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OSHA Publishes Proposed Heat Standard

On July 2, 2024, the Occupational Safety and Health Administration (OSHA) released its long-awaited Heat Injury and Illness Prevention standard which proposes protective measures OSHA has determined would significantly reduce heat-related injuries, illness and fatalities in the workplace. If finalized, the proposed standard would apply to all employers conducting outdoor and indoor work in all general industry, construction, maritime, and agriculture sectors where OSHA has jurisdiction. The proposed standard would more clearly set employer obligations and the measures necessary to protect employees from hazardous heat. Employers would be required to create a plan to evaluate and control heat hazards in their workplaces.

Specifically, the proposed standard would require employers to develop and implement a work site heat injury and illness prevention plan (HIIPP) with site-specific information to evaluate and control heat hazards in their workplaces and with input from nonmanagerial employees. The HIIPP must be in writing for employers with more than ten employees and must be made available to employees in a language they understand. Employers will need to re-evaluate the plan whenever a recordable heat-related injury or illness occurs and at least annually.

The proposed standard includes an initial heat trigger with a heat index of 80 degrees Fahrenheit, at which employers must provide drinking water that is suitably cool, break areas with cooling measures, and implement an acclimation protocol for new or returning employees. The high heat trigger of 90 degrees requires employers to provide employees with a minimum 15-minute paid rest break at least every two hours, observe employees for signs and symptoms of heat-related illness, and issue a hazard alert reminding employees to drink water and take breaks.

The proposed standard also requires significant recordkeeping and other administrative obligations. These include requiring employers to:

- Conduct regular heat risk assessments to evaluate the potential for heat exposure in different job roles and settings.

- Implement systems to monitor workplace temperature and humidity levels.
- Maintain records of monitoring data for at least six months.
- Maintain records of heat-related incidents.
- Conduct audits of heat safety measures to identify areas for improvement.
- Provide employee training on heat-related hazards.

As part of the HIIPP, the proposed standard requires employers to implement a heat emergency response plan that includes:

- Listing emergency phone numbers.
- Describing how employees can contact a supervisor and emergency medical services.
- Designating individuals to ensure heat emergency procedures are involved when appropriate.
- Describing procedures on how employees can be transported to a place where an emergency medical provider can reach them.
- Providing clear and precise directions to the workplace.
- Implementing procedures to respond when an employee is experiencing signs and symptoms of heat-related illness.

For more information on the proposed OSHA heat standard visit www.osha.gov/heat-exposure/rulemaking.

DOL Releases Fact Sheet/FAQ on Hauling of Aggregates

The NYS Department of Labor has released a Fact Sheet and Frequently Asked Questions (FAQ) regarding the application of the NYS prevailing wage to the hauling of aggregate supply construction material.

Both the Fact Sheet and FAQ provide needed clarity regarding under what circumstances the prevailing wage is required to be paid to drivers of trucks hauling aggregates, including exceptions to the prevailing wage requirements. Specifics are provided on what is considered a “worksites”, what is a “central stockpile”, and more information and examples concerning the “50-mile radius” rule.

Copies of the Fact Sheet and FAQ can be found at <https://dol.ny.gov/hauling-aggregate-supply-construction-materials>.



PRESIDENT'S MESSAGE

I hope all members are enjoying your summer months so far, with all the activities the warmer weather brings. Because we don't have regular membership meetings during the summer, while it might appear that NESCA is on "summer break", the association has actually been very busy behind the scenes preparing for the upcoming year.

Our committees have been meeting to plan educational programs, and the Board of Directors continues to explore new ways to enhance the value of your membership in NESCA. We are committed to ensuring that our offerings meet your expectations and contribute positively to your professional growth.

As usual, we have a calendar of activities planned for the coming year, and we encourage all of you to participate in as many ways as you can.

As of now, many members are looking forward to NESCA's "Day at the Races" in Saratoga on July 25th. This year we sold 415 tickets reflecting its ongoing popularity and success. By the time you read this message, I'm sure you will agree that a great time was had by all.

Just around the corner, NESCA will be hosting its 40th annual Golf Outing at Shaker Ridge Country Club. We literally sold this event out in a matter of weeks and will have approximately 250 golfers participating in the morning and afternoon flights. Events such as the Golf Outing allow members to visit with fellow subcontractors, suppliers and service providers and network in a relaxing, fun setting.

Our Trade Show Committee will soon be sending out exhibitor registration materials to members regarding NESCA's 43rd annual Trade Show which will be held October 10th at the Century House. This is another very popular event that will sell out quickly. If you would like to have an exhibit, I encourage you to return your registration form promptly. You don't want to miss out on this excellent opportunity.

As we navigate the ebbs and flows of our industry, the importance of partnerships cannot be overstated. The search for a dependable labor force remains a significant hurdle, and we are reminded of the critical role each of us plays in our collective efforts. Amidst the ongoing challenge of securing skilled labor and navigating the countless changing construction laws, NESCA is always at the forefront in an effort to prepare us for the challenges.

I want to give special thanks to a few NESCA companies who have helped me along the way and who still, in my opinion, have made agreements and stuck by them. Debrino Caulking, PCC Contracting, Schenectady Steel, Frank J Ryan & Sons, TEC Protective Coatings, Teal Becker & Chiamonte, Hinman Howard & Kattell and Janice Miller formerly of Mac Equipment, to name a few. These folks, some of them competitors, have given me advice or showed me different aspects of business that have helped me grow over the years. For me, this is what NESCA is about.

Attending monthly membership meetings and events presents different opportunities to meet people and their businesses some of us otherwise wouldn't. At our events members share and receive information that can potentially help our businesses grow.

Finally, a hearty thank you to all members who have remitted their 2024-25 membership dues. Your continued support of NESCA through the renewal of your membership will allow the association to continue to offer the exceptional benefits we all enjoy.

