RECLAIMING OSHA'S MISSION: ENSURING SAFETY WITHOUT OVERREACH

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINETEENTH CONGRESS

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C O N T E N T S

RECLAIMING OSHA'S MISSION: ENSURING SAFETY WITHOUT OVERREACH

Thursday, May 15, 2025

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:17 a.m., in Room 2175, Rayburn House Office Building, Washington, DC, Hon. Ryan Mackenzie (Chairman of the Subcommittee) presiding.

Present: Representatives Mackenzie, Messmer, Grothman, Comer, Miller, Walberg, Omar, Stevens, Casar, and Scott.

Also present: Representative Kiley.

Staff present: Vlad Cerga, Director of Information Technology; Libby Kearns, Press Assistant; Katerina Kerska, Legislative Assistant; Trey Kovacs, Director of Workforce Policy; Campbell Ladd, Clerk; R.J. Laukitis, Staff Director; Danny Marca, Director of Information Technology; Brad Mannion, Professional Staff Member; John Martin, Deputy Director of Workforce Policy/Counsel; Audra McGeorge, Communications Director; Alexis Morgan, Intern; Daniel Nadel, Legislative Assistant; Ethan Pann, Deputy Press Secretary and Digital Director; Kane Riddell, Staff Assistant; Carl Rifino, Intern; Sara Robertson, Press Secretary; Ann Vogel, Director of Operations; Ali Watson, Director of Member Services; Joe Wheeler, Professional Staff Member; James Whittaker, General Counsel; Ilana Brunner, Minority General Counsel; Ni'Aisha Banks, Policy Aide & Internship Coordinator; Patrick Jo, Minority Intern; Jessica Schieder, Minority Economic Policy Advisor; Dhrtvan Sherman, Minority Research Assistant; Bob Shull, Minority Senior Labor Policy Counsel; Raiyana Malone, Minority Press Secretary; Kevin McDermott Minority Director of Labor Policy; Marie McGrew, Minority Press Assistant; Véronique Pluviose, Minority Staff Director; Banyon Vassar, Minority Director of IT.

Chairman MACKENZIE. The Subcommittee on Workforce Protections will come to order. I note that a quorum is present. Without objection, the Chair is authorized to call a recess at any time. Today's hearing will review the Occupational Safety and Health Administration's activity under the previous administration, and we will also explore common sense solutions that can return OSHA to fulfilling its purpose of advancing workplace safety.

OSHA's mission is to ensure the hardworking men and women of this Nation are given safe and healthy working conditions. The agency fulfills this mission by setting and enforcing safety standards, and by providing education, outreach and compliance assist-

ance to both employers and employees. When necessary, OSHA's enforcement efforts include monetary and even criminal penalties, all with the goal of protecting workers.

That mission is critically important. However, in recent years we have seen a regulatory approach that in many cases may have gone beyond OSHA's statutory authority under the Occupational Safety and Health Act. While these actions may have been well intentioned, they often created confusion or imposed overly broad mandates that did not meet the realities of the industries affected, especially for small businesses.

For example, OSHA's attempt to implement a nationwide COVID vaccine mandate, later struck down by the U.S. Supreme Court, raised serious concerns about Federal overreach. In 2024, the agency issued a Worker Walk Around Rule, which opened the door to third-party individuals, even those without workplace safety backgrounds, entering jobsites to do safety inspections.

The proposed heat standard, while addressing a real concern, takes a one size fits all approach that fails to account for a wide range of conditions, and different industries and regions. We have also seen an expansion of enforcement tools, such as the Severe Violate Enforcement Program, and the Instance-by-Instance Citation Policy that may reflect a view of employers as adversaries, rather than partners in workplace safety.

That is a misguided perspective. Obviously, small businesses succeed when their employees succeed, and most of their employers take workplace safety very seriously. OSHA's mission is too important to be undermined by overreach. As the nature of work continues to change, broad-based regulatory efforts can unintentionally create more problems than they solve.

That is why today's conversation is so critically important. For instance, the tree care industry has petitioned for the creation of a Federal tree care standard for nearly two decades. This is one of the most dangerous industries in the Nation, but workers currently rely on a patchwork of standards that do not adequately address the unique challenges of the work being performed.

Similarly, because of technological advances with equipment and machinery, OSHA should update its 35-year-old standard on the control of hazardous energy, otherwise known as the lockout, tagout standard.

While we saw progress on both fronts, under the first Trump administration, now is the time to push for these solutions to be resolved. Republicans, under this American economy, and this administration, we know that American flourishes when workers flourish.

I look forward to the hearing for today's witnesses, so that they can bring about their knowledge, and share with us what can be improved from the past 4 years, the lessons that we have learned, and how we can keep OSHA focused on its core mission of keeping America's workers safe. With that, I yield to my Ranking Member for an opening statement.

[The Statement of Chairman Mackenzie follows:]

COMMITTEE ON EDUCATION & WORKFORCE
CHAIRMAN TIM WALBERG

COMMITTEE STATEMENT

Opening Statement of Rep. Ryan Mackenzie (R-PA), Chairman
Subcommittee on Workforce Protection
"Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"
May 15, 2025

(As prepared for delivery)

Today's hearing will review the Occupational Safety and Health Administration's (OSHA) activity under the previous administration and will also explore common-sense solutions that can return OSHA to fulfilling its purpose of advancing workplace safety.

OSHA's mission is to ensure the hard-working men and women of this nation are given safe and healthy working conditions. The agency fulfills this mission by setting and enforcing safety standards and by providing education, outreach, and compliance assistance to both employers and employees. When necessary, OSHA's enforcement efforts include monetary and even criminal penalties —all with the goal of protecting workers.

That mission is critically important. However, in recent years, we've seen a regulatory approach that, in many cases, may have gone beyond OSHA's statutory authority under the Occupational Safety and Health Act. While these actions may have been well-intentioned, they often created confusion or imposed overly broad mandates that didn't meet the realities of the industries affected—especially for small businesses.

For example, OSHA's attempt to implement a nationwide COVID vaccine mandate—later struck down by the Supreme Court—raised

serious concerns about federal overreach; In 2024, the agency issued the "worker walkaround" rule, which opens the door to third-party individuals—including union representatives with no workplace safety background—entering jobsites; And the proposed heat standard, while addressing a real concern, takes a one-size-fits-all approach that fails to account for the wide range of conditions across different industries and regions.

We've also seen an expansion of enforcement tools, such as the Severe Violator Enforcement Program and the instance-by-instance citation policy, that may reflect a view of employers as adversaries rather than partners in workplace safety. That's a misguided perspective. Small businesses succeed when their employees succeed, and most of these employers take worker safety seriously.

OSHA's mission is too important to be undermined by overreach. As the nature of work continues to change, broad-based regulatory efforts can unintentionally create more problems than they solve. That's why today's conversation is so important.

For instance, the tree care industry has petitioned for the creation of a federal tree care standard for nearly two decades. This is one of the most dangerous industries in the nation, but workers currently rely on a patchwork of standards that do not adequately address the unique challenges of the work being performed.

Similarly, because of technological advancements with equipment and machinery, OSHA should update its 35-year-old standard on the control of hazardous energy, otherwise known as the lockout/tagout standard. While we saw progress on both fronts under the first Trump administration, now is the time to push
these solutions forward. Republicans understand that America flourishes when her workers flourish.

I look forward to hearing from today's witnesses about what can be improved from the past four years, the lessons we've learned, and how we can keep OSHA focused on its core mission of keeping America's workers safe.

With that, I yield to the Ranking Member for an opening statement.

Ms. OMAR. Thank you, Chairman, and thank you to our witnesses for your testimony today. Over the past 100 days, President Trump and his administration have decimated the very agencies and resources that have kept workers safe and healthy. Now, Committee Republicans are following suit by holding this hearing to attack the work of the Occupational Safety and Health Administration.

We should all be able to recognize a basic truth. No job should ever be a death sentence. Workers deserve to come home to their families at the end of the day, not in pain, not in fear, but alive and well. To protect that fundamental right, Congress passed landmark safety laws and established important agencies, like OSHA, the Mine Safety and Health Administration, and the National Institute for Occupational Safety and Health.

All of these three agencies have been chronically underfunded since their inception, and largely because of that, they have long struggled to robustly defend workers from preventable injuries, illnesses, and death at work. In the 54 years since it was established, OSHA has made great strides, but it remains hamstrung by an overly complicated regulatory process, persistent underfunding, and the long uphill battle of updating standards to reflect scientific advances.

Despite these constraints, OSHA took action during the Biden administration and proposed commonsense safeguards, like the Heat Stress Rule, to prevent tragedies in the workplace. Rather than build on that progress, the Trump administration is now threatening to dismantle any government program or agency that prioritizes workers' health and protects workers on the job.

At one point, DOGE targeted at least 11 OSHA field offices to be permanently shut down, including the only office in Louisiana, located in what is known as "Cancer Alley", due to the presence of over 200 chemical plants and the high rates of cancer in the area.

MSHA has at least 30 field offices slated for closure on DOGE's hit list, including an office created in response to the Upper Big Branch Mine Disaster. While we face a surge in child labor violations, DOGE is still cutting staff and planning to close 20 Wage and Hour Division offices.

Shutting down field offices will endanger workers' lives by cutting off the public from DOL's most vital services. This also means severely limiting the geographic coverage of inspectors and investigators' enforcement activities against law-breaking companies and further straining an already resource strapped DOL.

It does not stop here. On April 1st, nearly the entire NIOSH workforce was placed on leave with the promise of being fired later this summer by HHS Secretary Kennedy.

In one sweeping move, Secretary Kennedy put 50 years of scientific expertise and public health research at risk. DOGE kicked out NIOSH's staffers, paid them to not work, and then after realizing that effectively eliminating NIOSH was a mistake, the Trump administration started to reverse course and re-hired only some of those staff.

This entire circus is wasteful, expensive, and harmful for workers—a description that could only apply to most of DOGE's actions. Workers are not expendable. They are not statistics. OSHA and NIOSH do the essential work of keeping workers safe. We must fund them properly and strengthen the laws that support their mission.

In my own district, we are already feeling the consequences of these cuts. The University of Minnesota's Midwest Center for Occupational Health and Safety is one of just 18 NIOSH-funded Education and Research Centers in the Nation. It trains the next generation of workplace safety experts in the region and helps protect our workers in high-risk industries. Without NIOSH, the invaluable research and workforce development provided by that center and others like it across the country will be lost.

That means fewer trained medical and safety professionals, less research capacity to prevent fatal accidents, and ultimately more injuries, more deaths, and more grieving families.

Democrats are committed to honoring those workers who have been harmed or killed on the job, not just with words, but with action to change the system.

Recently, Ranking Member Scott, Representative Courtney, and I reintroduced the Protecting America's Workers Act, a bill that would make long overdue improvements to the enforcement of the Occupational and Safety and Health Act. This bill would expand coverage to millions of workers currently excluded from the law's protections and strengthen whistleblower protections. These reforms are critical to preventing the most serious violations that endanger worker safety.

Democrats are also championing legislation to protect health care and social workers from violence, to make mining safer, and to prevent illness, injury from extreme heat. This is what it means to have an agenda to ensure safety.

With that in mind, I hope that we can have a productive discussion today. Thank you, and I yield back.

[The Statement of Ranking Member Omar follows:]

ED & WORKFORCE DEMOCRATS

OPENING STATEMENT

House Committee on Education and Workforce
Ranking Member Robert C. "Bobby" Scott

Opening Statement of Ranking Member Ilhan Omar (MN-05)
Subcommittee on Workforce Protections
"Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"
Thursday, May 15th, 2025 | 10:15 a.m.

Thank you, Chairman, and thank you to our witnesses for your testimony today.

Over the past 100 days, President Trump and his administration have decimated the very agencies and resources that keep workers safe and healthy. Now, Committee Republicans are following suit by holding this hearing to attack the work of the Occupational Safety and Health Administration.

We should all be able to recognize a basic truth: no job should ever be a death sentence. Workers deserve to come home to their families at the end of the day- not in pain, not in fear, but alive and well.

To protect that fundamental right, Congress passed landmark safety laws and established important agencies like OSHA, the Mine Safety and Health Administration, and the National Institute for Occupational Safety and Health. But all three of these agencies have been chronically underfunded since their inception. And, largely because of that, they have long struggled to robustly defend workers from preventable injuries, illnesses, and death at work.

In the 54 years since it was established, OSHA has made great strides, but it remains hamstrung by an overly complicated regulatory process, persistent underfunding, and the long, uphill battle of updating standards to reflect scientific advances.

Despite these constraints, OSHA took action during the Biden Administration and proposed common-sense safeguards, like the heat stress rule, to prevent tragedies in the workplace. Rather than build on that progress, the Trump Administration is now threatening to dismantle any government program or agency that prioritizes workers' health and protects workers on the job.

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Shutting down field offices will endanger workers' lives by cutting off the public from DOL's most vital services. This also means severely limiting the geographic coverage of inspectors' and investigators' enforcement activities against law-breaking companies and further straining an already resource-strapped DOL. And it doesn't stop here.

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DOGE kicked out NIOSH staffers, paid them to *not* work, and then – after realizing that effectively eliminating NIOSH was a mistake – the Trump Administration started to reverse course and rehire only *some* of those staffers. This entire circus was wasteful, expensive, and harmful for workers; a description that could apply to most of DOGE's actions.

Workers are not expendable. They are not a statistic. OSHA and NIOSH do the essential work of keeping workers safe. We must fund them properly and strengthen the laws the support their mission.

In my own district, we are already feeling the consequences of these cuts: The University of Minnesota's Midwest Center for Occupational Health and Safety is one of just 18 NIOSH-funded Education and Research Centers in the nation. It trains the next generation of workplace safety experts in the region and helps protect our workers in high-risk industries.

Without NIOSH, the invaluable research and workforce development provided by that Center—and others like it across the country—will be lost. That means fewer trained medical and safety professionals, less research capacity to prevent fatal accidents, and, ultimately, more injuries, more deaths, and more grieving families.

Democrats are committed to honoring those workers who have been harmed or killed on the job, not just with words, but with action to change the system.

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This is what it means to have an agenda to ensure safety. And with that in mind, I hope that we can have a productive discussion today.

Thank you, and I yield back.

Chairman MACKENZIE. Pursuant to Committee Rule 8–C, all members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., 14 days after this hearing. Without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material noted during the hearing to be submitted for the official hearing record.

I note that the Subcommittee—there may be some of my colleagues who are joining who are not permanent members of the

Subcommittee, they may be waiving on for the purpose of today's hearing.

Now, for the introduction of witnesses, I will start. Our first witness is Mr. Jake Parson, the President of the Northeast Division of CRH Americas Materials in West Hartford, Connecticut, testifying on behalf of the National Association of Manufacturers.

