

August 15, 2022

To: Carmyn Shute
Department of Labor and Industries
(sent via email to carmyn.shute@lni.wa.gov)

From: Rose Gundersen
Vice President of Operations & Retail Services, Washington Retail Association

RE: Initial Comments: Outdoor Heat Exposure Rulemaking

The Washington Retail Association (WR) represents more than 4,000 storefronts statewide that range from large national chains to small shops. Our members include wholesalers, dealers, professional services, and mall owners and operators. Our members employ about 400,000 people and are a major contributor to both the economy and well-being of every community in the state. We appreciate the opportunity to provide comments on the Outdoor Heat Exposure Rulemaking webinar on August 4, 2022.

WR members are committed to the safety and health of their employees. WR regularly provides members with training and education on best practices to ensure safe and healthy workplaces for employees. Although WR does not believe lowering the temperature threshold in the current emergency rule to 87 degrees F was warranted, the structure of the emergency rule, which is largely based on providing tools and information for employers and employees is workable.

WR has members impacted by the current emergency rule and any future permanent outdoor heat exposure rules. For example, auto repair shops (including those that provide emergency road services), garden outlets, home supplies, delivery services, and building material outlets often have employees that work intermittently outdoors. A key attribute is these workers are outdoors *intermittently* with water, shade, and indoor settings readily available. Based on the data presented by L&I, and the nature of retail work, WR believes that any permanent rule should exempt the retail sector because of the *low-risk situations* for workers in these settings (more on this below). At a minimum, the burdensome approach proposed in the webinar should be dramatically changed for low-risk sectors to mimic much of the approach taken in the emergency rule, which relies substantially on providing tools, guidance, and education for workers and employers.

Although WR urged L&I to initiate permanent rulemaking, we are deeply troubled by the drastic change in direction in the proposed rules discussed on the August 4th webinar. The proposed rules create so much uncertainty for employers that we urge L&I to “slow down” and consider stakeholders’ input deliberately and substantively throughout the process. As mentioned, the

emergency rule relies heavily on providing tools, guidance, and education to employers, and does include a mandated rest period when temperatures exceed 89 degrees F. In contrast, the permanent rule, as described, would be highly prescriptive, confusing, and would likely provide little, if any, incremental protection for workers. The following provides more detail on WR's specific concerns.

1. **The proposed direction will provide little if any, incremental protection for workers.** It appears that Dr. David Bonauto's analysis (presented in March) provides a significant foundation for much of the proposed rule (see slide 12 of the August 2022 webinar). That data (see slide 42 of the March presentation) shows there were 918 confirmed HRI claims (with only 654 of those claims accepted) over 11 years (2006-2017). *That equates to an average of 59 accepted claims per year across all business sectors.*

WR recognizes that any work-related illness is important; however, Dr. Bonauto's data must be put into context. Over the same analysis period, L&I data shows there were 1,171,740 accepted workers' compensation claims (WA. Dept of Labor and Industries, Data on Allowed Claim Counts and Costs by Year). Accordingly, the new regulatory approach outlined in the webinar is **based on 0.056% of the claims** accepted in the same period. **(See Exhibit A** - a set of data WR developed using aggregate claims data requested from L&I.)

For the Retail sector, Dr. Bonauto's data shows only 23 accepted HRI claims over the period **(or 0.02% of claims in the retail sector)**. L&I data for 2018-2021 reveals only 3 HRI claims in the Retail sector for that period 2018-2021 (or 1 claim per year). **(See Exhibit B** – a set of data WR requested from Dr. Bonauto)

Putting Dr. Bonauto's data into context, the total number of accepted HRI-related claims is 0.056% of the total claims across all business sectors that were accepted. Dr. Bonauto's data on the Retail sector shows that only 2.09 claims per year or 0.02% of accepted claims have been related to HRI. For the 2018-2021 period, HRI-related claims in the retail sector declined by 52%, to 1 claim per year compared to the 2006-2017 period.