Bryan Berry, President

NESCA NEWSLETTER

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INSIDE 300 FIRMS 2024

ALBANY BUSINESS REVIEW BEST PLACES TO WORK

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TOP WORK PLACES 2024



COUNSEL'S MESSAGE

Most subcontracts contain language which requires a subcontractor to perform work it may consider outside the subcontract scope, or otherwise disputed, upon receipt of a written directive to perform from either the Prime Contractor or the project Owner.

Those same subcontracts frequently provide that performance of additional work absent a signed change order results in a waiver of claim for additional compensation.

Absent an executed change order, executed construction change Directive, or contractually required written notice of claim being made, the subcontractor may end up being contractually required to perform work for which it may not be paid.

It is imperative for a subcontractor to obtain a written work directive to perform extra or disputed work if a written change order is not issued prior to commencing the additional work.

Even with an authorized written work directive, the subcontractor will likely be compelled to absorb the cost

of performing the extra work until well after its physical completion and closer to the end of the job or resolution of any dispute.

If a subcontractor refuses to perform disputed work after receipt of a written directive from the Prime Contractor, it risks its subcontract being terminated for cause and being exposed to damages for the cost of subcontract completion.

One method of limiting the obligation to absorb up front cost of performing additional work is to negotiate a requirement for a fully executed written change order within 45 days of physical completion of the additional work.

If the dispute involves a question whether the additional work is within the subcontract work parameters a contract clause can be incorporated providing for submission of the dispute to expedited arbitration.

Whether the issue is an unrealistic schedule, withholding of contract funds when a performance bond has been provided, supplementing the work force when labor is unavailable or contract terms requiring work acceleration or work performance out of sequence without fault of the subcontractor, contract terms and conditions can be developed to mitigate cost and hardship to the contractor and subcontractor.

In essence many troublesome project work issues are capable of being addressed at the time the subcontract is negotiated. The parties need to be prepared to accept terms and conditions for a balanced subcontract.

Walter G. Breakell, NESCA Legal Counsel

Question of the Month

Q. What is the difference between a “pay-when-paid” vs. a “pay-if-paid” clause?

A. A “pay-when-paid” clause merely fixes the time for payment and does not contain express language imposing a condition on the general contractor’s legal responsibility to pay the subcontractor. The provision, “contractor shall pay the subcontractor within 30 days after contractor’s receipt of payment from the owner” is an example of a “pay-when-paid” clause. A “pay-if-paid” clause, on the other hand, forces the subcontractor to expressly accept the credit risk of owner default/non-payment to the contractor. The provision, “contractor’s receipt of payment from the owner is a condition precedent to contractor’s obligation to pay the subcontractor” is an example of a “pay-if-paid” clause. While a “pay-when-paid” clause may cause a subcontractor to wait (for a reasonable period of time) until the general contractor receives payment from the owner before receiving payment, the subcontractor’s legal entitlement to payment will still be preserved. A “pay-if-paid” clause, on the other hand, means that receipt of payment by the contractor from the owner is a condition that must be met before payment by the contractor to the subcontractor is legally required. A very important distinction between a “pay-when-paid” clause and a “pay-if-paid” clause is that “pay-if-paid” clauses were outlawed by the NYS Court of Appeals in December 1995. In *West-Fair Electric Contractors et al. v. Aetna Casualty & Surety Company et. Al.* the Court determined that the general contractor’s liability to pay a subcontractor is not contingent upon the contractor having first received payment from the owner, thereby barring the enforceability of true contingent payment or “pay-if-paid” clauses.

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Roger H. Jones Scholarship Award Winners Announced

The NESCA Educational Foundation has announced that Roger H. Jones NESCA Scholarships have been awarded to each of ten deserving students enrolled in construction-related programs of study at accredited two-year or four-year colleges or universities for the 2024-25 academic year. As follows are this year's scholarship winners.

Name	College or University	Major
Eric Boggs	Dutchess CC	Construction Management
Ashley Boyd	SUNY Buffalo	Civil Engineering
Aiden Carl	Hudson Valley CC	Construction Management
Luke Hughston	Broome CC	Engineering Science
Tyler Hutchison	Hobart & Wm Smith	Engineering
Kirsten Litchfield	Union College	Geosciences
Michael Miciotta	Queens University Ontario	Mechanical Engineering
Ahlan Salamah	SUNY Ulster	Green Bldg. Management
Kloe Verdi	Penn. Tech	Welding/Testing
Garrett Wardwell	SUNY Cobleskill	Diesel Tech Power Systems

Congratulations to all ten scholarship winners! Scholarship applications for the 2025-26 academic year will be made available in January 2025. NESCA members are encouraged to contribute to the NESCA Educational Foundation to help fund scholarships for future applicants.

Help NESCA Grow – Win Big!

If you've benefited from your membership in NESCA, then there must be other commercial, industrial and public work subcontractors and suppliers you know who would also benefit by becoming a member. NESCA is renewing our annual membership recruitment drive that will run through the end of our fiscal year on June 30, 2025. This campaign gives every member of NESCA the opportunity to win cash while helping the association to grow stronger!

Rules of the Campaign

- For each and every new member you sponsor, you'll win \$100 cash!
- For every new member your sponsor after three new members, you'll win \$200 cash!
- All members who sponsor three or more new members will also be eligible for a special prize drawing at the end of the year!

The next time you are on a jobsite, please talk to subcontractors or suppliers who are not currently members of NESCA, let them know about all the things membership in NESCA has to offer, and see if you can get them to consider joining. If you would like a membership information packet to be sent to a subcontractor or supplier you believe should become a member of NESCA, please contact the NESCA office at 518-869-9800. Remember, when they join, you win!

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