Our second witness is Mr. Ben Tresselt, the President and Owner of Arborist Enterprises in Lancaster, Pennsylvania, testifying on behalf of the Tree Care Industry Association.

Our third witness is Mr. Jordan Barab, the former Deputy Assistant Secretary of OSHA from Takoma Park, Maryland. Our final witness is Ms. Felicia Watson, Senior Counsel for Littler Mendelson in Washington, DC.

We want to thank all of our witnesses for being here today, and we look forward to each of your testimoneys. Pursuant to Committee rules, I will ask that each of you limit your oral testimony to a 3-minute summary of the written testimony that you provided. The clock will count down from 3 minutes as Committee members have many questions for you, and we will—we would like to spend our time doing as many questions as possible.

Pursuant to Committee Rule 8–D, the Committee practice, however, is that we will not cutoff testimony until you reach the 5-minute mark. I would like to also remind the witnesses to be aware of their responsibility to provide accurate information to the Subcommittee, and with that, I will recognize our first testifier today, Mr. Parson, you can please begin.

STATEMENT OF MR. JAKE PARSON, PRESIDENT, NORTHEAST DIVISION, CRH AMERICAS MATERIALS, WEST HARTFORD, CONNECTICUT, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS.

Mr. PARSON. Good morning, Chairman Mackenzie, Ranking Member Omar, and members of the Subcommittee. As you have said, my name is Jake Parson, and I am proud to serve as the Division President for the Northeast Division of CRH Americas Materials.

In 1952, my great grandfather founded Jack B. Parson Companies in Brigham City, Utah, with a simple, but powerful ambition, to build and to make a difference. That spirit has guided four generations of our family in the construction materials industry, and I carry it with me in my role at CRH today.

CRH is the largest building materials company in the world. Our 50,000 employees across 48 states helped build the infrastructure you depend on, and craft the backyards you enjoy.

You may not know us as CRH, but you might know us as Pennsy Supply in Pennsylvania, Michigan Paving in Michigan, Mulzer in Indiana and Hinkle in Kentucky. CRH takes great pride in our local communities and takes our responsibility very seriously to ensure the safety of our employees and our subcontractors.

Common sense labor policies support manufacturing operations and empower the American worker, but recent actions by the Department of Labor threaten to impose unworkable rules that do very little to improve safety. If we want to grow manufacturing in

the U.S., we need to rebalance regulations that costs manufacturers 350 billion every year.

This is real money that could be spent on hiring people, building new facilities, and creating new products. OSHA has put forward costly rules that ignore the complexity of U.S. manufacturing.

One problematic regulation is the proposed Heat Rule. A one size fits all heat standard ignores the work manufacturers already do to protect our employees, and it ignores the unique ways in which it is done.

When it comes to heat, what makes sense for Maine does not make sense in Texas. During my time leading an asphalt production and paving business in Texas, I saw firsthand how extreme heat impacts our teams, and how local expertise and adaptive safety measures are critical. Now, overseeing similar operations in the northeast, I face a completely different climate, and set of challenges.

Any standard must reflect the realities of our industry, and the diverse environments in which we operate. The proposed rule imposes significant mandates on manufacturers, without fully grappling with, or understanding whether they are feasible or cost-effective. The result would be reduced production, and ultimately fewer jobs.

We can do better. Working together, manufacturers will continue to communicate best practices already in place to protect our employees. Collaboration is going to become increasingly important. This is the best path forward to keep workers safe and grow our economy. I am proud to continue my family's tradition, leading thousands of Americans, workers at CRH.

Manufacturers in America provide safe, well-paying jobs that strengthen our communities. We will continue to support OSHA in its mission of safety and provide this Committee with the input you need to make sound policy. Working together, we can enhance our Nation's economic competitiveness and empower the American worker.

Thank you for inviting me to testify today, and I look forward to your questions.

[The Statement of Mr. Parson follows:]

Testimony of Jake Parson
President, Northeast Division, CRH Americas Materials, Testifying on Behalf of the National Association of Manufacturers

U.S. House of Representatives
Subcommittee on Workforce Protections

"Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"
May 15, 2025

Chairman Mackenzie, Ranking Member Omar, and members of the Subcommittee, my name is Jake Parson, and I am proud to serve as President of the Northeast Division of CRH Americas Materials, overseeing operations across 10 states from Maine to Maryland. In 1952, my great grandfather founded Jack B. Parson Companies with a simple but powerful ambition: to build and to make a difference. That spirit of hard work, responsibility, and contribution to society has guided four generations of our family in the construction materials industry. Today, I carry that same ambition in my role at CRH, leading thousands of employees who build and maintain the roads, bridges, and infrastructure our communities rely on every day.

CRH is the largest building materials company—crushed stone, cement, ready-mix concrete, hot mix asphalt, pipe and precast, as well as products you know and use in your backyard—and while you may not know us as CRH, you very likely know us as Michigan Paving & Materials and Cadillac Asphalt in Michigan, Hinkle Contracting in Kentucky, Texas Materials in Texas, and Mulzer Crushed Stone in Indiana. Our 50,000 employees across 48 states and over 3,000 operating locations help build the roads and bridges you drive on, deliver the water you drink, and craft the backyards you enjoy. CRH takes great pride in our local communities and takes very seriously our responsibility to ensure the safety of our employees and subcontractors.

Manufacturers like CRH are committed to creating safe work environments for the 13 million people who make things in America—with 99% of manufacturing leaders agreeing that safety is

important to company culture, according to a recent survey[1]—all while providing stable jobs, competitive pay, and contributing $2.93 trillion to the U.S. economy.[2] Cooperation between manufacturers and employees on safety is key to lower incidents of injury and illness and to maintaining high rates of job satisfaction throughout the industry.[3,4] This is certainly true at CRH, where we take safety seriously from an employee's first day on the job.

Commonsense labor policies are critical to supporting manufacturing operations and empowering the American worker, sustaining the industries and workers that underpin our nation's prosperity. But regulatory actions by the Department of Labor threaten to impose unrealistic—and in one case unconstitutional—requirements that do little to improve safety, instead adding to the more than $350 billion in annual compliance costs that manufacturers face as a result of federal regulations.[5] If we want to grow manufacturing here in the U.S., we need to rebalance regulations that harm the ability of companies like CRH to compete and manufacturing workers' ability to thrive.

OSHA Heat Standard

A problematic rulemaking for manufacturers is the proposed regulation from the Occupational Safety and Health Administration establishing a standard for employers to measure, record, and control for heat in their workplaces. As the National Association of Manufacturers wrote in its comments on the proposed rule, manufacturers in the U.S. already dedicate significant

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[1] Chad Moutray and Anjana Radhakrishnan. *The Manufacturing Experience: The Role of Culture and Employee Engagement in Workforce Attraction and Retention* (Manufacturing Institute, September 2023). *Available at* https://www.themanufacturinginstitute.org/wp-content/uploads/2023/09/COLONI1.pdf

[2] National Association of Manufacturers, https://nam.org/mfgdata/

[3] *Manufacturers are looking to improve the frontline employee experience. Here's how.* (PricewaterhouseCoopers, November 2023). *Available at* https://themanufacturinginstitute.org/research/frontline-employee-experience/#access-the-report

[4] *Manufacturing Engagement and Retention Study*. (Manufacturing Institute and American Psychological Association, 2021). *Available at* https://themanufacturinginstitute.org/research/manufacturing-engagement-and-retention-study/

[5] Nicole V. Crain and W. Mark Crain. *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*. (National Association of Manufacturers, October 2023). *Available at* https://nam.org/issues/regulatory-and-legal-reform/cost-of-regulations/#crains

resources to protect their employees from hazardous heat, using tailored approaches with various measurements and controls to mitigate the effects of heat exposure while sustaining productivity.[6] These protections are required by law under the general duty clause of the Occupational Safety and Health Act and are also the right thing to do for the health and safety of manufacturing workers.[7]

The proposed heat rule misses the mark, however. It mandates one-size-fits-all requirements for manufacturers, despite the fact that companies across our industry have unique production processes and operate in different parts of the country. When it comes to heat, what makes sense for Maine will not make sense for Texas.[8] The proposed rule fails to account for these important geographic and climate differences. Instead, it establishes uniform heat triggers and controls, based on insufficient evidence. This runs counter to OSHA's practice of recognizing location-specific workplace hazards and is impractical for manufacturers in certain regions and particular industries.[9] This would put manufacturers in the position of having to reorient or remove all together certain production processes, resulting in harmful impacts on operations During my time leading an asphalt production and paving business in Texas, I saw firsthand how extreme heat impacts our teams and how local expertise and adaptive safety measures are critical. Now, overseeing similar operations in the Northeast, I face a completely different climate and a different set of challenges. A one-size-fits-all standard simply does not reflect the realities of our industry or the diverse environments in which we operate. Our people are the foundation

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[6] *Comment Letter on Notice of Proposed Rulemaking for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* (National Association of Manufacturers, January 14, 2025), https://www.regulations.gov/comment/OSHA-2021-0009-25315

[7] Occupational Safety and Health Administration, https://www.osha.gov/laws-regs/oshact/section5-duties

[8] Secretary of Labor v. United States Postal Service, Nos. 16-1713, 16-1872, 17-0023, 17-0279 (OSHRC. Feb. 17, 2023). Available at: https://www.oshrc.gov/assets/1/18/U.S.P.S.%5E16-1713%5E16-1872%5E17-0023%5E17-0279%5ECommission_Decision_and_ALJ_Decisions.pdf?12255

[9] Occupational Safety and Health Administration, https://www.osha.gov/enforcement/directives/lep

of everything we do. It is our duty to protect them not with rigid mandates, but with practical, localized solutions that truly keep them safe.

The rule also imposes significant compliance burdens on manufacturers, which depend on a responsive workforce to maintain operations and increase production when necessary to meet demand. These include mandates related to rest breaks, acclimatization, and monitoring. For example, certain manufacturing processes are continuous, necessitating employees to always monitor a line. However, the proposed rest breaks above the initial high heat trigger would require these employees to step away multiple times during a shift and for another employee to take their place. Any rulemaking must account for such cost increases. Failing to do so will result in lower productivity and a decrease in American manufacturing competitiveness.

Were OSHA to continue to pursue a rule establishing a heat standard, manufacturers would need to provide further input to communicate best practices already in place to protect employees and point out potential implementation issues. At the very least, any final rule should:

- Adopt a performance-oriented approach that allows employers to tailor controls according to their respective workplaces;
- Conduct a rigorous review to determine regional variations in incidents of heat-related illness;
- Account for the implications of any final rule on employers' operations—in particular, by thoroughly determining the economic and technological feasibility of any proposed controls;
- Consider workforce availability and labor costs associated with hiring additional employees in any economic feasibility analysis;
- Assess the impact of any final rule on the movement of freight; and

- Preclude any references to employee representatives.

OSHA Walkaround

The recent rule from OSHA making changes to the walkaround representative designation process is another example of regulatory overreach. As the NAM wrote in its comments on the proposed rulemaking, the walkaround rule infringes on the constitutional rights of employers and conflicts with our nation's foundational labor laws.[10] While the OSH Act and agency precedent allowed experts and consultants to accompany inspections as reasonably necessary, the walkaround rule opens this right to nonemployee representatives based on tangential qualifications. It exposes employers' facilities to antagonistic third parties and puts OSHA inspectors in the untenable position of adjudicating collective bargaining disputes, undermining the agency's focus on safety. Manufacturers are working to block this unconstitutional and overreaching rule.

Lockout/Tagout Standard

As stated, manufacturers are committed to protecting our employees from workplace hazards. A cooperative approach to safety—rather than punitive enforcement[11]—promises to yield long-term improvements based on best practices. One area for potential cooperation is in improvements to the control of hazardous energy. The NAM and members of the Council of Manufacturing Associations engaged with OSHA as part of a 2019 request for information on modernization of the lockout/tagout standard.[12] In those comments, manufacturers expressed

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[10] *Comment Letter on Notice of Proposed Rulemaking for Worker Walkaround Representative Designation Process* (National Association of Manufacturers, November 13, 2023), https://www.regulations.gov/comment/OSHA-2023-0008-1953

[11] Occupational Safety and Health Administration, https://www.osha.gov/memos/2023-01-26/application-of-instance-by-instance-penalty-adjustments

[12] *Comments on OSHA's Request for Information on the Control of Hazardous Energy (Lockout/Tagout)* (National Association of Manufacturers, Council of Manufacturing Associations, August 19, 2023). https://documents.nam.org/ERP/NAMCMA LOTO RFI Comments 8.19.19.pdf

willingness to collaborate with the agency and share best practices on ways to account for technological advances in equipment and the impact of those advances on the lockout/tagout standard, including through permitting the use of control circuit type devices. Real world experiences from the shop floor are the best way to understand the impact of regulation on manufacturing operations.

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I am proud to come from a long line of manufacturers and to continue that tradition leading thousands of American manufacturing workers at CRH. Manufacturers in America provide safe, well-paying jobs that strengthen our communities. We will continue to support OSHA in its mission of safety and provide members of this committee with information to legislate and perform effective oversight of our nation's labor laws. Through collaboration, we can enhance our nation's economic competitiveness and empower the American worker.

Thank you for inviting me to testify today and share our story. I look forward to your questions.

Chairman MACKENZIE. Thank you. I now recognize Mr. Tresselt for your testimony.

STATEMENT OF MR. BEN TRESSELT, PRESIDENT AND OWNER, ARBORIST ENTERPRISES, LANCASTER, PENNSYLVANIA ON BEHALF OF THE TREE CARE INDUSTRY ASSOCIATION

Mr. TRESSELT. Chairman Mackenzie, Ranking Member Omar, and distinguished members of the Subcommittee, thank you so much for the opportunity to testify today. My name is Ben Tresselt, and I am the President of Arborist Enterprises, a total tree care company located in Lancaster, Pennsylvania.

I am also the former Chairman of the Tree Care Industry Association. I am here today to urge OSHA to finalize a long overdue safety standard for tree care, one that reflects OSHA's core mission of protecting workers through clear, practical rules. Tree care is an extremely technical and very hazardous occupation.

Crews work aloft using chain saws, aerial lifts and cranes often near homes, roads and power lines. Tree care workers suffer serious injuries and fatalities well above the national averages, making our industry one of the most hazardous. That is why at our company we have worked hard to build a safety-first culture. We perform safety job assessments before every project, provide and maintain high quality climbing and protective gear for our employees, and follow the ANSI Z133, our industry's consensus safety standard.

