expected standards of worker safety, OSHA has ignored the existence of employee bad actors who could exploit this vague policy to avoid performing work for unreasonably long and unnecessary breaks while being compensated.

OSHA's involvement in pay-related matters, such as determining whether certain time is compensable, is unlawful, as OSHA lacks wage determination authority, and it conflicts with existing federal regulations and guidance on break compensability. OSHA's overstep will lead to legal disputes, and it undermines the FLSA's clear and existing compensation guidelines. Ultimately, the proposed rule's requirement that heat-related rest breaks be paid creates unnecessary complexity and conflict with the FLSA's clear, fair compensation policies for workers. While NAHB acknowledges that the rest breaks required by the proposed rule would be compensable, they already are compensable by virtue of existing legal authority under the FLSA, not due to the proposed rule. OSHA has no authority to issue a citation to a regulated entity for a wage and hour violation, and should, therefore, amend the proposed rule to clarify that the Wage and Hour Division, not OSHA, already mandates that the breaks anticipated by the proposed rule must be paid.

iii. Acclimatization

The two primary options for acclimatizing new workers outlined in OSHA's proposed standard involve gradual exposure to heat and workload adjustment. These requirements will likely result in significant administrative and cost burdens for employers.

Administratively, employers must develop and implement detailed acclimatization plans, including monitoring employees' adjustment to heat conditions over a specified period. Looking at both options for acclimatization, which involve the meticulous tracking of exposure time or rest breaks, many businesses will have to hire or retrain staff, acquire monitoring tools, and dedicate time to regulatory compliance. In the case of tracking mandatory rest breaks (described in option A) or the percentage of a shift worked by a new or returning employee (described in option B), both options require employers to maintain records of acclimatization in the event of an agency inspection, even though keeping these records is not explicitly mandated by OSHA. Under the threat of a citation and/or fine, employers will not only have to provide their written heat injury and illness prevention plans, they will also have to demonstrate compliance with those plans, which means they will have to document how their plans are being implemented to protect themselves in the event of an inspection or audit. The burden of proof will effectively shift to employers

⁴² <https://www.dol.gov/general/topic/workhours/breaks>.

to prove that they have complied with their own policies when OSHA is to bear the burden of proving noncompliance. This is one of several examples where OSHA creates a *de facto* recordkeeping requirement so employers can effectively demonstrate they are complying with OSHA's obligations and protect themselves from unreasonable and costly citations. Such an approach is unacceptable.

In addition to creating new, non-authorized recordkeeping requirements, the proposed mandate to develop and implement an acclimatization plan will result in increased labor costs due to extended work hours and/or additional staff to fill in while new and returning workers complete their acclimatization protocols. Both of the proposed acclimatization options limit the duration or intensity of a new worker's exposure to high temperatures over a set period of time. While this approach may be effective in reducing heat-related risks, it disrupts productivity as employees cannot perform at full capacity and it may necessitate hiring temporary workers to fill gaps or redistribute work among existing staff. OSHA's approach to acclimatization presupposes that these new or returning workers could be engaged in non-strenuous tasks for the rest of their shifts, but that is a flawed assumption and demonstrates that OSHA does not have a clear understanding of the nuances and rapidly changing conditions of most construction projects. Supervisors must also monitor workers during the acclimatization process, potentially diverting time and resources from other tasks. This approach also requires flexibility in scheduling, which could be difficult for businesses with strict deadlines or labor shortages. In both cases, these strategies create unnecessary administrative and financial hurdles, particularly for small businesses with limited resources.

When determining the best approach for acclimatizing new or returning workers, employers must be granted broad leeway to develop and implement protocols that correspond with the physical toll and exertion expected to be placed on the employees for the particular duties and environment in which they operate. By limiting employers to the two proposed options, OSHA is denying their ability to use their experience, knowledge, and understanding of the needs and circumstances of their own employees to improve the safety of their jobsites.

