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Legal Insights for Manufacturing: Labor & Employment

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Before a gathering of organized labor and government officials at the White House in September 2021, President Joseph Biden reiterated an intention that he had stated many times before: "I intend to be the most pro-union president leading the most pro-union administration in American history." On several scores he remained true to his aim, much to the chagrin of private businesses that are struggling to keep up with the labor-friendly policies implemented by the administration.

Perhaps no area of public policy and regulatory enforcement has been more exposed to regulatory whiplash—that is, swift policy U-turns from one administration to the next—than labor and employment. From novel interpretations of workplace safety to the expansion of the National Labor Relations Act's "protected concerted activity," the Biden administration has stridently advocated pro-labor positions, any of which could be subject to reversal under a new administration or by the courts.

Workplace Safety

Workplace safety has always been an intensely regulated area of employment law with particular relevance to manufacturers, and 2024 was no different. The Occupational Safety and Health Administration (OSHA) continued to propose and finalize rules that add significantly to the cost of compliance or otherwise complicate once-settled processes and procedures.

One of the highest-profile actions was the agency's so-called Walkaround Rule, which empowers employees to appoint individuals they deem fit to represent them during an inspection. This may be another worker or, notably, a

nonemployee. The new rule adds language that greatly expands third parties who might gain access to workplaces under the reasonable necessity standard, including those who possess "language or communication skills" deemed relevant by the OSHA inspector. Additionally, OSHA's inspectors will "have authority to resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of this section," which potentially removes administrative due-process constraints with which employers could contest OSHA's judgment regarding non-employee representatives.

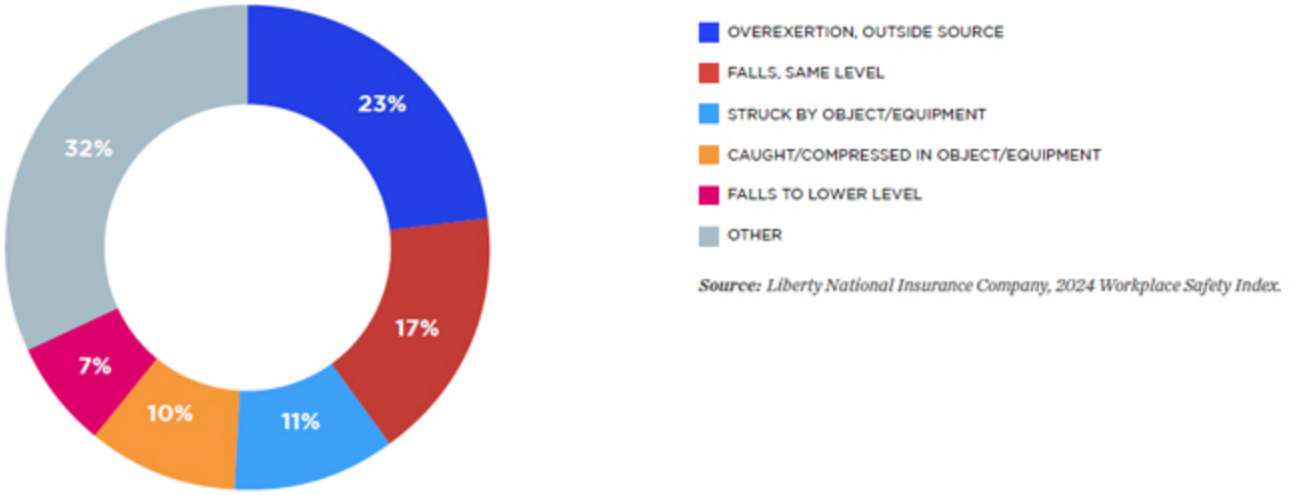
The rule is controversial in that it could provide a side door for union organizers to gain access to non-union workplaces. It has also been noted that the rule could provide the plaintiffs' bar with valuable insights to use in litigation against employers more generally. For these reasons and myriad others, the rule was targeted by industry and trade groups even before its effective date, with perhaps the most high-profile of these efforts being a federal lawsuit in Texas filed by the U.S. Chamber of Commerce, the National Association of Manufacturers, and Associated Builders and Contractors, Inc., among other plaintiffs.