Safety is at the core of how we hire, train and operate. Despite these efforts, OSHA continues to regulate our industry through a patchwork of standards that do not reflect the unique hazards or work conditions of tree care. This creates confusion and places unnecessary compliance burdens on employers trying to do the right thing.

Crane access into the tree is one clear example. In many cases, lifting a climber into a tree using a crane is the safest option, especially when the tree is structurally compromised in a tight space, or located above a hazard. The ANSI Z133 supports this safe method.

Several State OSHA plans also support it, but the Federal OSHA still applies a general rule of cranes, prohibiting lifting climbers into the tree, leaving the employer vulnerable to citation. At the same time, OHSA maintains five regional emphasis programs that explicitly direct inspectors to identify tree care operations, but once they do, there is no tree care specific standard to apply.

It is a nationwide enforcement effort without the right tools to carry it out effectively. In 2020, I served on OSHA's SBREFA's panel concerning tree care safety standard. The recommended outcome was clear, move forward with an OSHA standard grounded in the ANSI Z133, yet OSHA has delayed the Rule at least eight times while more complex rules have advanced.

A dedicated tree care safety standard will not expand the rule book, but it will clarify it by replacing outdated, misapplied rules with ones tailored to our type of work. In short, this kind of smart focused standard is exactly what OSHA was designed to deliver, a standard that protects workers, supports responsible businesses, and makes regulation more effective.

I respectfully urge the Subcommittee to ensure OSHA finalizes a safety standard for tree care. Thank you for the opportunity to testify, and I will welcome your questions.

[The Statement of Mr. Tresselt follows:]

Testimony of

Benjamin G. Tresselt III, BCMA

President, Arborist Enterprises

on behalf of the Tree Care Industry Association

before the

House Education and Workforce Committee

Subcommittee on Workforce Protections

May 15, 2025

Introduction

Chairman Mackenzie, Ranking Member Omar, and distinguished members of the Subcommittee:

Thank you for the opportunity to testify today on behalf of the Tree Care Industry Association (TCIA) on a topic that is incredibly important to my company and our industry—worker safety. My name is Ben Tresselt, and I am the President of Arborist Enterprises, a tree care company based in Lancaster County, Pennsylvania. I founded the company with my wife in 1991, and over the past 34 years, we've grown to a team of 20 employees serving residential and commercial clients across southeastern and southcentral Pennsylvania.

I am an ISA Board Certified Master Arborist and a former Chairman of TCIA. I also serve on the Accredited Standards Committee (ASC) Z133, which is responsible for revising the ANSI Z133 Safety Requirements for Arboricultural Operations (ANSI Z133)—the national consensus safety standard for the tree care industry. Arborist Enterprises is proud to be a TCIA-Accredited company and employs three Certified Treecare Safety Professionals (CTSPs).

Tree care is extremely technical and potentially hazardous work, requiring skilled professionals, specialized equipment, and constant attention to safety. Our crews access trees using aerial lifts and climbing systems with ropes and saddles. We perform tree pruning and removals near homes, roads, and power lines. We work aloft with chainsaws and rigging systems, coordinating with ground crews to manage drop zones and safely lower heavy wood sections. We remove entire trees using cranes.

Most of our work is performed in public-facing spaces—residential streets, parks, and schools—where crews must stay vigilant not only for their own safety but also to protect bystanders, traffic, and surrounding structures. There is little room for error, and the hazards are ever-present.

Across the country, TCIA's 1,400 member businesses perform similar work in communities of all sizes. Collectively, they employ more than 150,000 workers—a substantial share of the U.S. tree care workforce. These professionals help protect property, support utilities in maintaining reliable power service, and play a critical role in post-disaster response—clearing roads, restoring service, and reducing wildfire risk.

Despite the essential nature of this work, our industry faces an unacceptably high fatality rate—estimated to be 10 to 30 times higher than the national average—and more than a thousand workers are injured every year on the job.[1]

At Arborist Enterprises, we have worked hard to build a safety-first culture. We conduct job safety assessments before every project, invest in top-quality equipment, climbing and protective gear, and bring in outside consultants to deliver ongoing safety training. Our team uses the ANSI Z133 standard as our primary safety reference. Developed through a consensus process, Z133 offers clear, practical guidance tailored to the hazards of arboricultural work, and it is the first place we turn when evaluating how to perform a job safely.

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[1] Safeguarding Workers and Employers from OSHA Overreach and Skewed Priorities, 118th Cong. Page 2. (2024)(testimony of Peter Gerstenberger) https://edworkforce.house.gov/uploadedfiles/gerstenberger_testimony.pdf

Still, despite these efforts, OSHA continues to regulate our industry using a patchwork of general industry standards—none of which fully reflect the realities of safe tree care operations. This creates confusion, inconsistency, and unnecessary compliance burdens for employers who are trying to do the right thing. It also fails to provide workers, small businesses and regulators with the clear, relevant guidance they need to keep the industry safe as possible for workers and the public.

That's why I am here today—to respectfully urge OSHA to complete the work it began nearly two decades ago. Congress first called for action with a bipartisan, bicameral letter to OSHA in 1999, and TCIA formally petitioned for rulemaking in 2006. This is now the fourth time the TCIA has testified on this critical issue to this Congressional Subcommittee. Yet, nearly thirty years later, there is still no dedicated rule—and that delay continues to put our dedicated, hardworking tree care workers at risk and leaves responsible employers without the regulatory clarity they need.

The Limits of OSHA's Current Regulatory Framework

Despite widespread recognition of the inherent dangers in tree care, OSHA continues to regulate our industry under standards developed for other sectors, which often do not reflect the unique hazards or work conditions of arboriculture. As a result, employers, workers, and OSHA inspectors are left without clear guidance on how to identify risks or implement effective safety measures.

One of the most problematic examples is OSHA's treatment of cranes. In our industry, crews access trees using various methods—climbing, aerial lifts, and, in some situations, crane access. Crane access involves hoisting a qualified climber into the canopy using a crane's load line or boom. It is often the safest option when a tree is structurally compromised, situated in a tight space, or located above hazards such as structures or utility lines. The crane's load line provides a predictable, engineered anchor point, and the access method enables a controlled descent into the canopy and safer rigging of the tree for removal. This is significantly safer than climbing or positioning an aerial lift, which may be infeasible and pose greater danger to the worker.

The crane access method has been in use for over 50 years and has been recognized in the ANSI Z133 Safety Requirements for Arboricultural Operations since 1979. It is widely regarded by industry professionals as the safest option in many circumstances and is expressly permitted by several state OSHA plans.[2] However, Federal OSHA still applies 29 CFR §1910.180—a general industry crane rule that typically prohibits personnel hoisting. While employers may invoke exceptions for infeasibility or greater hazard, the process is cumbersome and leaves even safety-minded companies vulnerable to citations.

This is just one example. Federal OSHA routinely applies general industry standards—such as Fall Protection (§1910.140), Walking-Working Surfaces (§1910 Subpart D), and Crawler

[2] Notably, several OSHA-approved state plans have adopted standards permitting the use of cranes to hoist arborists, recognizing this method as both necessary and safe in many circumstances. California first implemented an emergency standard in 2004 to protect tree workers accessing beetle- and fire-killed trees, and made the rule permanent in 2012. Washington, Virginia, and Maryland have adopted similar standards. These state-specific rules were reviewed and approved by federal OSHA as being "at least as effective as" federal standards under the Occupational Safety and Health Act.

Locomotive and Truck Cranes (§1910.180)—in ways that do not reflect the realities of arboricultural work. These standards were not written for tree care operations and often conflict with the methods arborists must use to safely climb, rig, and remove trees in complex environments. As a result, employers committed to best practices may still face enforcement penalties, not for unsafe conduct, but for using techniques that fall outside OSHA's outdated regulatory framework. Without a dedicated standard, this misalignment will persist, leaving employers uncertain, inspectors constrained, and safety outcomes compromised.

The Limits of OSHA's Enforcement Approach

In recent years, OSHA has implemented five separate Regional Emphasis Programs (REPs) targeting tree care operations—covering nearly every major region where our industry operates.[3] These directives instruct OSHA compliance officers to look out for tree care work in the field. But once they find it, they are left with no tree-care-specific standard to enforce. In the absence of a clear regulatory framework, OSHA inspectors must rely on outdated standards developed for unrelated industries—none of which adequately address the hazards or technical demands of arboricultural work. The result is a nationwide emphasis on enforcement without the tools to do it effectively.

A dedicated OSHA standard would not expand the rulebook—it would clarify it. It would guide inspectors toward the hazards that matter most and provide employers with the clear expectations they need to comply. A tailored standard would allow OSHA to act proactively and consistently, identifying issues before they result in harm.

Recent enforcement data reinforces this point. In FY 2024, the General Duty Clause (GDC) was the most frequently cited OSHA standard relevant to tree care operations.[4] The GDC is used to fill in the gaps when a serious incident occurs but no specific OSHA rule applies—forcing inspectors to fall back on general language and outside materials to describe what went wrong. Other top citations that year were mostly for issues like missing PPE or failing to keep injury logs, which are easy to spot but don't get at the real hazards we face in tree care.

This trend is longstanding. In a review of 65 federal OSHA inspections from 2015 to 2017, TCIA found that in the absence of an accident or formal complaint, inspectors tended to issue citations under general OSHA standards—such as PPE or fall protection—that, while important, may not fully reflect the unique hazards of tree care operations. However, in post-accident inspections—where a serious injury or fatality had occurred—OSHA issued more targeted citations, and nearly one-third relied on the GDC, often referencing ANSI Z133 to define the

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[3] OSHA maintains Regional Emphasis Programs (REPs) focused on tree care operations in the regions covered by its Boston, New York City, Philadelphia, Atlanta, and San Francisco offices. These programs direct field staff to proactively identify and inspect tree care operations. REP documents available at: https://www.osha.gov/enforcement/directives/lep

[4] OSHA's citation data groups tree care operations under NAICS 561730 (Landscaping Services), which also includes non-arborist activities such as hardscaping. While a silica standard technically ranked first overall in FY 2024, it likely reflects work outside the tree care scope. The General Duty Clause (5(a)(1)) was the top-cited standard relevant to tree care hazards. Source: OSHA Frequently Cited Standards Report, NAICS Code 561730, Establishment Size: All, Period: October 2023 through September 2024. Accessed May 2025. https://www.osha.gov/pls/imis/citedstandard.html

hazard and determine what should have been done to prevent the incident.[5] That is a reactive enforcement model—one that penalizes employers after the fact rather than guiding them in advance.

Without a dedicated standard, this enforcement model will remain reactive, inconsistent, and incomplete. Employers committed to safety will continue facing uncertainty, and inspectors will be forced to improvise—often after an accident has already occurred. OSHA has the authority to fix this. What we need now is action: a clear, tailored rule that empowers employers and inspectors alike to prevent injuries, not just respond to them. And as I'll outline next, the groundwork for that rule already exists.

OSHA Has the Blueprint—But Has Yet to Act

Despite years of documented hazards, industry engagement, and formal recommendations, OSHA has still not issued a proposed safety standard specific to tree care operations. I know this firsthand because I served on the agency's Small Business Regulatory Enforcement Fairness Act (SBREFA) panel in 2020. That process brought together small employers from across the country—many of whom described exactly what I've shared today: the difficulty of navigating OSHA's enforcement approach without clear, industry-relevant standards.

The SBREFA panel concluded with a clear recommendation for OSHA to move forward with a dedicated rule. It emphasized that any standard should be grounded in the ANSI Z133 safety requirements—developed through consensus by employers, workers, and safety experts—and specifically noted the need to permit safe, widely accepted practices like the crane access method. The panel gave OSHA both the rationale and the roadmap to act.

As a member of the ANSI-accredited committee responsible for revising Z133, I've seen firsthand the level of care and expertise that goes into shaping this standard. I was recently appointed to chair the Z133 Task Group on Cranes and Knucklebooms for the 2025–2030 revision cycle—a role that reflects both my company's experience and the importance of crane access in modern tree care. These practices are widely used, widely understood, and widely recognized as safe when properly implemented. OSHA doesn't need to reinvent the wheel. The framework already exists.

Yet no proposed rule has been issued. Since the Tree Care Operations Standard first appeared on the Unified Regulatory Agenda in Fall 2020, OSHA has pushed the target date back at least eight times. During that same period, the agency completed work on more than a dozen other rulemakings—many of which were significantly more complex and more controversial. OSHA clearly has the capacity to act when it makes something a priority. The delay on this rule is not about resources—it's about where the agency chooses to focus its attention.

And that's what makes this a timely and necessary opportunity. The SBREFA panel marked the last major procedural step. The hazard data is overwhelming. Industry support is strong. The framework already exists. Policymakers across the spectrum are looking for ways to reduce regulatory burdens while improving outcomes—and this is exactly the kind of focused, consensus-driven solution that fits that mold. A tree care standard would replace uncertainty with

[5] A More Effective and Collaborative OSHA: A View from Stakeholders, 115th Cong. Page 4. (2018) (testimony of Peter Gerstenberger) https://edworkforce.house.gov/uploadedfiles/testimony_gerstenberger_2.27.18.pdf

clear expectations, align enforcement with real-world best practices, and help both workers and employers do their jobs safely and consistently.

Conclusion: A Standard That Delivers Real-World Results

The question is not whether OSHA can act—it's whether it will. The groundwork has already been laid. The hazards are well documented. The industry is engaged. A national consensus standard already exists. And the need for clarity—for both employers and enforcement—is urgent.

This isn't just about enforcement. It's about delivering better outcomes and saving lives. As a business owner, I want to do the right thing. I want to keep my employees safe. I want clear, practical rules that reflect the work we do every day. I also want a level playing field. Right now, companies that invest in training, equipment, and compliance often operate at a disadvantage. A targeted OSHA standard would help fix that imbalance—by aligning enforcement with widely accepted safety practices and helping ensure everyone is held to the same expectations.

A federal OSHA standard would also support workforce development. Like many skilled trades, tree care faces persistent labor shortages. Younger workers are often reluctant to enter an industry they perceive as very hazardous and inconsistent. A clear safety standard would send the opposite message—that we take safety seriously, that we have rules in place, and that we value their wellbeing. At my own company, several recent hires cited our safety culture as the reason they sought us out.

Finally, a standard would help make safety financially sustainable. Our industry faces some of the highest insurance premiums in the country. A uniform federal framework would allow insurers to more accurately assess risk and reward safety investments, helping employers control costs while raising safety standards across the board.

In short, this is the kind of smart, focused standard OSHA was designed to deliver—one that protects workers, supports responsible businesses, and makes regulation more effective.