D. Requirements at or Above the High Heat Trigger

i. Mandatory Rest Breaks

The proposed mandatory rest break requirement runs counter to the flexibility currently utilized by employers. NAHB members have provided examples of workers performing their duties for three to six hours with no or little rest breaks, then resting in a shaded or air-conditioned area at a time when the sun is at its hottest, and then completing the work for that day following peak heat hours. This schedule is not required of the employer, and workers are able to and encouraged to take rest breaks during the working hours. This and other similar methods are successful because they are an agreed upon approach by both groups: employees can stay safe and comfortable when the risk for a heat-related injury is highest and employers are able to meet project deadlines.

Moreover, home building involves various tasks where scheduling mandated rest breaks simply will not work, as rest periods may break up setting, curing and/or other time-sensitive processes, can damage the

final product, and/or add to costs that directly fall on the homeowner or feed into the builder's already small profit margin on a home.⁴³ Some of these time-sensitive tasks include:

1. **Pouring Concrete:** Interrupting the pouring process can lead to uneven curing, resulting in weak spots, cracks or an inconsistent finish. Once the concrete starts setting, it must be continuously worked to ensure smoothness and strength. Imperfections in concrete can become safety issues for future residents and visitors. Imperfect pavement can warp and create trip hazards. Weakened concrete can crack, which could be a cosmetic issue or could compromise a building's structural stability. In any case, concrete defects are expensive and time consuming to fix.
2. **Painting or Staining:** Taking a break while painting or staining a surface can leave visible streaks, lap marks or uneven drying. If the break occurs before the paint has dried to a certain point, it can cause smudging or blending issues when resuming.
3. **Installing Flooring:** During the installation of hardwood or tile flooring, laying down adhesive or mortar needs to be done in continuous, even sections. Taking a break before the adhesive has set could cause it to dry prematurely, leading to a poor bond or misaligned tiles.
4. **Tiling:** Tile installation requires precise placement of each tile while the adhesive is wet. Interruptions can cause tiles to shift or set unevenly, requiring rework or resulting in gaps and misalignment.
5. **Roofing:** When applying shingles or roofing materials, interruptions can cause misalignment, uneven spacing or inadequate sealing. If breaks are not well-timed, it can also expose parts of the roof to rain or moisture, potentially causing water damage or compromising the installation.
6. **Drywall Installation and Mudding:** After drywall is hung, joint compound needs to be applied in a continuous process to ensure smooth, even seams. Taking breaks can lead to visible seams, lines or inconsistencies when the compound dries.
7. **Masonry (Brick or Stonework):** When laying bricks or stone, interruptions can cause the mortar to dry too quickly or unevenly, leading to weak joints or shifting of the bricks. Consistency in applying the mortar and placing the bricks is essential for structural integrity.
8. **Framing:** Taking breaks during the framing of walls or structures can result in misalignment, skewed walls or uneven spacing between studs, which could compromise the building's structural integrity.

Mandating a rest period while in the midst of performing any of these activities can clearly and unnecessarily create problems for supervisors and workers and compromise the quality of the final product. OSHA must recognize the need for flexibility in conducting these tasks, and others. OSHA must also address the worker who may refuse a mandatory break. The process for a worker installing roofing tile, for instance, to take a break includes, but is not limited to, the following: the worker must remove their fall protection equipment, descend from the height at which they are working, walk to the designated rest area or air-conditioned vehicle, rest for an uninterrupted 15 minutes, then repeat the process to return to their work area. If that worker is nearing completion of the project, there is a much greater incentive for the worker to finish the job then leave for home or another job, and almost no incentive for

⁴³ NAHB's 2022 version of its Builders' Cost of Doing Business Study showed the average net profit for single-family builders was 7.0 percent. Rose Quint, National Association of Home Builders, *Builders' Profit Margins Fall as Balance Sheets Grow*, April 25, 2022, https://eyeonhousing.org/2022/04/builders-profit-margins-fall-as-balance-sheets-grow/?_ga=2.124442570.1595858153.1732583360-2110708299.1732583360 (Accessed Nov. 13, 2024).

that worker to take the mandated break if the worker is not experiencing signs or symptoms of a heat-related illness.

