S.3412 (Ramos)/A.3527 (Bronson)

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BILL

S.3412 (Ramos)/A.3527 (Bronson)

SUBJECT

TEMP Act - Provides for the regulation of all indoor and outdoor worksites

DATE

May 20, 2025

OPPOSE

These bills – S.3412 (Ramos)/A.3527 (Bronson)– are intended to regulate employee exposure to temperature extremes in both indoor and outdoor worksites and are referred to as the "Temperature Extreme Mitigation Program (TEMP) Act. The Business Council, on behalf of its more than 3,500 members, opposes both of these bills.

These bills impose significant administrative and financial obligations on employers that are duplicative of already existing federal employee safety obligations under the Occupational Safety and Health Act (OSHA). Imposing such significant additional burdens will not make workers safer and will only contribute to the perception of New York not being "business friendly."

Under the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act of 1970, employers are required to provide their employees with a place of employment that "is free from recognized hazards that are causing or likely to cause death or serious harm to employees." The courts have interpreted OSHA's general duty clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard. This includes heat and cold related hazards.

Consequently, any employer who knowingly exposes a worker to extreme heat or cold conditions as a condition of employment is already liable for significant fines and penalties under current federal law.

Not only do these bills not improve upon existing requirements to protect employees, but they are also lacking in many areas:

1. Both are limited to only certain industries. All workers in all industries deserve the protection from heat/cold illnesses provided by OSHA.
2. They rely only on temperature as a metric. There are no ties to physical exertion/level of activity, or even levels of hydration, which can mitigate illness. This is especially true for so-called "cold illness" (which is not defined). For example, the level of exertion/activity can mitigate impacts from exposure to cold.
3. While the bills provide for required hydration, breaks, etc., there are no provisions for employer enforcement of these activities through the disciplinary process.
4. While the Department of Labor is tasked with developing a training program outlining the signs of heat/cold illness, it does not seem that such a training curriculum would be specific to employers, workplaces, or operations as is required under OSHA.

5. Signage requirements are unclear for situations when employees work out of the "worksite."
6. Air conditioning requirements in buildings and vehicles are not supported by science. And there is no provision to allow employers to discipline employees who ignore employer regulations and training on their use.
7. These bills do not require employee participation in the selection of appropriate personal protective equipment (PPE) as is required by OSHA.
8. The data collection provisions of each bill are again duplicative of OSHA injury/illness reporting requirements and, in some cases, may be contrary to current negotiated labor agreements.

To facilitate employee compliance and improve employee protections without hurting New York's regional competitiveness, we respectfully request the sponsors consider a few amendments to the proposed legislation.

1. Narrow the definition of "employee." As drafted, "employee" is defined too broadly and would make an employer responsible for heat illness prevention to not only its employees, but also to "independent contractors" and "any individual delivering goods or transporting people at, to or from the worksite on behalf of the employer, regardless of whether delivery or transport is conducted by an individual or entity that would otherwise be deemed an employer." It is overly burdensome for organizations to implement the various requirements of the TEMP Act to delivery partners and independent contractors for numerous reasons, including:
   - Delivery and transportation companies are otherwise solely responsible for the health and safety of their employees (under Federal law as applied in New York). For these reasons, this broad definition is without precedent in the area of workplace heat illness prevention anywhere in the nation (including in California, Washington, Oregon, and Maryland) and is an outlier among New York employment laws.
   - By their nature, independent contractors act independently of the organizations to which they provide services. Employers should not be held responsible for ensuring that such drivers' vehicles have air conditioning, ensuring that drivers have a minimum amount of water while making deliveries, or compliance with any other requirements in the bill as to such drivers.

Therefore, the definition of "employee" should be narrowed to a traditional definition consistent with the OSHA ("an employee of an employer who is employed in a business of his employer which affects commerce") and other New York labor laws (e.g., Article 6 – Payment of Wages – "any person employed for hire by an employer in any employment"). We are comfortable with the bill's definition of "Employer" and recommend simplifying the definition of "Employee" to mean "an employee of an Employer."

2. The bill should not impose a maximum indoor temperature or mandate air conditioning in warehouses. The TEMP Act states that "[f]or the purposes of indoor temperature regulated environments, the indoor temperature shall fall between sixty-eight and seventy-five degrees Fahrenheit, to the extent practicable." § 743(5). It also requires air conditioning in warehouses in a covered industry. These provisions are

unprecedented nationally - no state with heat illness prevention rules sets a maximum indoor temperature or mandates air conditioning, and for good reason:

- There would be endless litigation over what is “practicable” for employers to do to keep their buildings below a specified temperature.
- Setting a maximum indoor temperature and mandating air conditioning would impose unnecessary costs on employers and an unnecessary drain on the power grid, diverting resources from addressing greater heat hazards.