On behalf of Arborist Enterprises, TCIA, and the thousands of dedicated, hardworking tree care professionals, I urge this Subcommittee to keep the pressure on. Let's finish what we started. Let's make tree care operations safety proactive, not reactive. And let's give our workforce the clear, industry-relevant safe working environment they deserve.

Thank you for the opportunity to testify. I welcome your questions.

Chairman MACKENZIE. Thank you. Next I will recognize Mr. Barab for your testimony.

STATEMENT OF MR. JORDAN BARAB, FORMER DEPUTY ASSISTANT SECRETARY OF OSHA (2009–2017), TAKOMA PARK, MARYLAND

Mr. BARAB. Thank you for inviting me here to testify, but I will take issue with the title of this hearing. OSHA's problem is not

overreach but, rather, underreach. Last year I told this Committee about Gabriel Infante, a Texas construction worker who died of heat stroke, a death that would have been prevented had OSHA's Heat Standard been in place.

These preventable tragedies continue. Last August, Baltimore Public Works employee Ron Silver II tragically died of heat stroke. The State of Maryland has since issued a tough Heat Standard, a standard that would have saved Ron Silver's life.

More than 712,000 workers now can say their lives have been saved since the passage of the Occupational Safety and Health Act. Far fewer workers are dying today from asbestos-related disease, or diseases caused by exposure to lead, formaldehyde because of OSHA's standards. OSHA standards have significantly reduced deaths in confined spaces and deep trenches. Fewer workers fall to their deaths, or have their limbs crushed in machinery. Work-related Hepatitis B deaths have virtually been eliminated since OSHA issued its Bloodborne Pathogen Standard, and I could go on and on.

Unfortunately, despite the lives saved by OSHA, the original mission of the agency to assure the safety and health of American workers through enforcement of OSHA standards has not been realized.

It is difficult to comprehend today, but only 3 Senators and 58 Representatives voted against passage of the Occupational Safety and Health Act in 1970. OSHA is a tiny agency with a miniscule budget, and an enormous mission to ensure the work safety in 11.8 million workplaces, covering 161 million workers.

In Fiscal Year 2024, OSHA had only 1,800 inspectors, one inspector for every 84,937 workers. If OSHA was to inspect every workplace in the country just once, it would take 185 years, almost two centuries, and it only promises to get worse. OSHA has lost 10 percent of its staff due to early retirements, and very little likelihood that any of these positions will be refilled.

This is hardly a recipe for reclaiming OSHA's mission.

OSHA's standard setting process is in shambles. It can take 7 to 10 to 20 years to issue a single OSHA standard.

The founders of this Act would undoubtedly be shocked and disappointed if they knew what had become of OSHA today. They never would have envisioned an agency that would take decades to issue a standard and centuries to inspect workplaces. This is a clear example of underreach, and the main solution is not difficult, significantly increase funding for OSHA's enforcement and standards program and modernize the law.

While this hearing focuses on OSHA's mission, I cannot ignore the chaos at NIOSH because the functioning of NIOSH is critical to the mission of OSHA.

Almost the entire NIOSH staff was RIF-ed last month, and a few were brought back and restored a couple of days ago because of a court order.

NIOSH provides lifesaving support to miners suffering from black lung disease, workers in the agriculture and fishing industry, firefighters who have suffered disproportionately from cancer and heart disease, provides compensation to 9/11 workers, as well as to America's nuclear veterans who built America's nuclear arsenal.

Most of these workers have not been brought back, and their programs are not operating, despite Secretary Kennedy's claims that they are just being reorganized. I am sorry to say, but Secretary Kennedy was lying at yesterday's Senate hearing when he claimed that no working scientists at HHS were fired. Hundreds of working scientists and engineers at NIOSH have been RIF-ed.

Before closing, I want to emphasize the importance of some of the standards that OSHA should prioritize. First, the Heat Standard. More workers died from heat working in construction than any other industry last year. At least 55 workers died from heat on the job in 2023, which was a 28 percent increase from 2022, and 121 workers died from the effects of heat from 2017 to 2022.

The solutions laid out in OSHA's proposal are simple, flexible, inexpensive, desperately needed, and long overdue. COVID–19, Ebola, Avian Flu, Tuberculosis, MRSA, are just a few of the infectious diseases that healthcare workers are not protected from because, aside from bloodborne pathogens, there is no infectious disease standard.

The danger is obvious. Thousands of health care workers died from COVID during the COVID pandemic. Assaults against health care workers and social service workers are a serious problem, and a standard is clearly needed. In fact, this House has twice passed bipartisan legislation requiring OSHA to issue a standard.

To restore OSHA's mission and prevent underreach, Congress should first significantly increase OSHA's enforcement and standard setting budget. Second, pass legislation enabling OSHA to quickly update antiquated standards for toxic substances and other hazards.

Third, urge OSHA to issue heat, infectious disease, tree care, violence and emergency response standards, and finally permanently restore NIOSH. Thank you.

[The Statement of Mr. Barab follows:]

Testimony of Jordan Barab

Before the House Education and Workforce Committee Subcommittee on Workforce Protections US House of Representatives

"Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"

May 15, 2025

Good morning. My name is Jordan Barab. I served as Acting Assistant Secretary for OSHA in 2009, and Deputy Assistant Secretary from 2009 to the final day of the Obama Administration. I also ran the health and safety program for the American Federation of State, County and Municipal employees for 16 years, served for 4 years at the US Chemical Safety and Hazard Investigation Board and 4 years as a Senior Labor Policy Advisor on this committee from 2007 to 2009, and 2019 to 2021.

I am happy to be testifying before this Committee today, and I commend the title of this hearing: "**Reclaiming OSHA's Mission: Ensuring Safety Without Overreach**." Although, as I will explain, underreach is more a problem with OSHA than overreach.

The Occupational Safety and Health Act was passed more than 50 years ago. It was signed by President Richard Nixon after the bill passed with overwhelming bipartisan majorities in the House and Senate: It's difficult to comprehend in these days of extreme, mindless partisanship, but only three Senators and 58 Representatives voted against passage of the Occupational Safety and Health Act.

OSHA's mission, as laid out in the Occupational Safety and Health Act of 1970 was to "To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act."

Let me jump to the most obvious truth: OSHA safety and health standards save lives. Period. More than 712,000 workers now can say their lives have been saved since the passage of the OSH Act.[1]

[1] *Death on the Job 2025*, AFL-CIO, https://aflcio.org/dotj-2025

Far fewer workers are dying today of asbestos-related disease, or diseases caused by exposure to lead or formaldehyde because of OSHA standards. Cotton dust deaths were virtually eliminated following issuance of the cotton dust standard.

Comprehensive standards have significantly reduced deaths in confined spaces and deep trenches. Fewer workers fall to their deaths from buildings or get their limbs crushed in machinery.

Grain facilities may still occasionally explode, but the frequency of those disasters is significantly lower than before OSHA's grain handling standard was issued. Work-related hepatitis B deaths have been virtually eliminated since issuance of OSHA's bloodborne pathogens standard. And I could go on and on.

Unfortunately, despite the lives saved, the injuries and occupational diseases prevented – despite the years added to workers' lives, OSHA has failed to fully live up to the mission that OSHA's founders envisioned.

NIOSH and MSHA

While this hearing focuses on OSHA's mission, I cannot leave this room without commenting on this administration's evisceration of the National Institute for Occupational Safety and Health, or NIOSH, as well as actions by the Mine Safety and Health administration that endanger miners' lives.

This hearing is about "reclaiming" OSHA's mission, and NIOSH is a critical part of that mission.

NIOSH was established by Section 22 of the Occupational Safety and Health Act to conduct research, training and numerous other functions critical to protecting workers in this country. NIOSH is the only federal agency in the United States that conducts research on worker safety and health hazards methods to control those hazards.

No other agency has the expertise to do the work NIOSH does. When Congress passed the OSHAct they made clear that OSHA and NIOSH had distinct, different responsibilities. OSHA was directed to set and enforce legally binding safety and health standards. and enforce them. NIOSH was specifically established to conduct and fund evidence-based research, both through field studies, investigations and laboratory testing, to make recommendations for standards based on that research, and support training for safety and health professionals. The Mine Safety and Health of 1977 established the same responsibilities for MSHA and NIOSH for safety and health in the mining industry.

The agencies (NIOSH and OSHA, and NIOSH and MSHA) are directed to collaborate and coordinate, but NIOSH was created as a separate and independent agency to ensure that

the research and recommendations were based only on the science and not other political or policy considerations.

NIOSH staff are highly trained, scientific experts - medical doctors, epidemiologists, biologists, chemists, engineers, industrial hygienists, and statisticians - that have specialized expertise in respiratory diseases, toxicology, ergonomics, respiratory protection, other personal protection equipment, safety engineering, sampling and laboratory methods, and more. The work of these experts forms the scientific and technical backbone for worker safety and health protections in the United States. NIOSH's expert research and recommendations are relied on by many countries throughout the world.

OSHA and MSHA do not conduct research. They develop and enforce standards, standards largely based on the research that NIOSH conducts.

OSHA and MSHA do not conduct research – they are not authorized to do so. These agencies develop and enforce standards, standards largely based on the research that NIOSH conducts.

OSHA and MSHA staff are safety and health regulatory and enforcement specialists, not researchers. But without NIOSH's research, technical expertise and collaboration, OSHA and MSHA cannot do their jobs. Any suggestion that their missions are duplicative with NIOSH is incorrect.

In addition, through the Mine Safety and Health Act of 1969, Congress authorized NIOSH to provide medical screenings. The law entitles coal miners to transfer to work in a less dusty part of the mine if they develop early signs of the disease.

Yet today, 1 in 5 longtime coal miners in Central Appalachia have black lung, the highest level recorded in 25 years.[2] And many have a more severe form of black lung called Progressive Massive Fibrosis that hits younger miners much more quickly.[3] The cause is the increased amount of silica dust that miners are exposed to as a result of more drilling through silica-containing rock in narrower coal seams, longer working hours and the use of new mining equipment that generates more dust.

But due to massive DOGE-ordered "Reductions in Force" at NIOSH, the entire coal workers health program, as well as the mine safety research centers, have been eliminated

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[2] CDC reinstates workers who screen coal miners for black lung disease, *Washington Post*, https://www.washingtonpost.com/climate-environment/2025/04/29/cdc-black-lung-screening-coal-miners/

[3] Pneumoconiosis among underground bituminous coal miners in the United States: is silicosis becoming more frequent?, *Occupational & Environmental Medicine*, https://oem.bmj.com/content/67/10/652

while jettisoning NIOSH engineers, staff, and other scientists conducting research to save the lives of this nation's coal miners.

NIOSH is no longer providing medical screenings or reviewing medical information to determine coal miners' rights for transfer to low-dust jobs. There are no epidemiologists left to analyze the data on the region's black lung epidemic. The IT staff that processes X-rays is gone. The agency doesn't even have mailroom employees to send letters to miners and their doctors. There is no procurement staff to renew expired contracts with radiologists.

The fatal impact these cuts are having on this nation's coal miners has fortunately received a great deal of publicity.

Less known are the vital services that other NIOSH programs provide.

- NIOSH develops technologies that protect workers. For example, NIOSH has developed technology that can measure silica exposure in real time at the mine site instead of submitting dust samples to outside laboratories and waiting weeks to determine whether miners are over-exposed. It benefits miners because they can make quick worksite changes to reduce exposures and it benefits mine operators because it is more cost-effective than using outside labs.

- NIOSH runs the nation's only program that certifies respirators –- ensuring that respirators actually protect worker and that ineffective counterfeit respirators don't infiltrate the system. The NIOSH respirator program is recognized world-wide as the gold standard and there is no replacement. Unless these experts are permanently restored, employers who rely on NIOSH certified respirators can no longer be sure their employees will have adequate respiratory protection, increasing risk of disease, workers compensation cases and litigation.

- NIOSH staff are this nation's health and safety detectives. NIOSH's Health Hazard Evaluations go into workplaces where workers are having health problems of unknown origin. They identify the cause of the problems and recommend measures to fix the problems.

- Agricultural, fishing and forestry workers experience the highest fatal injury rate of all industries, with more than 18.6 deaths occurring per 100,000 full-time workers in

2022.[4] NIOSH's work with the commercial fishing industry has reduced deaths by 80 percent.[5]

- NIOSH supports 12 regional Agricultural Safety and Health Centers.[6] Experts there help farmers retrofit decades-old tractors with rollover structures, help farmworkers prevent Lyme disease and Avian Flu and educate farmers about the dangers of heat exposure and other hazards fire emergencies, grain bins, farm machinery or confined spaces.

  The agricultural education program is particularly important because farms are one of the few hazardous workplaces where young children are allowed to work. In addition, due to Congressional language on OSHA appropriations bills, OSHA is not allowed to investigate or cite any injuries or deaths on small farms.

- Firefighters who run into danger to save the lives of our families have the riskiest jobs in the country. Aside from the obvious fire dangers, they also suffer higher rates of heart disease and cancer. NIOSH currently administers the National Firefighter Registry (NFR) for Cancer, a program that collects health and occupational information that can be used to assist in understanding cancer risk among firefighters.

- Today we may be on the verge of a human Avian Flu pandemic. We've seen how avian flu can be transmitted from birds to cattle, and from cattle to workers. It may only be luck that it hasn't yet spread from worker to worker and then across whole communities. And I think we can all agree that we don't think this nation should be depending on luck to protect us from the next pandemic.

  Yet NIOSH is the only agency out there studying how Avian Flu is transmitted from animals to humans and identifying ways to prevent that transmission.

  Because if Avian flu becomes transmittable from human to human, God help us. NIOSH may be our last defense against that catastrophe.

- NIOSH also administers the World Trade Center Health Program which addresses the diseases of workers who responded to and cleaned up the World Trade Center site after the devastating 9/11 attacks. The program provides medical evaluations

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[4] Centers for Agricultural Safety and Health, NIOSH, https://www.cdc.gov/niosh/extramural-programs/php/about/ag-centers.html#:~:text=AgFF%20workers%20continue%20to%20experience%20the%20highest%20fatal%20injury%20rate%20of%20all%20industries.

[5] "NIOSH Letter of Support: Help Protect Commercial Fishing Safety," Alaska Maritime Safety Education Association.

[6] Centers for Agricultural Safety and Health, NIOSH, https://www.cdc.gov/niosh/extramural-programs/php/about/ag-centers.html

and medical services to workers who participated in rescue, recovery, or cleanup activities in the aftermath of the attacks and coordinates research into health conditions linked to the aftermath of the attacks.

- The NIOSH Western States Division runs its Oil and Gas Extraction Program which develops and communicates workplace solutions to protect workers in the highly hazardous oil and gas extraction industry. The division also conducts research and develops strategies to prevent work-related motor vehicle crashes, the leading cause of workplace death.