Unfortunately, when outlining the proposed requirements for mandatory rest breaks, OSHA does not address the easiest solution, which is avoiding work at the time of highest risk. The agency also fails to recognize the difficulty of complying with this requirement when conducting common, time-sensitive tasks, or the jobsite realities faced by workers who are at low risk of a heat-related illness. Instead, OSHA creates additional costs for employers who must enforce potentially unwanted breaks among workers. Additionally, mandatory rest breaks taken during the morning may reduce productivity during a relatively cooler part of the day and increase risks for employees during peak heat hours. While arguably well intentioned, mandatory rest breaks are not the panacea the agency makes them out to be. Due to the challenges, problems and potential to raise more risks, the agency must remove any mandatory rest break provisions and allow flexibility for workers to take rest breaks as needed.

ii. Employer Supervision or Communication and the “Buddy System”

OSHA’s requirements for employee observation under high heat conditions fails to address several key concerns of working in the presence of a supervisor or the newly created position known as a heat safety coordinator and for employees performing work alone. First, OSHA must clearly define the employer-employee relationship for work sites with multiple employers by stating the responsibility for this observation should fall solely on the respective employer. At the same time, OSHA must fulfill the following obligations in any potential final standard:

- 1. Clarify the phrase “in close enough proximity to communicate with and see” in the preamble.** There are various examples in residential construction of employee observation that could fall under this vague language but are ultimately subjective and dependent on the perspective of the employer, inspector, etc. For instance, many large housing developments could require employees of a roofing or electrical contractor to perform work on multiple homes at the same time, with the distance between these employees spanning an entire subdivision. As written, the proposal offers no clear way of knowing whether the agency would consider this distance “close enough proximity” for employee observation. Given the equally vague definition of work area,⁴⁴ the same concerns apply to the proposed “buddy system” method of employee observation.
- 2. Expand on the language in paragraph (f)(3)(ii) regarding observation.** As written, the proposed regulatory text simply states observation by a supervisor or heat safety coordinator must be fulfilled and that each observer must be responsible for no more than 20 employees. The immediate question of observation frequency comes to mind, and while the preamble discusses a supervisor or heat safety coordinator’s ability to “have other tasks or work responsibilities while implementing the observation role,” this language must also be included in the text of the regulation.

OSHA must also address the situation where an employee working alone at a work site, who is not experiencing signs or symptoms of a heat-related illness, does not respond to an employer’s attempts at

⁴⁴ 89 Fed. Reg. at 71,069.

communication within the required two-hour timeframe.⁴⁵ Generally, employers will implement their emergency response procedures if a lone employee is suspected of experiencing a heat-related injury or illness or if the employer becomes aware of the signs or symptoms of one from that employee. However, there may be cases where an emergency does not exist, yet the costs associated with the emergency response procedures (sending a supervisor or other employees to the work site, involving emergency services, etc.) must be paid by the employer. In some instances, stopping to respond to a text or other communication method could create a greater hazard for that employee who may be in the middle of a detailed project (e.g., ascending or descending a ladder, driving, operating power tools, etc.). NAHB members have reported workers can be “annoyed” by frequent check-ins from their employer and may refuse to answer calls or respond to other forms of electronic communication while performing their job, as they interpret this supervision as micromanaging. In this situation, there is no telling whether there is an annoyed worker or an emergency event happening with the lone employee.

NAHB believes employers should act cautiously and respond to a situation as if an emergency is occurring with an employee. However, the cost of false alarms is concerning; when the employer complies with the observation requirement and the employee knowingly or willfully fails to respond, OSHA would still bring an enforcement action against the employer. The employer would then be in the position of having to defend itself against a citation and the resulting financial penalties from that citation. Therefore, NAHB urges the agency to clarify the extent of liability employers may face when the employer has implemented communication policies and procedures with lone employees.

