

June 3, 2021

By electronic submission:

<https://www.townhall.virginia.gov/L/comments.cfm?stageid=8926>

And

By Email to:

Jay Withrow
Director, Division of Legal Support, ORA, OPPPI, and OWP
Virginia Department of Labor and Industry
600 E. Main Street, Suite 207
jay.withrow@doli.virginia.gov

RE: Comments on Notice of Intended Regulatory Action on Heat Illness Prevention; Heat Illness Prevention Standard, 16 VAC 25-210 [under development]

Dear Mr. Withrow,

On behalf of Celanese Corporation (“Celanese”), we are submitting comments in response to the Virginia Department of Labor and Industry’s Safety and Health Codes Board (“Board’s”) Notice of Intended Regulatory Action (“NOIRA”) to adopt a regulation on Heat Illness Prevention. Celanese is deeply committed to the safety of its workers and particularly concerned with worker health, safety, and well-being during hot days in Virginia. Celanese therefore supports workplace safety policies that ensure feasible action, which are based on sound science, and are not unnecessarily complex or difficult to implement. With that said, Celanese supports the Board’s proposal to provide a standard on heat illness prevention, but does have concerns over the intended scope, feasibility, complexity, and ambiguities in the proposed regulatory language.

- **The proposed Heat Illness Prevention Standard does not have a clear scope.**

The Board’s rulemaking documents convey that it is considering a “comprehensive regulation to address employee exposure to heat illness hazards during indoor and outdoor work activities in all industries under the jurisdiction of the Virginia State Plan for occupational safety and health.” But the NOIRA and associated documents focus on heat illness issues associated with mainly outdoor work. To avoid confusion, the Board should ensure any regulation on heat illness prevention identifies the scope and application of the requirements. This can be accomplished through adding a “scope” or “applicability” section directly in the regulation text. As indoor and outdoor environments also pose different potential exposure to heat illness hazards, the Board should ensure the regulation clarifies when preventive measures may differ for indoor or outdoor environments. That said, because multiple definitions could impose unnecessarily burdensome obligations on employers or create confusion, the

Board should ensure the scope and application of the regulation does not lead to employers having to develop or implement different “plans” or “programs” to manage heat illness issues.

- **The proposed Heat Illness Prevention Standard should be based on sound scientific information and data.**

The Board’s rulemaking documents convey that the regulation will be set up to achieve the highest degree of health and safety protection for employees, while still heeding the latest available scientific data. In evaluating preventive measures that will be required by the standard, we urge you to rely on the best available scientific evidence on identification and prevention of heat illnesses. This approach would ensure both the most effective methods for identifying potential heat illness and appropriateness of controls. The Board should specifically consider information, data, and recommendations from the National Institute for Occupational Safety and Health, as well as research and data collected in public health studies and research.

- **The proposed Heat Illness Prevention Standard requirements for written programs and controls should be flexible enough to accommodate incorporation into employers’ already established programs or health and safety initiatives, without requiring new or separate program efforts.**

Employers balance many competing regulatory compliance obligations, including the need for many programs, plans, policies, and procedures under federal, state, and local laws. The Board should therefore implement a regulation that achieves its goal of protecting worker health and safety while still being flexible enough to avoid imposing new or added obligations on employers to complete unnecessary duplication of effort purely administrative steps. Employers should, for example, be able to incorporate heat illness hazard identification processes and controls into their current health and safety programs and initiatives without having to develop separate or unique “programs” or written “plans.” In addition, because the procedure for assessing heat hazards is more like a “process” than a plan, employers should be able to use their current hazard identification processes to identify, evaluate, and respond to heat illness hazards, rather than developing a new set of procedures or operations to deal specifically with heat illnesses.