- NIOSH administers vital parts of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) which provides cash and medical benefits to persons with certain health conditions linked to their work in the atomic weapons, beryllium, or uranium mining and processing industries as well as certain Department of Energy (DOE) contractors.

  In order to determine whether and the level of compensation and benefits needed, NIOSH conducts radiation exposure assessments for workers with cancer who filed claims with the DOL arising from their employment in the Department of Energy's nuclear weapons complex. Secretary Kennedy issued RIF notices to nearly all of the NIOSH staff upon which the DOL relies to provide timely decisions for compensation under EEOICPA. Thanks to the DOGE chainsaw taken to NIOSH, claimants with life threatening illnesses can expect to wait up to 4 years to get a determination on their claim.

- NIOSH conducts research into safety and health issues in the mining industry and conducts mine safety and health research at laboratories in Pittsburgh, PA and Spokane, Washington.

Almost all of the employees working on these programs have been terminated as of next month, and the few programs that remain are too understaffed to operate.

The preventable illnesses and death caused by these cuts are not only tragic, but they're illegal as well. Almost all of these programs are mandated by law.[7]

But the Trump administration seems to be in denial. HHS Secretary Kennedy stated on Fox News recently:

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[7] "National Institute for Occupational Safety and Health (NIOSH): Authorities and Activities," Congressional Research Service, April 9, 2025

> President Trump has not cut the 9/11 program. We took that program, and we took a lot of OSHA (sic), and there was also a lot of complaints that we ended OSHA (sic), but we've just consolidated that in a new sub-agency, the Administration for a Healthy America.
>
> All those programs were not terminated, as the media has reported, but they've simply been consolidated into a place that makes more sense. [8]

Clearly Secretary Kennedy doesn't understand what NIOSH is, nor the difference between OSHA and NIOSH. Nor does he apparently understand that there is nothing left in NIOSH to move into another sub-agency. There is no there there.

I don't know if the Secretary is lying, confused or misinformed, but the fact is that NIOSH, and the life-saving services it provides to this nation's workers, are gone. And as a result, OSHA will be less able to pursue its mission, and more workers will be injured, made sick and die on the job.

Meanwhile, MSHA has announced a four-month enforcement delay to its new silica standard – a standard that will prevent young miners from deadly lung disease and Progressive Massive Fibrosis.

Ending the so-called 'war on coal' by declaring war on the health and lives of this nation's miners is unacceptable and certainly not what was envisioned when the Mine Safety and Health Act was passed and signed into law by President Nixon.

OSHA Enforcement

OSHA has a tiny budget and is severely understaffed

The agency has an enormous mission: to ensure worker safety in 11.8 million workplaces -- covering 161 million workers -- under the Occupational Safety and Health Act's jurisdiction. And in FY 2024, the agency had only 1800 inspectors to accomplish that mission.

And while OSHA's enforcement resources shrink, the number of workplaces continues to grow.

What that means is that if OSHA inspectors were to inspect every workplace in the country just once, it would take 185 years – almost two centuries. OSHA has only one inspector for every 84,937 workers in this country.

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[8] "'DATA CHAOS': Secretary Kennedy defends database on 'existential disease'", *Fox News*, May 5, 2025, https://www.foxnews.com/video/6372390809112

This is not what the Congressional founders of OSHA envisioned when creating the agency and establishing OSHA's mission.

A crucial reason that Congress passed the OSHAct was to support American business. In Section 2(a) of the OSHAct, Congress found that

> Personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

Liberty Mutual Insurance, estimated in 2024 that the cost of the most disabling workplace injuries to employers at more than $58 billion a year—more than $1 billion per week.[9]

And that's only direct costs such as medical and lost-wage payments. If indirect costs (such as overtime, training and lost productivity) are factored in, the overall costs are much higher: between $174 billion and $348 billion annually in direct and indirect costs.

Contrast this with OSHA's current budget: a paltry $632 million a year, which amounts to $3.92 available to protect each worker.

This problem has only increased during this administration as the agency has lost around 10 percent of its staff due to early retirement. DOGE has also announced the closing of 11 OSHA offices which means inspectors will take longer to reach worksites – hardly an action that will increase government efficiency.

And we haven't seen what RIFs or budget cuts this administration or Congress may be considering.

OSHA Standards

Second, and most importantly, there is no question that a major part of OSHA's mission, according to Congress, is to issue occupational safety and health standards to protect workers from hazards that pose a significant risk of harm.

The very first line of the law charges OSHA "To assure safe and healthful working conditions for working men and women; *by authorizing enforcement of the standards developed under the Act"* [emphasis added]

And despite the frequent complaints, OSHA standards do not harm businesses. There is extensive evidence that OSHA standards are effective in preventing injuries and illnesses

[9] 2024 Liberty Mutual Workplace Safety Index. Available at https://business.libertymutual.com/insights/2024-workplace-safety-index.

and that OSHA inspections lead to decreases in injuries for several years after a workplace is inspected.

As my colleague Dr. David Michaels used to say, "OSHA standards don't kill jobs. They stop jobs from killing workers."

I'll cut to the chase: OSHA standards take far too long to issue. OSHA's silica, beryllium and walking & working surfaces standards took 20 years to finalize. Other standards can take a decade.

Again, I think we can all agree this is not what the original founders of OSHA envisioned.

Congress declared the purpose of the Occupational Safety and Health Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human *resources by providing for the development and promulgation of occupational safety and health standards;"*

Congress further specified that those standards "require conditions, or the adoption or use of one or more practices, means, methods, operations, or processes*, reasonably necessary or appropriate* to provide safe or healthful employment."

Health standards must assure, "to the extent feasible, on the basis of the best available evidence, that *no employee* will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

Congress also specified what health standards should include. Health standards "shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations.

And furthermore, standards must be science-based. "Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws."

As evidenced by the fact that almost all OSHA health and safety standards have been upheld after industry legal challenges shows that OSHA has assiduously complied with the requirements of the law.

OSHA standards not only save lives, but they also benefit employers who are committed to protecting their employees. While some may claim that the General Duty Clause, which requires employers to provide a safe workplace, is adequate for worker protection, a standard tells employers exactly what they must do to protect their workers. Employers often prefer standards over the use of the General Duty Clause because unlike a standard, the General Duty Clause doesn't lay out exactly what an employer must do to be in compliance with the law.

OSHA's Regulatory Process

OSHA's regulatory process – the steps it needs to take to issue a standard – is long, but it provides a more robust public input process than any other governmental agency. Not only does OSHA generally issue a Request for Information in order to begin gathering evidence needed to issue a standard, but the Small Business Regulatory Enforcement and Fairness Act requires the agency to collect information from small businesses on the impact of a planned standard.

After a proposal is issued, OSHA provides time – often months – for written comments, followed by public hearings which, for larger standards, can last for weeks. Anyone can testify at those hearings, and witnesses at those regulatory hearings can also question any other witnesses, as well as OSHA's experts.

The hearings are followed by another lengthy period of public comments and submission of briefs. All of those comments must be considered before finalizing the standard, and OSHA must justify why it accepted or rejected every comment.

For example, before issuing the OSHA standard to protect workers exposed to silica from silicosis and lung cancer, we held fourteen days of hearings and kept the comment period open for almost a year. Before the rule was completed, OSHA had received more than 2,000 comments for a total of 34,000 pages of materials.

I can say from long experience that although OSHA's robust public comment period is lengthy, it provides valuable information to the agency about how a standard will not only protect workers, but also the best way the protections can be implemented to benefit workers and employers.

It does no one any good – OSHA, workers or employers – to issue standards that are unworkable. Happily, although new standards are always controversial and aways result in lawsuits from regulated industries, once implemented, they successfully protect workers with no significant burden on employers or business profitability.

OSHA's Regulatory History

During its first three decades of its existence, OSHA issued groundbreaking standards on hazards such as asbestos, lead, benzene, hazard communication and chemical process safety. These standards required employers to implement measures to reduce exposures to chemicals and other hazards, and to provide training, medical surveillance and protective equipment to workers. Numerous studies have documented that these rules have been very effective, significantly reducing injuries, disease and fatalities, often at costs much lower than anticipated.

A 1995 study[10] of the regulatory analysis conducted on several OSHA regulations, conducted by the Office of Technology Assessment (OTA), evaluated several OSHA standards that had been in effect for a number of years to determine the accuracy of cost and benefit estimates conducted by OSHA and the regulated industries. The study showed that not only did industry grossly overestimate expected costs, but even OSHA routinely overestimated the costs and underestimated the benefits of standards. OTA found that part of the reason that OSHA overestimates costs is that the agency fails to take into account the ingenuity of American industry. American businesses have been particularly good at developing new technologies that are much more cost effective and efficient than OSHA had predicted.

For example, when OSHA reduced the vinyl chloride exposure limit from 500 ppm to 1 ppm to prevent additional cases of hepatic angiosarcoma, industry spokespersons issued dire predictions of job loss and plant closures. However, in less than two 2 years virtually all U.S. manufacturing plants were able to meet the new standard while still maintaining rapid growth of sales volume. This was accomplished largely through better containment of unpolymerized vinyl chloride monomer and improved exposure monitoring. The OTA reported that actual costs to industry were only 25% of OSHA's projected costs for implementing the standard.

OSHA's Regulatory Process is Too Slow

Unfortunately, over the years, the standard setting process has become more difficult and lengthier. There are several reasons for this.

First, in addition to the strict criteria for OSHA standards spelled out by the Occupational Safety and Health Act, court decisions, executive orders and legislation over the past 50 years have imposed layers of new regulatory analysis and review requirements. Industry

[10] http://govinfo.library.unt.edu/ota/Ota_1/DATA/1995/9531.PDF

opposition and lawsuits have also increased, adding to the length of time it takes to finalize a standard.

A significant part of the regulatory stagnation problem is that OSHA's budget for standards and guidance has been starved. In FY 2017, that budget stood at a paltry $20 million. This level had largely remained stagnant for several years and was far too low for OSHA to move forward on more than a few standards at one time

The Trump administration then cut that small budget by 10%. OSHA's Standards and Guidance line item only reached the $20 million level again last year. That line item currently stands at only $21 million compared with $19.5 million in FY 2010, 15 years ago.

This means that OSHA must carefully triage what standards it will work on, prioritizing those that will protect the most workers, and focusing on exposed workers with the least existing protections.

Furthermore, since the Reagan and George H.W. Bush administrations, Republican administrations have almost never issued major new OSHA health standards unless ordered to do so by the courts.

The problem is particularly acute for toxic chemicals. Over the entire 54-year history of OSHA, the agency has issued comprehensive health standards for only 31 substances. Most of these standards were set in the first two decades of the Act.

Over the last 25 years, OSHA has issued only three chemical standards — hexavalent chromium in 2006 (under court order), silica in 2016 and beryllium in 2017. Each of the last two took almost 20 years from start to completion. And for both chemicals, it was known for many decades before that the OSHA standards were not protective and that thousands of workers died during the lengthy rulemaking period from exposures that were finally regulated by OSHA.

For approximately 400 additional chemicals, there are permissible exposure limits (PELs) in place that govern exposure to these substances. However, for these substances, there are no requirements for monitoring, medical exams or other measures that are included in more recent, comprehensive OSHA standards.

These PELs were adopted in 1971 under a provision of the Act that allowed OSHA to adopt existing government and industry consensus standards so a body of regulation could be in place while new standards were being developed. Much of the scientific evidence behind these PELs, which codified the ACGIH Threshold Limit Values from 1968, dates from the 1940s and 1950s. Many chemicals now recognized as hazardous were not covered by the 1968 limits.

In 1989, OSHA attempted to update those limits, but the revised rule was overturned by the courts because the agency failed to make the necessary risk and feasibility determinations for all of the chemicals covered by the rule.

To issue a new chemical standard, OSHA is required to make extensive findings for *every single individual chemical*, one chemical at a time. That is an onerous and resource intensive task, making it impossible for OSHA to regulate more than a few of the enormous number of chemicals currently used in workplaces and new chemicals being produced.

The result is that many serious chemical hazards are not regulated at all by federal OSHA or subject to weak and out-of-date requirements. Some states, including California and Washington, have done a better job updating exposure limits, and as a result workers in those states have much better protection against exposure to toxic substances.

Similarly, in its first years, OSHA adopted dozens of manufacturing and construction standards based on industry consensus standards. Although those consensus standards have been regularly updated by the consensus standard organizations every three to five years, many of the 50-year-old versions remain on OSHA's books.

Like chemical standards, OSHA doesn't have the resources available to update more than a small fraction of those standards.

OSHA's inaction and the slow pace of standard setting not only means that many workplace standards are out of date and that workers go without protection from hazards. It means that more workers will suffer death, illness and injury from preventable hazards.

For workers, delay equals injury, illness and death. The AFL-CIO has estimated the impact on workers' lives from delays in recent OSHA standards. Twelve-thousand lives were lost from exposure to silica in the 19 years it took for OSHA to issue the silica standard, and over 1700 workers died needlessly of beryllium related disease in the time it took for OSHA to issue its beryllium standard.[11]

The General Duty Clause

Where there is no OSHA standard, the agency can cite under OSHA's General Duty Clause (GDC). The GDC is section 5(a)(1) of the law which simply requires the employer to provide a safe and healthful workplace.

If employees are exposed to a serious, recognized hazard and there are feasible means of abatement, OSHA can issue a GDC violation.

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[11] AFL-CIO, 2024 Death on the Job, Page 79 https://aflcio.org/sites/default/files/2024-04/2411%20DOTJ%202024%20DIG%20NB%20REV.pdf 44

Some have said that OSHA doesn't really need to issue any new standards because it can just depend on using the General Duty Clause.

Duty violations, however, are not a replacement for OSHA standards. For OSHA, they are extremely labor intensive and not conducive to swift correction of preventable hazards.

And, as I described above, relying on GDC violations also disadvantages employers who may find it difficult to determine what they are required to do to protect their employees, as opposed to a standard that clearly lays out elements that employers must comply with.

In addition, the General Duty Clause is generally reactive; it is almost always used only *after* a worker has been injured or killed.

OSHA's use of the General Duty Clause has often come under sharp criticism from business associations and the attorneys that represent them. The agency is often accused of "overuse" in such issues as ergonomics, workplace violence and heat.