E. Additional Provisions of the Proposed Rulemaking

i. Administrative Controls – Adjusting Work Schedules

One of OSHA’s suggested administrative controls includes varying employees’ work schedules, stating in the preamble that this and other administrative controls “are a well-accepted and long-standing approach to protect workers from occupational hazards.”⁴⁶ NAHB supports utilizing administrative controls as a way to minimize risk and avoid the hottest parts of a workday, yet adjusting work schedules for construction work for earlier or later in a day comes with many issues outside of the control of the employer. First is daylight and dark. Certain activities can be performed in the dark, but special precautions oftentimes have to be taken. Second is noise. Many areas impose strict noise restrictions during early morning hours to ensure that residents are not disturbed by construction activities before or after a certain time, often limiting work to a specific window during the day. Where local ordinances do not exist, builders may also deal with the issue of rules set by homeowner associations (HOA), which can include restrictions on work hours or the types of machinery that can be used, adding another layer of complexity for contractors. Third is coordination across the work site and/or project. Most activities on residential construction sites follow a predetermined order and schedule, but if the schedule for framing a home, for instance, is revised, it impacts the timeframes of all subsequent stages of the project that follow. When compounded, these delays can mean additional days or weeks of unintended time spent building, which translate to costs that fall on the homeowner or contractor.

⁴⁵ 89 Fed. Reg. at 70,792.

⁴⁶ 89 Fed. Reg. at 70,749.

Outside of these types of restrictions, NAHB members have also experienced harassment from neighbors for beginning work at certain times of the day or having certain deliveries made, creating tension in the workplace and making it difficult to maintain a smooth workflow. Along with the points made in support of a separate construction industry standard, a set of unique industry-wide requirements should include a pre-emption clause for local ordinances or HOA requirements when possible to meet the agency's desired outcome.

ii. OSHA Must Explicitly State that Employers are Only Responsible for Their Employees in a Standard

A primary concern for NAHB and its members throughout this rulemaking process has been that OSHA would fail to recognize and clearly define the responsibility of an employer for their own employees from the responsibility of a builder or general contractor to the workers of other employers on a work site. Despite repeatedly urging the agency to establish that each employer at a work site is responsible for the health, safety and well-being of their own employees, OSHA has remained silent. There is no language in the rule that limits an employer's responsibility to his or her employees and no indication that a general contractor would not be subject to liability if he did not share his water with an employee of a subcontractor. Instead, based on past enforcement activity, the agency will likely direct its compliance safety and health officers to continue to apply the agency's multi-employer citation policy (MECP) during enforcement actions resulting in penalties for employers whom the agency recognizes as the host or controlling employers, even if their own employees are not exposed to a heat-related hazard.⁴⁷ As NAHB has argued during countless prior rulemakings, we are adamantly opposed to such an interpretation.

Like it has in the past, the agency is taking a broad approach to regulating jobsites – this time, for work that is performed in high temperatures. Rather than enforcing a regulation concerning fall protection when working from heights or working near to silica-generating materials, for example, the compliance obligation laid out under this rulemaking will be widespread across entire work sites. As a result of this problematic approach, any employer, controlling or otherwise, would bear an immense burden in supervising all activity and having an authoritative presence over all workers throughout the lifetime of a construction project, yet OSHA would hold these contractors liable if an incident occurs with non-employee workers or hazards to which their own employees may never be exposed. Given the scope of this standard, OSHA cannot reasonably expect enforcement of their MECP without significant cost increases for the employers that would be most impacted by this policy.

Further, the recent changes to the DOL's test for determining independent contractor status under the FLSA⁴⁸ also raise concerns for builders/general contractors on if or when they should intervene with their subcontractors over matters of safety. According to the regulation, actions from potential employers that "go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control."⁴⁹ If builders/general contractors require their subcontractors to perform specific activities or use certain methods to comply with the proposed heat

⁴⁷ Directive No. CPL 2-0.124, *Multi-Employer Citation Policy*, Dec. 10, 1999.

⁴⁸ 89 Fed. Reg. at 1,638.

⁴⁹ §795.110(b)(4).

standard because the builder/general contractor may be liable for the contractor's noncompliance under the MECP, then that may be a level of control which could convert the independent contractor into an employee.