WR believes the data indicates that current measures taken by employers, supplemented by the emergency rule have proven effective and that the burdensome, costly approach presented in the webinar will provide little if any, incremental protection to workers. The data does not show that the risk equates to the burden and conditions of the proposed rule.

2. **Employers cannot control the environmental and personal risk factors that may contribute to HRI.** Again, the basis for the proposed permanent rule appears to be based on data presented in the March stakeholder's meeting. Slides 38-40 from the March meeting outline the three categories of risk factors that contribute to HRI-related claims: work, environmental and

personal. Despite the fact that employers cannot control the environmental or personal risk factors, the low rate of HRI claims reflects they have been providing a workplace safe from heat-related incidences. The low rate of HRI claims in the retail sector reflects the intermittent nature of outdoor work in retail settings combined with the best practices already employed to ensure the availability of water, shade, and rest breaks.

3. **The proposed rule for acclimatization is confusing, subjective, impracticable to implement, and may be in conflict with the Americans with Disabilities Act (ADA).** WR recognizes that employees may need to acclimatize as they change work locations or other situations arise. However, the approach in the proposed rule does not distinguish between workers on the west side and east side of Washington State. Moreover, it is unclear how employers are required to provide monitoring or demonstrate they are adhering to the proposed rule. An employer has no way to ensure they have accurate information on an employee's personal history for 14 days preceding a heat event. Moreover, the personal risks involving alcohol, drug use, and medical conditions will not be disclosed voluntarily by many, perhaps most, employees. Finally, WR questions if requiring disclosure or even voluntary disclosure would be inconsistent with the Americans with Disability Act.

WR urges that acclimatization standards focus on education, training, and awareness, like the emergency rule, and not attempt to set rigid standards that only add confusion and uncertainty.

4. **The proposed lower heat triggers raise several substantive issues:**
 - a. As mentioned earlier, Dr. Bonauto's data provides a substantial basis for the Department's proposed rule. That data showed that 44% of the HRI claims were submitted when temperatures were less than 89 degrees F. Using the Retail sector data, that means only *10 claims or less than 1 per year*, were submitted for HRI-related claims over the 11 years when temperatures were less than 89 degrees F. For the 2018-2021 period, using the 44% rate below 89 degrees F, the claims declined to *0.45 claims per year*. Again, that small number of incidences suggests that current measures to protect retail employees are effective and do not justify lowering the triggering temperature thresholds to 80-degree F.
 - b. The proposed heat trigger does not recognize the climatic differences between Western and Eastern Washington. It is simply common sense to acknowledge those differences.
 - c. The data does not support a "year-round" rule. Again, citing Dr. Bonauto's data (slide 42 from the March webinar), 76% of the accepted HRI claims occurred in the July-September period. Again, recognizing that the total number of accepted HRI claims is only 0.06% of the total number of claims over the same period, WR believes any outdoor heat rule should focus on the time of highest risk, and not put unnecessary burdens on both employers and employees during the remainder of the year.

5. **Current standards are effectively protecting retail sector workers from HRI.** The data (presented in March) shows that only 0.02% of claims in the retail sector are HRI related. Since 2017, there has been less than one claim per year, a very low incidence rate for HRI-related claims in the Retail sector. This is due to the working conditions and measures used by both the businesses and workers in the retail sector to protect from heat-related illness. These include:
- a. The intermittent nature of outdoor work in a retail setting
 - b. Availability of shade, water, and facilities.
 - c. Education, training, and awareness.
 - d. Commitment to safe working conditions for all retail workers

WR believes that the low-risk nature of retail work must be recognized in any permanent rule and that the sector warrants consideration to be exempt. At a minimum, the burdensome approach proposed in the webinar should be dramatically changed for low-risk sectors, like retail, to mimic much of the approach taken in the emergency rule, which relies substantially on providing tools, guidance and education for workers and employers.