In addition to the Walkaround Rule, OSHA pushed forward new workplace safety rules in 2024 that more directly impact current compliance efforts. In January, its final rule requiring new submissions of injury and illness data for certain employers in high-hazard industries took effect. The rule will require certain employers to electronically submit injury and illness information they must already maintain to OSHA directly. OSHA indicated in its press release that it intends to publish some of the data it collects from these submissions on its website "to allow employers, employees, potential employees, employee representatives, current and potential customers, researchers and the general public to use information about a company's workplace safety and health record to make informed decisions." OSHA has also indicated that "it will use this data to intervene through strategic outreach and enforcement to reduce worker injuries and illnesses in high-hazard industries." The new rule requires covered establishments with 100 or more employees to electronically submit information from their Form 300 and Form 301 to OSHA once a year. This submission is in addition to the obligation to submit Form 300A.

52,000

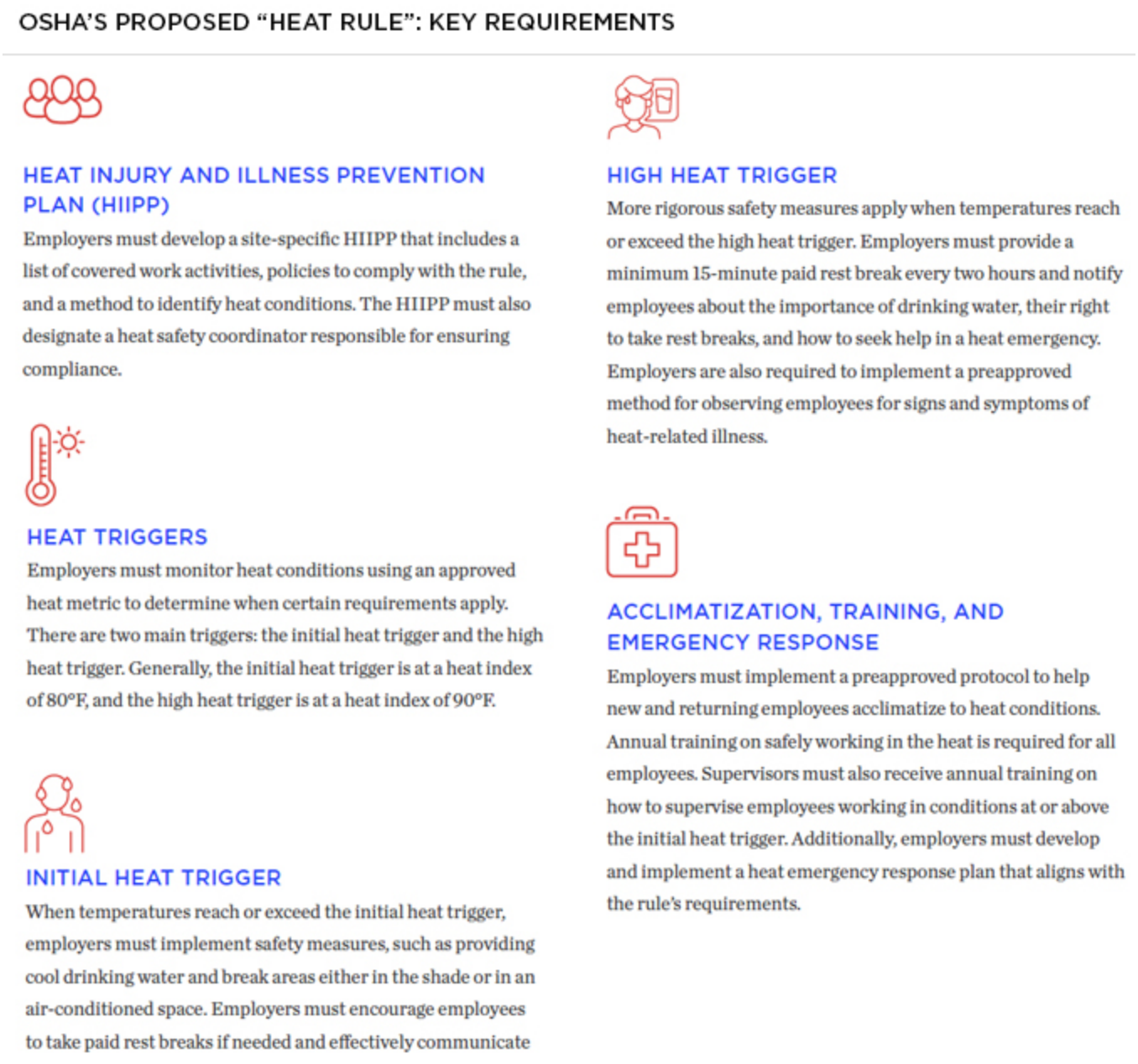
Number of employers impacted by OSHA's new revised rule concerning occupational injury and illness recordkeeping.