NAHB strongly urges OSHA to explicitly refrain from including any multi-employer compliance requirements or obligations in a final standard. Failing to do so would not only create undue burden and cost increases for construction, but for other industries where multiple employers share a work site and/or where contractor-subcontractor relationships commonly exist.

iii. Timeline for Compliance

Given the scope of this rulemaking, the proposed compliance timeframe of 150 days after publication of the final rulemaking is inadequate for employers to comply. Like the separate industry-specific standards for respirable silica and lead mentioned earlier, there is also agency precedent for a phase-in approach for regulated entities to comply with the requirements.⁵⁰ NAHB specifically adopts the suggested implementation requirements set forth in CISC's comments and requests the agency implement a phased-in approach with an effective date of 90 days after any final rule is published in the Federal Register, and a full compliance date that is 18 months after the effective date.

VII. Conclusion

Given the broad scope of the proposed rule, OSHA has missed an opportunity to adopt a thoughtful and meaningful rule that is specific to the different industries who will be subject to its requirements. NAHB and other stakeholders have repeatedly urged OSHA not to implement a one-size-fits-all approach covering the industries that will be subject to its requirements. That is exactly what has happened. The varying differences among the industries, and sectors within those industries, demand an approach that not only recognizes those differences but also provides flexibility to the employers and employees to whom any standard would apply. As there should be industry-specific standards, there should also be differences in how these standards are applied, specifically in setting heat triggers for different geographic regions.

OSHA has created a standard that reaches well past its long-promoted principles of "Water. Rest. Shade.", and far beyond the agency's legal authority under the OSH Act. OSHA must reconsider its current rulemaking, withdraw the rule as proposed and develop a series of industry-specific regulations that meet the agency's main tenets for keeping workers safe in extreme temperatures.

At the time of writing, OSHA has scheduled an informal public hearing on the proposed rulemaking for June 16, 2025. NAHB welcomes the opportunity to engage the agency further and strongly requests the agency provide multiple opportunities for public hearings that allow for more collaboration between OSHA, employer and employee representatives and other affected stakeholders.

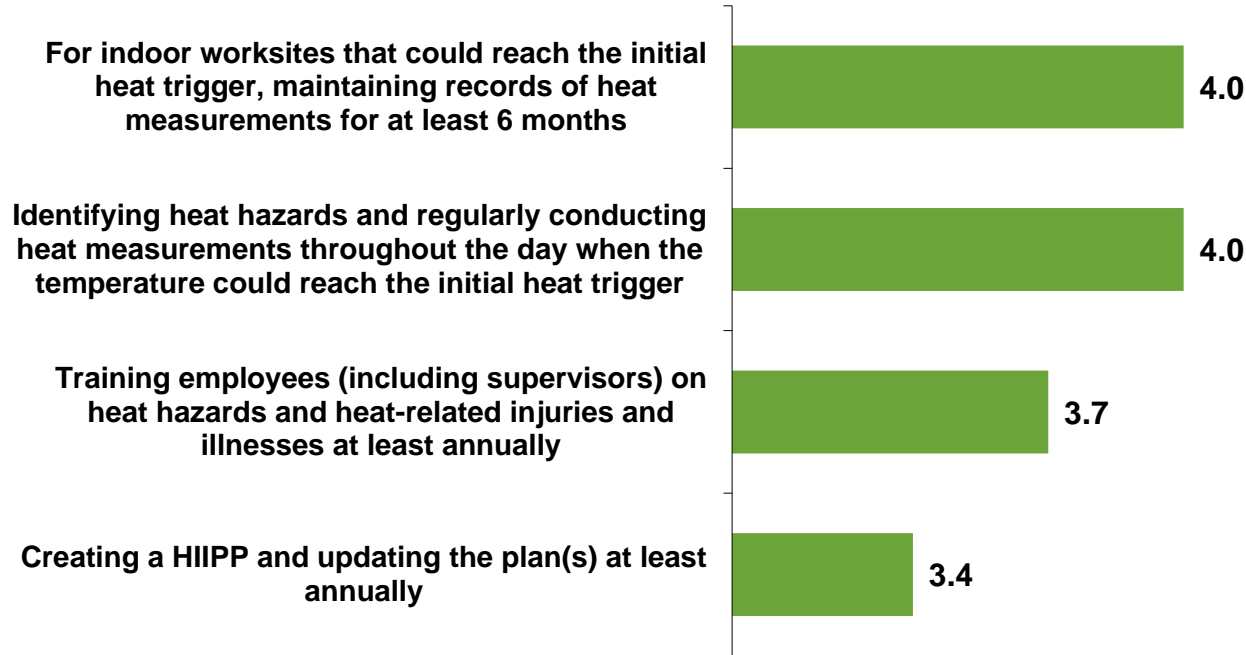
⁵⁰ As discussed in its Jan. 14, 2025, letter from the Construction Industry Safety Coalition to Docket No. OSHA-2021-0009, the 2012 hazard communication standard rulemaking required all employees be trained on the new label elements and safety data sheet format ("SDS") by December 1, 2013, while full compliance with the final rule began in 2015. Additionally, the agency's 2024 rulemaking adopted the same tiered approach for establishments to comply.