In a 2015 workplace violence case before the Occupational Safety and Health Review Commission, the U.S. Chamber of Commerce, argued in an *amicus* brief[12] that OSHA was misusing the General Duty Clause. The Chamber wrote that the GDC "serves the limited purpose of insuring 'the protection of employees who are working under special circumstances' that are inappropriate for specific standards." The Chamber then complained that OSHA "has declined for years to promulgate any such [workplace violence] standard" even though "the Secretary has never made any showing that workplace violence issues are 'inappropriate for specific standards,'"

The Chamber made a forceful legal argument in favor of standards and against reliance on the General Duty Clause:

> Courts have long admonished the Secretary that "specific standards are intended to be the primary method of achieving the policies of the Act" and that "they should be used instead of the general duty clause whenever possible." Usery v. Marquette Cement Mfg. Co., 568 F .2d 902, 905 n.5 (2d Cir. 1977)

I therefore find it amusing and somewhat confusing that some business associations – and their attorneys – now argue that OSHA doesn't need a heat standard because it can just rely on the GDC.

For example, after OSHA's heat proposal was issued, Marc Freedman, Vice President of Workplace Policy, stated that instead of a heat standard, "the 'general duty clause' is

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[12] Brief Of Amicus Curiae Chamber Of Commerce Of The United States of America In Support Of Respondent Integra Health Management, Inc.,., (OSHRC Docket 13-1124), October 28, 2015.

actually the perfect avenue for OSHA to use because the clause works to 'put employers on notice that there are some hazards without standards that they still need to protect employees from.'"[13]

What Mr. Freedman failed to mention is that OSHA's attempts to use the general duty clause to protect workers from heat have been strenuously contested by employers cited by OSHA for GDC heat violations, making it more difficult for OSHA to effectively use this enforcement authority to protect workers from excessive heat.

It's almost as if the business community hates the General Duty Clause – until OSHA tries to issue a standard. Then they love it.

On the other hand, they *love* the General Duty Clause – until OSHA actually uses it. Then they hate it.

As I said, it's confusing. It's almost as if they don't want OSHA to its job.

OSHA's Regulatory Priorities

There are numerous workplace hazards that are not regulated by OSHA. Some hazards are old and well known, such as heat and workplace violence. Some are new, such as wildfire smoke and newly detected infectious diseases like COVID-19 and Ebola.

In addition, as mentioned above, there are numerous chemical, manufacturing and construction hazards that are significantly outdated.

Because of severe budgetary restrictions, however, OSHA can actively prioritize only a few standards at a time even under an Administration that supports legal safeguards. The current administration, however, has cut OSHA's budget and declared that every new regulation or standard must be offset by the repeal of ten other regulations.
Again, this is an obvious conflict with OSHA's mission.

OSHA's current top priorities are heat, infectious diseases, workplace violence, tree care and emergency response.

All are serious hazards to workers and the standards, when issued, will protect workers' health and lives.

[13] https://www.eenews.net/articles/biden-in-hot-seat-to-protect-workers-from-warming/

Heat

There is no doubt that heat is a life-threatening hazard, and more specifically a workplace hazard. Climate change is making it worse. Last year was the hottest year on record since global temperatures began being documented in 1850.

Heat is the leading cause of weather-related deaths in the United States, killing more than 200 people last year.[14]

According to OSHA, excessive heat killed 121 workers between 2017 and 2022. There were an average of 34 heat-related workplace deaths each year between 1992 and 2022, according to the Bureau of Labor Statistics.[15] In 2022 alone, there were 43 such fatalities. In 2022, there were 43 heat-related deaths, up from 36 the year before.

We also know that these numbers are significant undercounts because heat-related illnesses often mimic other illnesses and frequently manifest themselves after work hours.

Climate change may be making the heat hazard worse, but heat-related illness is not new. The sun was created on the 4th day of creation and soon thereafter, death by sunstroke was documented in the Bible. Heat plagued the builders of the great pyramids and slowed the Roman legions.

The U.S Army developed strict work-rest rules in the 1950s to protect American soldiers. (If fact, at OSHA's urging, BP successfully enforced the US Army's work/rest requirements, shaded rest areas, hydration liquids, and onsite heat monitoring to ensure that no workers suffered serious heat-related illness during the 2012 Deepwater Horizon cleanup when tens of thousands of unconditioned workers were deployed to the stifling and humid coast to clean up the oil spill dressed in protective clothing.)[16]

Heat was recognized as a preventable workplace hazard in the legislative history of the OSH Act as a preventable industrial disease. The text noted at that time that "existing legislation in this area does not begin to meet the problems.

The National Institute for Occupational Safety and Health (NIOSH) issued its original Criteria Document on Heat in 1972. That document recommended an OSHA heat standard.

In response to the NIOSH recommendations, in 1973 OSHA appointed a Standards Advisory Committee on Heat Stress which presented recommendations for a standard

[14] https://www.weather.gov/hazstat/
[15] https://www.osha.gov/sites/default/files/Heat-NPRM-Final-Background-to-Sum-Ex.pdf
[16] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3957409/

for work in hot environments in 1974. Now, fifty years later, OSHA is finally taking action to issue a standard to protect workers from this widespread serious workplace hazard.

Heat affects everyone, but workers are on the front lines - 32 million people in the US work outdoors. Construction workers are just 6 percent of the American workforce while accounting for 36 percent of all occupational heat-related deaths. Farmworkers are 35 times more likely to die from heat than other workers.[17]

And although heat hazards impact workers in many industries, workers of color have a higher likelihood of working in jobs with hazardous heat exposure.

Almost every day we hear tragic stories of workers dying from preventable heat illness on the job. Last summer, Baltimore Department of Public Works employee Ron Silver II, age 36, died from heat stroke after hauling trash all day where the heat index reached 103 degrees Fahrenheit. Silver was the father of five children, ranging in ages from 10 to 16 and had been working for the DPW for less than a year. Residents in the area where Silver died said he had knocked on a door, asking for help before he collapsed. Neighbors gave him water, performed CPR and called 911. Silver had been showing signs of heat illness earlier in the day, but his co-workers were apparently not aware of the signs, nor did they know how to respond.[18]

Last year, we also witnessed the heat stroke death of postal worker Wendy Johnson who died in North Carolina. She was at least the second postal worker to die recently of heat stroke after the death in Texas the previous year of Eugene Gates who died from heat stroke while delivering mail on his route in Lakewood, Texas, during a sweltering summer heatwave that saw the temperature reach 98 degrees. The heat index — factoring in humidity — climbed to over 113 degrees that day.

E&E News reported on a farm worker, Gabriel Infante, who started showing signs of heat stroke on the job. His employer thought he was on drugs and by the time they realized he needed help; it was too late. Gabriel died a few hours later after five days on the job. His body temperature was 109.8 degrees. He was 24.[19]

If OSHA's heat standard had been in place, Ron Silver, Wendy Johnson, Eugene Gates and Gabriel Infante would likely be alive today. They would have been supplied with water and rest. If they had still gotten sick, their employers and co-workers would have recognized the signs and had an emergency response plan in place.

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[17] https://onlinelibrary.wiley.com/doi/10.1002/ajim.22381

[18] "Gov. Moore calls for 'full investigation' after Baltimore sanitation worker's heat death," *The Baltimore Banner,* https://www.thebaltimorebanner.com/politics-power/local-government/dpw-death-ronald-silver-XAPWOOWV2JA7JO4AQ7KDVRFF5Q/

[19] https://www.eenews.net/articles/inside-bidens-push-to-stop-heat-deaths-after-decades-of-delay/

Heat is also a burden for the states. For example, heat accounted for nearly 50% of all injury claims filed with the Nevada Occupational Safety & Health Administration from 2020 to 2024. Employee injury claims related to extreme heat also accounted for the largest share of compensation claims awarded by Nevada OSHA at 30%.[20]

Finally, failure to address the hazards of workplace heat is a problem for employers and the economy. The *New York Times* recently reported[21] that

- In 2021, more than 2.5 billion hours of labor in the U.S. agriculture, construction, manufacturing, and service sectors were lost to heat exposure, according to data compiled by The Lancet.[22]
- Another report found that in 2020, the loss of labor as a result of heat exposure cost the economy about $100 billion, a figure projected to grow to $500 billion annually by 2050.[23]
- Other research found that as the mercury reaches 90 degrees Fahrenheit, productivity slumps by about 25 percent and when it goes past 100 degrees, productivity drops off by 70 percent.[24]

Ironically, Texas, the state that recently passed a law prohibiting localities from protecting construction workers from heat-related illness, leads all states in terms of lost productivity linked to heat, according to an analysis of federal data conducted by Vivid Economics.[25]

Given these facts, I'm surprised there is any opposition to a strong OSHA heat standard. In fact, I'm astounded that 90% of Congressional representatives aren't racing to co-sponsor the Ascuncion Valdivia Heat Illness and Fatality Prevention Act[26] that would enable OSHA to issue an Interim Final Standard to protect workers in a matter of months, instead of the years it will take OSHA to finalize its much-needed standard.

Some states – such as California, Washington, Oregon, Maryland, Nevada and others have issued statewide heat standard. But a national standard is needed. Businesses would benefit from complying with one national standard, rather than dozens of

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[20] https://nevadacurrent.com/2024/07/11/despite-some-progress-nevada-workers-still-arent-protected-from-extreme-heat/
[21] https://www.nytimes.com/2023/07/31/climate/heat-labor-productivity-climate.html
[22] https://www.vox.com/23844420/extreme-heat-work-labor-osha-climate-change
[23] https://onebillionresilient.org/extreme-heat-the-economic-and-social-consequences-for-the-united-states/#:~:text=Among%20the%20report's%20key%20findings,afflicting%20Black%20and%20Hispanic%20workers.
[24] https://link.springer.com/article/10.1007/s00484-021-02105-0
[25] https://www.atlanticcouncil.org/wp-content/uploads/2021/08/Extreme-Heat-Report-2021.pdf
[26] https://www.congress.gov/bill/118th-congress/house-bill/4897?q=%7B%22search%22%3A%22valdivia%22%7D&s=2&r=2

different state standards. And there is no reason that workers in San Diego should be protected from heat, while another worker across the border in Phoenix are left to fend for themselves under unsafe heat conditions.

I commend this administration for conducting hearings on OSHA's heat standard next month. It is vitally important that a strong standard be issued as quickly as possible. This standard must include heat thresholds so that employers know when the requirements of the standard are triggered.

There must be strong requirements for the provision of water, rest and shade. The rest periods must be mandatory, and workers must not lose compensation for those rest breaks. If rest breaks are voluntary and unpaid, workers will not take advantage of them. Emergency response plans and annual training are essential. And the standard also needs mandatory provision for providing acclimatization periods for workers newly exposed to heat.

All of these measures are scientifically based and proven to protect workers. Without these basic provisions, workers will continue to die needlessly from preventable heat-related illness.

The heat standard (like every single OSHA standard) has been criticized for being inflexible and "one size fits all." But that's not accurate. If employees are not exposed to high heat, the employer is not required to implement the standard.

Should employers in Montana be subjected to the same rules as employers in Florida? Of course! Are Montana workers any less susceptible to heat hazards on a 95 degree day than workers in Florida?

Infectious Diseases

One of OSHA's main regulatory priorities is an infectious disease standard. Currently that standard focuses on health care workers, rather than the general workforce.

The only regulatory protections workers have from infectious diseases is the Bloodborne Pathogens standard, which was issued in 1991 to protect healthcare workers from serious diseases like hepatitis B and C, and HIV/AIDS. CDC Guidance is just that: guidance. It is not enforceable.

That standard, issuance of which was fiercely opposed by the healthcare industry, has been a resounding success, changing the way health care is practiced and all but eliminated occupationally acquired hepatitis B.

Some of you may be too young to remember, but prior to the issuance of the bloodborne pathogens standard, doctors, dentists and nurses rarely wore masks or gloves. Common practice was to manually recap syringes, leading to numerous needles sticks and disease.

Needle boxes, where they existed at all, often leaked and overflowed. Infectious waste was with regular uncontaminated garbage. Healthcare workers had to pay exorbitant fees out of their paychecks for hepatitis B vaccinations.

Today, we are seeing more "new" diseases affecting this nation's citizens and its front-line healthcare workers. Just 50 years ago, when the OSHAct was passed, HIV/AIDS didn't exist, nor did Ebola, COVID-19 or the Avian flu. And research has shown that climate change is ushering in more new diseases.[27,28,29]

Yet this nation's frontline caregivers – those we depend on to keep us alive when we get sick – have no enforceable protections, except for OSHA's Bloodborne Pathogen Standard, against these diseases.

Tree Care

Almost no week goes by where a worker is not killed in a tree-trimming incident. There is no doubt that a Tree Care standard is needed. For that reason, the Tree Care standard is one of OSHA's top priorities.

I commend the Tree Care Industry Association, who testified before this committee last summer, for pushing for a strong standard.

OSHA has, over the last several years, enforced tree care safety using a variety of existing standards. In 2015, the agency determined that tree are workers could better be protected though issuance of a vertical tree care standard. Unfortunately, the Trump administration shelved the rule on the "long term agenda" in 2017 and then moved it back to the active agenda the following year. Little progress was made until the current administration.

The sad fact is that OSHA's serious budget shortfall, as I discussed above, is keeping this, and other important rules from moving forward as fast as everyone would like. The good news is that there are existing OSHA standards protecting tree workers, including standards that address vehicle-mounted elevating and rotating work platforms; personal protective equipment, portable power tools; machine guarding; and electrical safety.

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[27] Jones, K., Patel, N., Levy, M. *et al.* Global trends in emerging infectious diseases. *Nature* **451**, 990–993 (2008). https://doi.org/10.1038/nature06536

[28] Schulte, P. A., Bhattacharya, A., Butler, C. R., Chun, H. K., Jacklitsch, B., Jacobs, T., ... Wagner, G. R. (2016). Advancing the framework for considering the effects of climate change on worker safety and health. Journal of Occupational and Environmental Hygiene, 13(11), 847–865. https://doi.org/10.1080/15459624.2016.1179388

29 Schulte, Paul, Chun, Heekyoung, Climate Change and Occupational Safety and Health: Establishing a Preliminary Framework, *Journal of occupational and environmental hygiene*, 6(9):542-54

But the problem is that OSHA's standards staff has been decimated. It was already inadequate to fulfill the mission of the agency, and they have reportedly lost an additional third of their staff due to recent early retirements.

If the TCIA and concerned members of this committee are sincerely interested in moving this standard forward as quickly as possible, the best way to do that is to significantly increase OSHA's budget for standards and guidance.

Emergency Response

I will never forget one evening in April 2013 when my wife called me from the TV to say she had just seen something about a huge explosion in Texas. That was the West Texas ammonium nitrate fertilizer explosion that killed 15 people and destroyed a good part of the city of West.

Twelve of the 15 deaths in that explosion were emergency responders. They bravely rushed in to fight the fire, with no information about what was burning, and even less information about how to handle a fire that involved ammonium nitrate. Nor did they know that the ammonium nitrate had been improperly stored at the facility. They were heroes who should not have died that night.