- **The proposed Heat Illness Prevention Standard should not unreasonably expand employers’ obligations to control of employees’ personal health and medical conditions, or require employers to make fit-for-duty determinations.**

The Board’s rulemaking documents contemplate specific rules for managing heat illness, including potential management of employees’ personal risk factors that could contribute to heat illness and some considerations for return to work following an employee’s exhibition of heat illness symptoms. While employers need to be aware of the personal risk factors that can contribute to heat illness as well as the signs and symptoms of heat illness to ensure identification of heat illness occurrence and appropriate emergency response—any Heat Illness Standard adopted should not put employers in a position to act as a medical professional or advisor to employees. Employers should, as a result, not be responsible for managing their employees’ personal health or medical conditions, counseling employees on personal risk factors, or deciding on when an employee should return to work following symptoms of heat illness. Rather, employers should only be responsible for educating workers on the risk factors that can contribute to heat illnesses and injuries, including personal risk factors, identifying

potential heat illness symptoms, and ensuring appropriate emergency response. Further, employers should be able to rely on designated medical or healthcare professionals to determine when it is safe to bring an employee back to work rather than rely on the employee's statements or assertions of ability to return following a heat illness incident.

- **The proposed Heat Illness Prevention Standard should sufficiently direct employers on identification of heat illness hazards, occurrence of heat illness, and selection of appropriate controls, including engineering controls and personal protective equipment.**

As the proposed Heat Illness Prevention Standard has applicability to diverse operations, the Board should ensure regulation text sufficiently details steps, analytical processes, and measures to identify and evaluate heat illness hazards. This would include detailed enough instructions to employers on measures for evaluating temperatures and relative humidity; temperatures and factors at which engineering controls are required, if feasible; and options for employers to use alternative controls like personal protective equipment ("PPE"). The regulation text should also have flexibility for employers in evaluating and responding to heat illness hazards so as to address their specific work operations and needs. For example, some employers may be able to use engineering controls, such as outside cooling units for some fixed outdoor environments, but be unable to use outside cooling units for mobile or constantly shifting outdoor work. Employers should also be allowed to follow recommendations on engineering controls, administrative controls, and required PPE from local public health authorities or employees' personal medical providers.

In addition, the Heat Illness Prevention Standard should identify appropriate methods for responding to and managing heat-related emergencies. More specifically, the standard should be clear on heat illness symptoms, when there has been a heat-related emergency, and the expected level of emergency response. To avoid confusion and also align with industry best practices, we recommend that the Board use federal OSHA's guidance for "Preparing for and Responding to Heat-Related Emergencies," which has a chart for employers to use advising on when a worker may be experiencing heat stroke, exhaustion, cramps, rash, or a medical emergency and directs on the appropriate emergency response, in development of the standard. See <https://www.osha.gov/heat/heat-index/heat-emergencies>. The standard should also detail objective steps employers should follow when removing or bringing an employee back to work that are not based on an employee's singular symptoms or consideration for the surrounding circumstances. Employers should not, for example, need to treat all potential symptoms of heat illness, such as vomiting or fatigue, as a heat illness case requiring emergency treatment or medical clearance for the employees to return to work. Rather, employers should be able to use the evidence reasonably and readily available along with present circumstances to take appropriate action to remove employees from work where necessary, ensure appropriate first aid or medical response as detailed in federal OSHA's guidance, and return the employees to work.

- **The Board should ensure that employers are given time to comply with new requirements.**

The Board's rulemaking documents convey the potential for a complex standard and regulations with many new regulatory compliance, including considerations for a written plan, development of new procedures, establishment of new or differing engineering controls, and extensive training for management and employees. It will take time for employers to review their compliance obligations

under the standard, develop responsive programs, implement new or added controls, and develop and implement training. The Board should also know that training for an employer is unlikely to be as easy as developing a single PowerPoint presentation and rolling out to an entire employee population at a single time. Employers may, in fact, need to develop many training materials (e.g., supervisor level training, affected employee training, training for specific hazards and controls, and awareness training) and roll out in phases or to multiple shifts and departments. The Board should therefore ensure employers have clear and adequate notice of the new requirements as well as time to implement (i.e., minimum of 90 days).

We appreciate the opportunity to provide this input and your thoughtful and serious consideration to our input and recommendations. To discuss this subject more, please contact me at your convenience.

Sincerely,



Cressinda ("Chris") D. Schlag
Counsel for Celanese Corporation