Appendix A

Broad Requirements Most Likely to Increase Construction Costs: Maintaining Records for 6 Months & Regular Heat Measurements During the Day

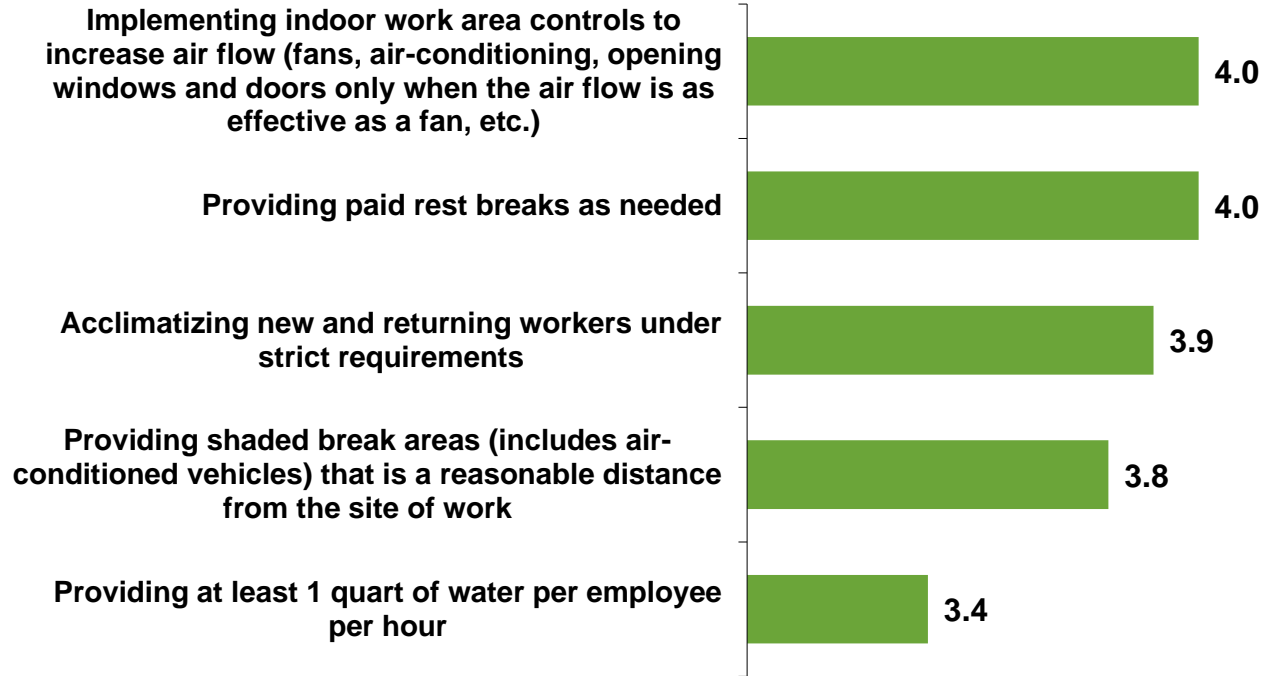
Average cost increase rating; 1=no increase at all, 5=very significant increase.