WR also believes the data shows the most effective strategy is to provide employers and workers with the information and tools to avoid heat related illnesses. That is the fundamental approach in the current emergency rules, which allows employers to work with their employees to gauge the appropriate combination of protective measures. Based on the data presented, this approach is clearly working in the retail sector. WR believes that a major reason for the success is because employers are not focused on implementing certain measures at specific trigger points; instead, employers and workers are adapting their work to meet the conditions expected at the location, or in the specific situation, over a period of time (e.g. roadside repair). It is commonsense.

The proposed rule establishes restrictive standards, lowers temperature thresholds to levels that are common throughout the state, and includes confusing, likely unenforceable standards for acclimatization. WR fears the proposed approach will be less effective because employers and workers will be focused “on what to do at what temperatures,” instead of focusing on overall common-sense measures that have proven effective.

Finally, WR is deeply concerned with the reliance on the data presented in March by Dr. Bonauto. That data seems to be taken out of context because additional L&I claims data shows that the number of HRI claims is extraordinarily small (**0.056%** across all business sectors and 0.020% for retails). The data for the Retail sector also shows just a handful of claims over the 14-year period. That is likely the result of mostly indoor and the intermittent nature of outdoor work in a retail setting, measures already in place by employers, increased education and awareness across the state and collaboration with frontline workers.

Considering all the L&I data and key points presented, WR is not persuaded that the proposed rule would provide additional protection for workers, and that low-risk sectors, like retail, should be exempt from these burdensome standards proposed.

The Washington Retail Association looks forward to working with L&I on this important rulemaking.



Rose Gundersen
Vice President of Operations & Retail Services
Washington Retail Association

Exhibit A

All State Fund Accepted Claims Compared with HRI Claim Data Presented in March 2022

Table 1: All State Fund Accepted and Rejected Claims for Selected Periods of Time by NAICS Industry Sector

For the period 1/1/2006 - 12/31/2017*						
NAICS Industry Sector (NAICS Code)	Accepted	Rejected	HRI	Accepted	% of all Accepted claims	
Construction (23)	178416	17339		170	0.095%	
Manufacturing (31,32,33)	125934	15424		55	0.044%	
Retail Trade (44,45)	112578	16908		23	0.020%	
Accommodation and Food Services (72)	107502	12560		30	0.028%	
Administrative and Support and Waste Management and Remediation Services (56)	78546	13757		58	0.074%	
Agriculture, Forestry, Fishing and Hunting (11)	79680	7461		111	0.139%	
Wholesale Trade (42)	69484	8141		33	0.047%	
Public Administration (92)	56331	9451		94	0.167%	
Transportation and Warehousing (44, 45)	51039	8576		22	0.043%	
Other Services (except Public Administration) (81)	50685	5648		12	0.024%	
All Other NAICS Sectors (21,22,51,52,53,54,55,61,62,71)	261545	58568		46	0.018%	
Totals:	1171740	173833		654	0.056%	

Exhibit B

Table 3: Accepted HRI Washington State Fund Claims by Occupation with 3 or More Claims, 2006 - 2021

SOC Code	Occupation Description	Number of Accepted Claims
Wholesale Trade (NAICS 42)(n=39)		
537062	Laborers and Freight, Stock, and Material Movers, Hand	10
533033	Truck Drivers, Light or Delivery Services	6
519199	Production Workers, All Other	3
	Other SOC Codes	20
Retail Trade (NAICS 44-45)(n=25)		
537062	Laborers and Freight, Stock, and Material Movers, Hand	5
533033	Truck Drivers, Light or Delivery Services	3
	Other SOC Codes	17
Transportation and Warehousing (NAICS 48-49) (n=30)		
533032	Truck Drivers, Heavy and Tractor-Trailer	8
536099	Transportation Workers, All Other	4
537062	Laborers and Freight, Stock, and Material Movers, Hand	4
	Other SOC Codes	14