Emergency responders save lives put at risk from chemical plant disasters, train wrecks, hurricanes, tornadoes, floods and fires. They deserve the best protection we can provide. OSHA estimates that more than 80 emergency responders die every year who would be covered by this standard.

OSHA's current emergency response rules are antiquated and spread across several different OSHA standards. The equipment described in OSHA's currently applicable standards would fit much better into a mid-20th century Noman Rockwell painting than a 21st century firehouse. They are in dire need of updating.

This emergency response standard is moving forward. A proposal has been issued, hearings have been held, and we are currently in a post-comment period.

I understand that legitimate concern has been raised about whether it is feasible for low-budget volunteer fire departments to comply with the proposed standard.

But a proposal is just a proposal. OSHA has collected information, including extensive consultation with professional and volunteer fire organizations and other experts. Based on that input, OSHA experts and solicitors developed a draft standard and opened it to the public for comment.

To encourage discussion, OSHA has published a separate 8-page list of questions[30] it needs answers to so that people don't have to read the regulatory text and the 200 pages of preamble.

It is in no one's interest – and certainly not in OSHA's interest – for any volunteer fire or rescue organizations to be put out of business by this standard. Which is why OSHA is soliciting information, data and other evidence about the feasibility of this standard. If OSHA is presented with convincing evidence that the standard is not feasible for volunteer fire departments, I have no doubt that they will exempt them. That is how the system is supposed to work.

But there must be strong evidence, not just rhetoric. For every standard that OSHA has proposed over the last 50 plus years, the regulated industry has claimed that the new standard would put them out of business and kill jobs. Most of those claims were simple fearmongering. The perennial accusation that an OSHA standard would throw entire industries or large numbers of businesses into bankruptcy is a myth.

Business owners are smart. The good ones figure out how to ensure their workers' safety, comply with OSHA standards and still make a profit.

And OSHA is responsive to public comment. Because it is the law, and because no one at OSHA has any interest in issuing any standard that employers cannot comply with.

Workplace Violence

Workplace violence plagues many of this country's most valuable workers – particularly employees who work in health care institutions. And the problem is growing.

The President and CEO of the Massachusetts Health and Hospital Association Steve Walsh, estimated recently that a healthcare worker is assaulted every 36 minutes in Massachusetts.[31]

Workplace violence has been on OSHA's regulatory agenda only since 2016, although it's a far older problem. I've been working to prevent assaults in healthcare and social service occupations since the early 1980s, long before OSHA even recognized it as a hazard over which OSHA had authority.

Health care and social service workers are at high risk of assault by patients, clients, and members of the public. Peer reviewed studies and Bureau of Labor Statistics (BLS) data show high injury rates from workplace violence for these workers. BLS statistics indicate public employees are at even higher risk, but they are not covered by Federal or state OSHA in 23 states. Furthermore, assaults on health care and social service workers are underreported because reporting practices are burdensome; many health care and social

[30] https://www.osha.gov/sites/default/files/ER_NPRM_Questions_and_Issues.pdf
[31] "Hospital chief: Massachusetts health care workers assaulted every 36 minutes," *Fall River Reporter*, https://fallriverreporter.com/hospital-chief-massachusetts-health-care-workers-assaulted-every-36-minutes/

service workers perceive such violence as part of their job; and, they are often disciplined for reporting assaults.

OSHA has had well-respected guidance to prevent workplace violence in health care and social service workplace since the late 1990s and has issued numerous citations under the General Duty Clause.

The House of Representatives have twice passed bipartisan legislation that would have required OSHA to issue a workplace violence standard within a far shorter period of time than OSHA is able to do under current conditions. I want to urge this committee to reconsider that legislation.

Employee Walkaround Representatives on OSHA Inspections

While OSHA's revised walkaround regulation is not a health and safety standard, and therefore subject to different criteria than standards, I would like to make a few observations.

This regulation has been the subject of scurrilous misconceptions: that it is allegedly a stalking horse for union organizing, that it will result in the theft of trade secrets, that it will cause chaos and disruption in the workplace and that walkaround representatives will get themselves killed in dangerous machinery. None of these allegations are true.

The revised walkaround regulation is not about union organizing; it is about making OSHA inspections more effective and saving workers' lives.

OSHA has always allowed third-party walkaround representatives for employees with no problem. While the previous version of the regulation suggested industrial hygienists and safety experts as *examples* of third-party walkaround representatives, that list was not exclusive.

In fact, when I worked for a union, I was often the workers' walkaround representative – even in workplaces we did not officially represent. The employers never accused me of disrupting the workplace, stealing business information, organizing workers or doing anything except ensuring that the workers were provided with a safe workplace.

Congress determined when it passed the Occupational Safety and Health Act in 1970 that among workers' most important rights was the ability to walk around with OSHA inspectors when they were conducting an inspection. Those walk-around representatives were mostly – although certainly not exclusively – utilized in union workplaces. But in fact, there is nothing in the Act or previous regulations that restrict walkaround representatives to employees of the employer.

The alternative was for OSHA inspectors to consult with a reasonable number of workers. But that process was never as effective as worker authorized walkaround representatives. The comments submitted to OSHA about this rule were replete with reports of retaliation against workers that are seen talking to OSHA inspectors. Non-English-speaking workers

are often more comfortable with their own translators than the employers. And the walkaround representatives of workers are often more familiar with unique work processes than OSHA inspectors.

Furthermore, the Mine Safety and Health Act permits union third party walkaround representatives – and courts have upheld that policy – without incident. It has not resulted in increased organizing activity, the theft of trade secrets, injuries of walkaround reps, nor has it disrupted the MSHA inspection process.

Today we have far fewer unionized workplaces than we had in 1970, but the importance for workers – all workers – to be able to choose their walkaround representatives has never been greater. This country now has many more vehicles for worker representative than existed in 1970 – worker and immigrant rights organizations, COSH and faith-based groups and others that non-union workers need to assist and represent them in a variety of areas where they need help to resolve workplace problems.

And OSHA inspectors are well equipped and trained to exclude any third-party walkaround representative from the workplace if they are causing problems or doing anything except helping to ensure safe working conditions.

Conclusion

In conclusion, there are a few things we should all agree with.

First, I think we can all agree that the safety and health of workers in this country should continue to be a major priority, and that reasonable standards and tough enforcement of those standards play an indispensable role in protecting workers. Protecting workers by enforcing OSHA standards, is, in fact, the mission of the Occupational Safety and Health Administration.

Second, no one approves of overreach – in government agencies, in Congress, or in the White House. But I think I've made clear in my testimony that overreach is not the problem that OSHA is dealing with. OSHA's problem is underreach – the lack of resources – and, at times, political will, to fulfill its mission.

Finally, I have a few recommendations for the Committee's consideration that will ensure that OSHA is better able to achieve its mission.

1. OSHA's enforcement staff needs to grow significantly, not shrink. It is inconceivable that it would take almost two centuries to reach every workplace in the country just once.
2. The regulatory process needs to be strengthened, not weakened. Changes need to be made that will grow OSHA's regulatory staff and speed up the process of issuing strong OSHA health and safety protections so that workers don't have to wait decades to receive the safeguards they need.

3. The Committee should examine the standards and standard setting practices in California and Washington under their state OSHA programs. Those programs are more effective and far speedier than federal OSHA's.
4. Given the backlog in protections at the federal level, Congress should pass legislation that would permit OSHA to easily update permissible exposure limits for toxic substances and other antiquated consensus standards. This is not a new idea. A similar procedure that was utilized to establish an initial body of regulation under section 6(a) of the OSHAct in 1971.
5. Where there are urgent new hazards that need to be addressed to expeditiously provide workers with needed protections, Congress should pass legislation exempting the agency from some procedural requirements under section 6(b) of the OSH Act or the Administrative Procedure Act or pass legislation authorizing OSHA to issue interim final standards.
6. There are many other problems with OSHA: low penalties, weak whistleblower protections, state plans that are not at least as effective as the federal program, and the lack of coverage for public employees in over half the states. Most of these problems are addressed in the Protecting America's Workers Act, H.R. 3036,[32] introduced by Mr. Courtney this past Workers Memorial Day. I strongly encourage the committee to act on this legislation. It is the best route available to reclaim OSHA's mission.

Finally, this hearing is about OSHA's mission. This nation and this Congress cannot forget that a safe workplace is a legal right for almost all workers in this country and it is OSHA's mission – assigned by you, the House of Representatives and the Senate – to ensure that mission is fulfilled.

The evidence is clear that unsafe conditions cause injuries and deaths and the evidence shows clearly that OSHA standards, and enforcement of those standards, save lives. Workers cannot depend on workers comp, insurance companies or individual state actions to protect their health and save their lives. Workers in almost all cases cannot sue their employer if they are injured on the job, even in cases of negligence. And workers can't sue to enforce their OSHA rights. All workers have is OSHA standards, inspections and enforcement.

I think we can all agree that the Representatives and Senators of both parties who voted to pass the Occupational Safety and Health Act in 1970 would have been aghast if they knew

[32] The Protecting America's Workers Act, H.R. 3036, https://www.congress.gov/bill/119th-congress/house-bill/3036?q=%7B%22search%22%3A%22protecting+americas+workers+act%22%7D&s=1&r=1

that 50 years down the road it would take decades to issue a single OSHA standard or centuries to inspect every workplace in the country.

In other words, because of paltry budgets and lack of political support, OSHA is failing to accomplish its mission – the mission that an overwhelming bipartisan majority of Congress gave the agency 54 years ago.

Happily, it is within your power to change that.

If you are sincerely interested in reclaiming OSHA's mission, there is a clear path ahead starting with a significant *increase* in OSHA's budget and actions to clear away the obstacles to issuing faster regulatory safeguards.

I urge you to pay attention to the lessons learned over the past fifty years and join efforts to strengthen instead of to weaken our commitment to assuring safe and healthful working conditions for working men and women of this country

Thank you for inviting me to testify today, and I would be happy to answer your questions.

Chairman MACKENZIE. Thank you. Last, I will recognize Ms. Watson for your testimony.

STATEMENT OF MS. FELICIA WATSON, SENIOR COUNSEL, LITTLER MENDELSON, WASHINGTON, D.C.

Ms. WATSON. Good morning, Chairman Mackenzie, Ranking Member Omar, and members of the Subcommittee. Thank you for the opportunity to testify today about the important topic of ensur-

ing OSHA's mission without overreach. I am here today to emphasize the shared goal of increasing compliance with the OSH Act, while safeguarding the ability of employers and employees to thrive in their chosen professions.

With more than two decades in the residential construction industry, I have observed some consistent themes within OSHA's regulatory and enforcement effort and would like the Subcommittee to consider these points. First, OSHA already has the ability to address worker walk around employee representation, instance-by-instance, and the Severe Violator Enforcement Program.

OSHA has shifted away from its original mission of focusing on workplace safety, into the role of a disciplinarian, evidenced by the update to the instance-by-instance policy, and expansion from applying only to willful citations, to all others, including other than serious violations specific to record keeping.

Multiple record keeping violations do not improve workplace safety. Likewise, the Worker Walk Around Amendments were unnecessary because they addressed a non-existent issue. There was no actual concern to be remedies.

Processes already existed to ensure employees were fully able to participate in any inspection, but the agency broadened who could participate as an employee representative to non-party, third party—excuse me, non-employee third-party representatives, but with no requirements that these individuals have any particular expertise, which seems contrary to the regulation's requirement of good cause and reasonably necessary.

Even more problematic is that the OSHA inspector has ultimate authority to decide whether good cause and reasonably necessary requirements have been met. This expansion also leaves employers with no recourse if the OSHA inspector decides to allow a non-employee third party to participate in that inspection.

As with the worker walkaround, OSHA's updates to the instance-by-instance and Severe Violator Enforcement Program, it can already be addressed by rules that are currently in effect. Neither of these add anything to improving safety. OSHA's stated purpose for changing instance-by-instance is to make OSHA penalties more effective.

How does that comport with OSHA's own statement that a general contractor, for example, can end up on the Severe Violator Enforcement Program, even if none of its own employees are exposed to the hazard? These changes ignore the underlying causes, and the focus instead should be away from penalizing employers and finding solutions to these issues.

The burden on employers involving paperwork requirements has increased exponentially, taking the pending heat regulation, the focus is so much on having written plans, updating these plans, keeping records of indoor temperatures, that it leaves employers with little time to focus on safety. Thank you for your time, and I look forward to your questions.

[The Statement of Ms. Watson follows:]

Testimony of Felicia Watson

Before the United States House of Representatives
Committee on Education & Workforce Subcommittee
on Workforce Protections

Hearing on "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"

May 15, 2025

Chairman Mackenzie, Ranking Member Omar, and Members of the Subcommittee:

Good morning and thank you for the opportunity to testify today about the important topic of Reclaiming OSHA's Mission: Ensuring Safety Without Overreach.

First, let me begin with a brief overview of my background and commitment to increasing compliance with the Occupational Safety and Health Act (the "OSH Act"). Currently, I am a senior counsel in the law firm Littler Mendelson, P.C., and am a member of the firm's Occupational Safety and Health Practice Group. In that role, I represent and counsel employers facing a wide range of occupational safety and health law issues.

Prior to joining Littler, I worked for more than twenty years in the residential construction industry as an assistant vice president with the National Association of Home Builders of the United States in the Office of Legal Affairs, where I focused on issues affecting home building including construction liability; labor, occupational safety and health; international trade; and privacy. I wish to emphasize that my testimony and the views I express today are solely on my own behalf, and not on behalf of my firm or any of its members or clients.

I am here today because we all have the common goal of increasing compliance with the OSH Act, while safeguarding the ability of employers and employees to work and thrive in their chosen professions. I will focus on four of OSHA's recent regulatory and enforcement policies

affecting employers and workers: (1) the Worker Walkaround Representative Designation Process; (2) changes to the Instance-By-Instance enforcement policy; (3) the Severe Violator Enforcement Program; (4) and the proposed rule on Heat Illness and Injury Prevention in Outdoor and Indoor Workplaces. While OSHA is well-intentioned, there is no data to prove that these rules and policies achieve OSHA's mission: protecting workers. These are not solution-based systems, these are punitive based systems, and that is not what the OSH Act was supposed to be.