Q: The proposed standard mandates broad requirements for all covered employers. Please rate how significantly each of these requirements would increase your construction costs. Use a scale from 1 to 5, where 1=No increase at all and 5=Very significant increase.

Requirements Triggered at 80°F Most Likely to Increase Construction Costs: Increasing Indoor Air Flow & Providing Paid Breaks

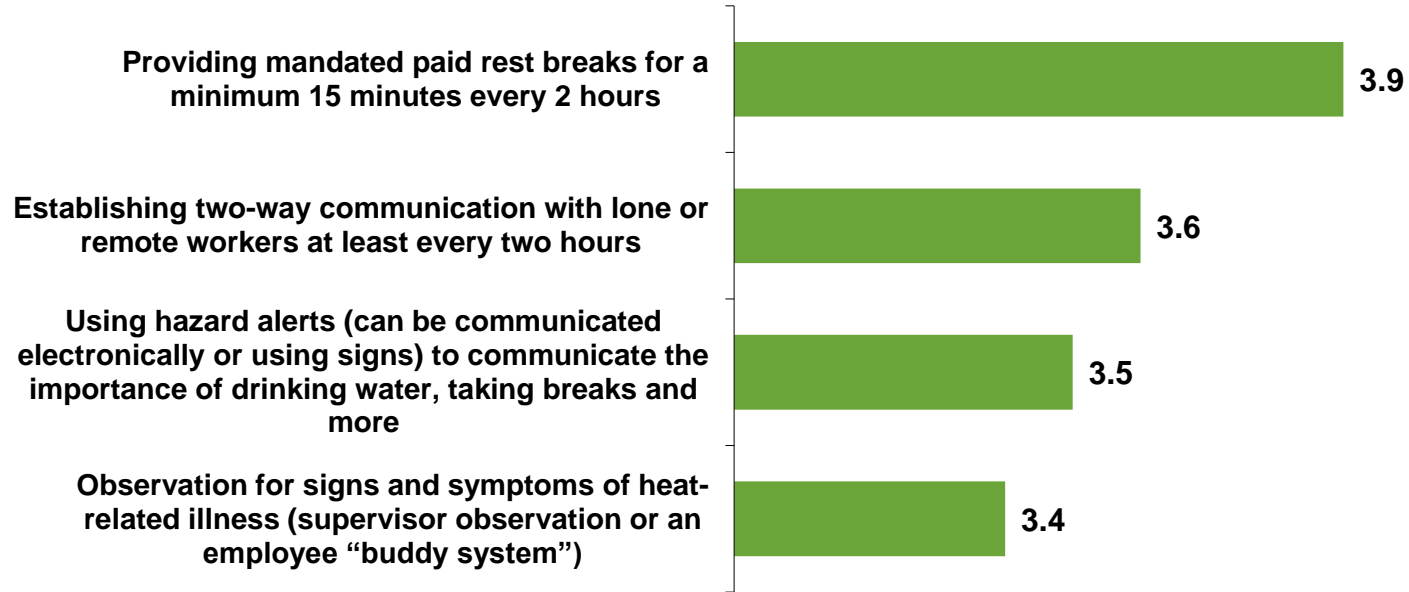
Average cost increase rating; 1=no increase at all, 5=very significant increase.



Q: The proposed standard mandates more specific requirements when a work site reaches 80°F. Please rate how significantly each of these requirements would increase your construction costs. Use a scale from 1 to 5, where 1=No increase at all and 5=Very significant increase.