MANUFACTURING INDUSTRY TOP LOSS CAUSES
The U.S. manufacturing industry lost $7.53 billion due to workplace-related injuries last year.



Source: *Liberty National Insurance Company, 2024 Workplace Safety Index.*

After hinting at it for years, OSHA announced in July 2024 a proposed rulemaking that would establish comprehensive requirements for employers to protect employees from heat-related injuries. The proposed rule would apply to many manufacturing enterprises, with exemptions for activities involving minimal heat exposure, indoor work areas or vehicles consistently kept below 80°F through air conditioning, and certain emergency response operations. Telework and sedentary indoor activities are also exempt.



Wage & Hour Litigation Trends

Lawsuits filed in connection with the Fair Labor Standards Act (FLSA) have actually decreased over the past decade; however, settlement values have run conspicuously higher in recent years, topping an average of $1 million in 2023. Furthermore, the U.S. Department of Labor (DOL) has continued its

audit and enforcement activity, bolstered by larger staffs and budgets. In 2023, DOL's Wage and Hour Division recovered over $274 million in back wages and damages from private businesses, most of it connected to overtime violations.

Overtime Exemptions

In April 2024, the DOL implemented its final rule that raises the salary basis for overtime exemptions under the FLSA. Because the rule necessarily increases employee compensation and sets in motion changes to exempt classification criteria, it immediately faced challenges in federal court. In July, the U.S. District Court for the Eastern District of Texas granted an injunction requested by the State of Texas, preventing the DOL from enforcing its rule.

The injunction's scope is narrow; it applies only to individuals employed directly by the State of Texas and does not include private employees in Texas or any other jurisdictions, but the reasoning in the opinion—which suggests that the DOL lacks the authority to issue this rule—will likely have an impact on the pending and future legal challenges regarding the DOL's ability to enforce the rules against employers more broadly. Manufacturers should follow the overtime rule's status closely and be prepared to comply with it should court challenges fail. The two-step increase for the standard salary level requirement for executive, administrative, professional, and computer employees, if it stands, is substantial, with 2025 levels representing a 65 percent increase from the pre-rule level.

Independent Contractors

Traditionally, manufacturers have not relied heavily on independent contractors, but those who do should pay close attention to a DOL final rule issued in January 2024 that changes the methodology for determining whether a worker is an "employee" subject to FLSA or an independent contractor. This rule rescinds a Trump-era rule from 2021 and returns to a flexible "totality-of-circumstances" test to assess economic reality. The final rule took effect on March 11, 2024.

Just as DOL's withdrawal of the 2021 rule occasioned lawsuits from private businesses, the new rule was immediately targeted for litigation, and the fate of the rule remains in doubt.

PAGA Reform

In a rare bit of good news on the wage-and-hour front—at least, if you have operations in California—in June 2024, California Governor Gavin Newsom, alongside business and legislative leaders, announced a significant agreement to reform the state's Labor Code Private Attorneys General Act of 2004 (PAGA), which allows employees to bring enforcement actions against their employers on behalf of the state for alleged violations of the California Labor Code and provides employees with a 25 percent cut of the penalties assessed. As one might imagine, PAGA has been subject to abuse,

including the extraction of large settlements from employers for technical violations that did not cause any actual damage to an employee.

While the reforms do not remove PAGA as a source of worry for California-based manufacturers, they do allow employers to significantly reduce penalties if they take "all reasonable steps" to comply with the Labor Code, either before or within 60 days of receiving a PAGA notice. Thus, the cure provisions will likely become a significant part of responding to PAGA actions given the potential for substantial reductions in penalties.