3. Give employers more flexibility. The bill as drafted requires certain controls when the temperature hits 80 degrees. § 743(5). Instead, we propose utilizing Nevada’s existing rule. It requires that employers determine the roles and tasks that put employees at risk of heat illness—without setting temperature thresholds at which specific controls must be put in place. Employers must then implement controls for workers at risk. See Nevada Regulation R131-24AP. If the temperature threshold is retained, then employers should have flexibility to action off of a heat index of 80 degrees (like is present in the proposed federal heat rule). The difference will generally be negligible (1 or 2 degrees) when the temperature is around 80 degrees. Often, the heat index in New York is higher than the dry bulb temperature, and so offering employers the flexibility to measure and action off of the heat index will not compromise employee safety.

Moreover, in addition to actioning at a reasonable heat index threshold, employers should have flexibility to action off of a wet bulb globe temperature (WBGT) in outdoor conditions. WBGT is generally recognized as a good measure of heat stress outdoors. We recommend following the proposed federal rule in this respect. See proposed 29 C.F.R. § 1910.148.

4. Vehicle should be defined. The bill requires employers to provide air-conditioning in all “employer provided vehicles” but does not define “vehicle.” To remove ambiguity, the bill should clearly define “vehicle” and not require air-conditioning in vehicles where air-conditioning is not standard (such as certain aircraft ground support equipment).
5. Remove the rebuttable presumption of retaliation. The bill currently establishes a rebuttable presumption of unlawful retaliation if an employee’s employment is terminated within 90 days of a complaint made under the act. § 745(3). This is an outlier in the health and safety space. This provision would foster frivolous complaints and litigation. NY should align with federal law in this respect and remove the presumption. Per 29 U.S.C. § 660:

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1)

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2)

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3)

Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

If the presumption is retained, the time period should be shortened from 90 days to 30 days.

6. The bill should not require specific equipment. The bill requires employers to provide "necessary protective equipment" to "withstand temperatures at or exceeding the heat stress thresholds" in the bill "to the extent practicable." § 744(5). This requirement is problematic for several reasons:
   - The phrase "withstand temperatures at or exceeding the heat stress thresholds" is unworkable and ambiguous. Employers won't know how to determine what is necessary to enable employees to "withstand" particular temperatures.
   - Fans and air conditioning are listed, along with "anything additional deemed necessary by the [Department of Labor] to combat extreme heat." This is yet another outlier among heat rules. The controls specified elsewhere in the bill (water, shade, rest) are sufficient regulatory requirements. Employers should be empowered to implement additional controls of their choosing that fit the needs of their employees.
7. The bill should not be so prescriptive with respect to the proximity of shade to employees and minimum space per resting employee. The bill requires employers to provide shade "as close to the worksite as reasonably possible" and to provide at least four-square feet of shade per resting employee. § 744(3)(a). First, employers should not be subject to a citation if shade is reasonably close to the worksite but not as close "as reasonably possible." Second, it is unnecessary to prescribe this amount of space per employee. California requires sufficient room so that employees can sit in a normal posture fully in the shade without having to be in physical contact with each other. See California Code of Regulations, Title 8, section 3395(d)(1). California's approach is better.
8. An employer should not have to provide its plan to all employees. The bill requires an employer to provide its written plan to mitigate heat stress "to all employees and applicable labor organizations on an annual basis." § 746(2). Requiring an employer to provide its written plan to all employees imposes an unnecessary administrative

burden. The plan should be available to supervisors responsible for actioning the plan, and all affected employees should be trained on heat illness prevention in a manner consistent with the employer's plan.

9. The penalty provision should be clarified. The bill requires an employer to pay "penalties of no less than fifty dollars per day for failing to implement heat protection standards as set forth in this article." The bill should clarify that such penalties may only be assessed prospectively following notice from the NY Department of Labor that the Department alleges a violation and must end upon abatement of the alleged violation.

New York employers want to protect the safety and well-being of their employees and take seriously their obligations under OSHA. These bills – without consideration of the changes described above - do nothing to improve employee safety and only provide unnecessary and duplicative administrative and financial burdens on employers already struggling under a difficult business environment.

For these reasons, The Business Council opposes these bills.