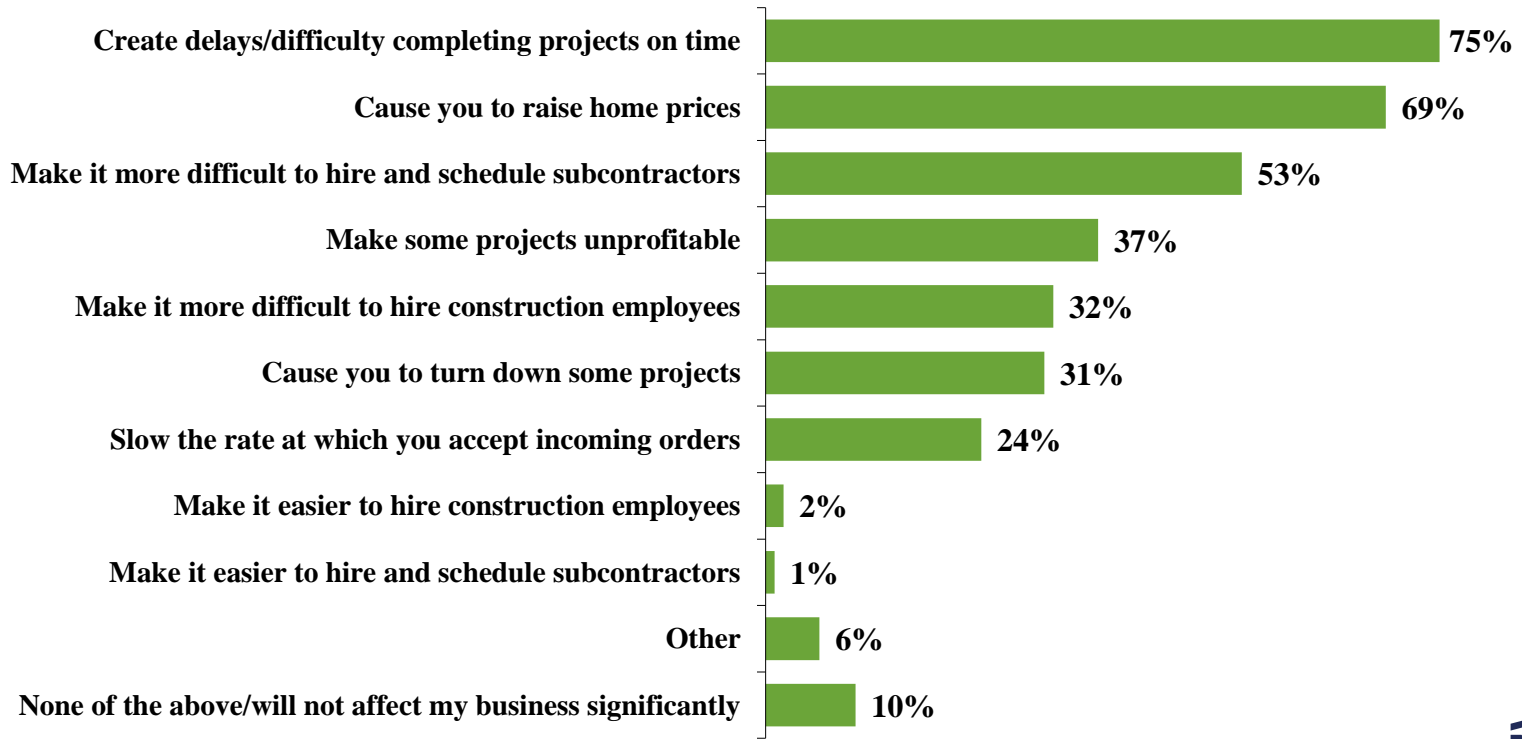
Requirement Triggered at 90°F Most Likely to Increase Construction Costs: Providing Paid Breaks for 15 Minutes Every 2 Hours

Average cost increase rating; 1=no increase at all, 5=very significant increase.



Q: The proposed standard mandates more specific requirements when a work site reaches 90°F. Please rate how significantly each of these requirements would increase your construction costs. Use a scale from 1 to 5, where 1=No increase at all and 5=Very significant increase.

If Proposal is Adopted, Most Likely Effects on Builders (65%+): Delays Completing Projects on Time & Higher Home Prices



Q: If adopted, what effects are these requirements likely to have on your business? (Select all that apply).