I. The Amendments to the Worker Walkaround Rule Were Unnecessary

Under the prior Administration, OSHA amended its regulation regarding the process for designating employee representatives during an OSHA inspection, known as the Worker Walkaround Representative Designation process, found in 29 C.F.R. § 1903.8(c). OSHA's stated purpose of proposing the rule change was to aid workplace inspections "by better enabling employees to select a representative of their choice to accompany the [Compliance Safety and Health Officer (CSHO)] during a physical workplace inspection." Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59,825-26 (Aug. 30, 2023). Effective at the end of May last year, the final rule clarifies that employees may designate a non-employee third party as their representative during an OSHA inspection and makes two changes to the regulation. First, employers may either select another employee or a non-employee third party to serve as their representative during an inspection. Second, the regulation no longer states that non-employee third-party representatives should be limited to individuals with formal credentials, such as safety engineers or industrial hygienists. Instead, a CSHO may now permit a non-employee third-party representative to join the inspection if the third-party representative will aid the CSHO in conducting "an effective and thorough physical inspection of the workplace" by virtue of their knowledge, skills, or experience. The revised § 1903.8(c) states that when the representative is

not an employee of the employer, the third party may accompany the CSHO during the physical inspection "if, in the judgment of the [CSHO], good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)."

This final rule largely codifies an OSHA policy from 2013 which stated that non-employees could represent employee interests in enforcement-related matters. This policy became known as the "Fairfax Memo." The Fairfax Memo suggested that the OSH Act authorized a union or community organization representative to act on behalf of employees as a walkaround representative during a physical inspection of a non-unionized worksite so long as they had been authorized by the employees to serve as their representative. The 2013 policy was challenged in federal court by the National Federation of Independent Business (NFIB). *NFIB v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017). Before that lawsuit could be decided on its merits, the first Trump administration formally rescinded the Fairfax Memo in 2017. Thereafter, NFIB withdrew the lawsuit.

Despite significant concerns from business and other industry groups expressed during the rulemaking process, OSHA moved forward with the final rule as we see it today. In the more than 11,500 comments submitted in response to the walkaround rule, those opposed to the rule raised consistent concerns particularly given that the regulatory text is so short. Here are some of the more problematic areas that I see.

First, the revisions to the regulation were wholly unnecessary because the amendment addressed a nonexistent issue. There was no actual concern to be remedied. Processes already

existed in the prior iteration of the regulation to ensure active employee participation during an inspection. Employees were, and still are, empowered to file complaints with OSHA, including anonymously; they are also provided with protection from retaliation if they report a safety concern either to their employer or OSHA. Further, CSHOs routinely interview employees without management present during the inspection process, and employees have the right to speak with CSHOs in private. For unionized jobsites the designated employee representative is given notice and opportunity to participate in all stages of the inspection. OSHA's revision to this regulation amounted to the "solution" in search of a problem that did not exist in the first place.

Second is the fact that the rule vests the CSHO with the ultimate authority to decide whether the "good cause" and "reasonably necessary" requirements have been met to permit a non-employee third-party to join an inspection. OSHA has not defined what these terms mean, nor has it provided sufficient guidance or a defined process for CSHOs to follow in arriving at their determination, other than referring to the factors already listed in the rule. This is a circular approach that does nothing to aid employers and employees.

Third, the final rule does not provide employers with any mechanism to object to the selection of that non-employee third-party representative. OSHA issued Frequently Asked Questions (FAQs) when it published the final rule. In the FAQs, OSHA indicates that employees and the employers can object to a representative by raising their concerns with the CSHO. However, the CSHO has sole authority to resolve any disputes. This leaves an employer only one option if it disagrees with the CSHO's determination: refuse to give consent to the inspection. At that point, the CSHO can either go ahead with the inspection without the non-employee third-party representative or follow the Agency's procedures for obtaining an administrative warrant to

conduct the physical inspection. But that still does not address the employer's objection to that non-employe third-party representative. Employers have no recourse.

Fourth, the rule creates unique risks for those workplaces that are multi-employer jobsites. With the increased use of specialty trade contractors in the construction industry, jobsites may have multiple contractors, subcontracting entities, and suppliers on any given jobsite, each with their own employees, policies, and procedures. Under OSHA's current multi-employer enforcement policy, OSHA inspectors will routinely open an inspection of multiple onsite entities under the direction of a single general contractor. Based on the text of the final walkaround rule, however, employees of each entity can designate their own third-party representative to assist in the inspection. The problem here is now you end up with the potential for multiple non-employee third-party representatives with no relation to the relevant controlling, exposing, creating, and correcting employers who are participating in the inspection. Moreover, the final rule fails to address the knowledge or qualifications necessary of these designated third parties. In my opinion, a non-employee third-party representative without specific education or training related to the scope of the inspection is insufficient to demonstrate that this person "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace."

Fifth, the regulation provides no clarity on what the non-employee third-party's role will be during the course of a physical inspection. The regulation is silent on the scope or extent of this individual's authority. Nor does the regulation address the type of information the non-employee third-party may access during the inspection. The fact that OSHA's final rule fails to define what level of access these individuals will have without more, raises serious concerns for me. Likewise, the rule is not clear what input the non-employee third-party may providing during the inspection nor does OSHA address how differing opinions between the CSHO and the non-employee third-

party will impact the outcome of the inspection. This is particularly troublesome given that the non-employee third-party can literally be anyone with no specified level of education, experience, or expertise so long as the CSHO authorizes their participation. A logical outgrowth of this vague, ill-defined approach is that non-employee third-party participation will vary markedly from inspection to inspection based on factors that include personality, personal agenda, and the skill and experience, or lack of same, of this individual.

Sixth, the revised regulation also requires businesses to provide personal protective equipment (PPE) to non-employee third-party representatives during an inspection. Construction industry employers, for example, may have policies requiring visitors to wear PPE on jobsites, and some may have extra PPE available for visitors in accordance with their own policies. But not all PPE is a universal fit, and some PPE requires fit testing or other training before use. Yet, OSHA may consider an employer's refusal to provide PPE to the non-employee third-party representative as interference with the inspection. OSHA also presumes that small businesses, such as small home builders or specialty trade contractors, will have extra PPE available for anyone. My 20 years of experience in this field has shown me that is not usually the case as smaller companies provide their employees with PPE and require the employees to take care of and maintain their issued equipment. Having an available supply of extra PPE for visitors is not a routine occurrence on most construction sites, especially without advance notice of the need for extra PPE.

Ultimately, the regulation in its current form does nothing to improve workplace safety. It does, however, serve as an example of the Agency's overreach.

2. The Update to the Instance-by-Instance Citation Policy was Unnecessary

In January 2023, OSHA issued a memorandum for its regional administrators announcing a significant expansion of the application of the Agency's Instance-by-Instance (2023 policy) enforcement policy. *See,* Memorandum for Regional Administrations from Kimberly A. Stille,

Directorate of Enforcement Program and Scott C. Ketcham, Directorate of Construction, Application of Instance-by-Instance Penalty Adjustments (Jan. 26, 2023) (available at: Application of Instance-by-Instance Penalty Adjustments | Occupational Safety and Health Administration).

Prior to this announcement, OSHA regional administrators relied on the Agency's instance-by- instance policy published in 1990 that only applied to willful citations. Now, under this new enforcement policy, OSHA will base decisions to use instance-by-instance citations on considerations specific to high-gravity serious violations that include falls, trenching, machine guarding, respiratory protection, permit required confined space, lockout tagout, and other-than-serious violations specific to recordkeeping. Later, in April 2024, the agency's Instance-by-Instance policy changed to provide additional discretion to issue Instance-by-Instance penalties for serious and/or repeat violations of *any* OSHA standard, the General Duty Clause, or other-than-serious violations of OSHA's recordkeeping requirements. *See,* Memorandum for Regional Administrations from Kimberly A. Stille, Directorate of Enforcement Program and Scott C. Ketcham, Directorate of Construction, Instance-by-Instance Citation Policy for Serious, Repeat, and Other-Than-Serious Violations (April 17, 2024) (available at: Instance-by-Instance Citation Policy for Serious, Repeat, and Other-Than-Serious Violations | Occupational Safety and Health Administration).

The scope of the new instance-by-instance policy applies to general industry, agriculture, maritime, and construction industries. OSHA's stated purpose for changing the policy is "to make [OSHA's] penalties more effective in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain policy workplace safety and health requirements." Press Release, U.S. Department of Labor (Jan. 26, 2023) (available at: https://www.osha.gov/news/newsreleases/national/01262023-0).

While instance-by-instance had been permitted prior to the January 2023 and April 2024

expansions, OSHA has essentially weaponized the instance-by-instance policy by giving area directors and district managers, as well as CSHOs more "tools" in their enforcement toolbox. This shift in policy casts a much wider net than what the Agency is supposed to be trying to accomplish, which is to protect workers from unsafe workplaces.

It is one thing to say, as laid out in the 1990 policy, that the Agency will use instance-by-instance if citations fall within a certain classification or category (e.g., a willful citation will include every instance of the violation). It is another to say that OSHA will do this for every classification of citation, including recordkeeping, i.e., those items not tied to safety. The 2023 policy contains an inclusion for bad actors and certain citations are heightened by past bad behavior, but that does not address the problem. Even before it was updated, the policy treated the symptom but never addressed the cause. That could be due to a number of things including perhaps not adequately conducting outreach to the employer, or the regulation at issue is too complicated, or it just includes a "gotcha" that limits an employer's flexibility, but just because an employer receives a citation does not mean they are a bad actor.

Take OSHA's pending heat rule and consider how the instance-by-instance policy can apply. Let's say that rule goes into effect as proposed and requires the employer to supply 32 ounces of suitably cool water per employee per hour. If employees run out of water part way through their shift, but no one tells management, the employer could be cited for each violation. Meaning that it could receive a separate citation for failing to provide water for each employee on that shift. If the employer had ten (10) employees on the worksite, the employer would receive 10 citations for failure to provide adequate water in violation of the regulation. The employer could also be cited for failing to provide suitably cool water for those same 10 employees leaving the employer with 20 citations. Even though the employer was not aware the water had run out. The possibilities of these type of situations occurring are endless.

OSHA defines a willful violation as one in which the employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. The bottom line is that the revised instance-by-instance policy is a punitive-based system focusing on punishing the *employer* rather than on correcting the violation. Normally intent has to be proven in punitive cases. Yet the new instance-by-instance policy bifurcates that requirement. The OSH Act is not a strict liability statute, but the instance-by-instance policy turns it in to one creating excessive penalties that have no boundaries of when or why they need to be applied. The risk of course, is that it will not be applied universally among inspectors, and there is no standard dictating when it should be applied. The original policy, applying instance-by-instance to citations when willful violations occur is much more purposeful and achieves OSHA's stated purpose of addressing those employers who do not follow the OSH Act and its regulations.

The only real reason for such a broad expansion of the instance-by-instance policy is to punish employers, even if those penalties are wholly unrelated to health and safety. Again, this is a punitive-based system rather than a solutions-oriented system and is wholly inconsistent with the purpose of the OSH Act.

3. Expansion of the Severe Violator Enforcement Program Criteria is Problematic

Turning to OSHA's Severe Violator Enforcement Program (SVEP), as with instance-by-instance, this program fails to address its underlying issues. The Agency's stated purpose for the SVEP is to focus its "inspection resources on employers that have demonstrated indifference to their OSH Act obligations through willful, repeated, or failure-to-abate violations." (OSHA Directive No. CPL 02-00-169 (effective Sept. 15, 2022). When OSHA expanded its criteria for placing employers in its SVEP, it broadened the applicability to violations of all hazards and OSHA standards, focusing on repeat offenders. As a result, many more employers could be placed on this list. More troubling is the fact that an employer can qualify for SVEP "*even if none of its own*

employees were exposed to hazards." CPL-02-00-169 at 6 (emphasis added).

Now, OSHA may add employers to the SVEP list if they meet any of the following criteria:

1. The Fatality/Catastrophe (3 or more employees hospitalized) inspection where OSHA finds at least one willful or repeated violation or issues a failure-to-abate violations.

2. The Non-Fatality/Catastrophe inspection where OSHA finds at least two willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on the presence of high gravity serious violations.

3. Egregious enforcement actions where an employer is cited for instance-by-instance violations.

OSHA then publishes information about employers on the SVEP and the related inspections on the agency's SVEP public log. This follows OSHA's standard approach in issuing press releases when it issues violations, even though the citation may ultimately be vacated or when an employer is successful in showing no violation, in fact, occurred. Publishing such information to the public does not have any relationship to improving safety. To say otherwise is disingenuous. While the updated approach identifies a mechanism for employers to be removed from the SVEP, it is extremely difficult and has additional obligations beyond the requirement that all penalties are paid, and abatement completed. Removal from the list can occur three years after an employer receives verification that their changes are acceptable. To be eligible to meet the three-year length of time, OSHA also requires employers to have no new serious citations related to the hazards identified in the original SVEP inspection or at any related establishments and receive one follow-up or referral OSHA inspection within one year of the citation becoming a final order. This inspection occurs even if OSHA receives verification of abatement of the cited violations.

One of the many issues surrounding the SVEP is that certain industries are more vulnerable to inclusion on this list. For example, OSHA explicitly states that "a general contractor may be cited for the same violations as other contractors qualifying for SVEP, and therefore may also

qualify for the program." CPL-02-00-169 at 6. I find this particularly troubling for construction industry employers, where a general contractor can end up on the SVEP merely because of the actions of its subcontractor. This eliminates any type of due process for general contractors, and effectively holds them strictly liable for the actions of subcontractors. As I have said, the OSH Act is not a strict liability statute but OSHA's approach to enforcement has morphed from identifying solutions into a role of strict disciplinarian. Moreover, the third criteria that can get an employer added to the SVEP list, egregious activity, includes recordkeeping violations. This is an example of overreach to try and control how area offices issue citations. There is nothing beneficial about recordkeeping violations because they do not improve safety. This is just a rubber stamp on official behavior, just as with the instance-by-instance policy that plays into a determination that activity is egregious. A good example of this is found in the construction industry, where an employer may have a history of injuries, which are due more to being in a high hazard industry, rather than a dereliction of commitment to safety. If these injuries are recordable, it is not truly indicative of a bad workplace appropriate for inclusion in the SVEP. Using that criteria to add an employer to a list now for an item unrelated to prior injuries has no correlation. Instead, OSHA should be working with employers to address these issues and better manage these high hazard industries. This backwards look is not helpful.

All this is to say that both policies, the instance-by-instance and the SVEP, can be addressed by rules we currently have. Neither of these policies add anything to improving safety and are unnecessary.

4. As Proposed, OSHA's Heat Illness and Injury Prevention in Outdoor and Indoor Workplaces is Unworkable

As discussed above, although OSHA's rulemaking is still ongoing, and the Agency has its informal public hearing scheduled for June, I have several concerns with the proposed regulation. The primary concern is that it is much too complicated and overly prescriptive, especially for

smaller businesses who want to ensure they are meeting their compliance obligations. It is also a once-size fits all approach that fails to differentiate between covered industries, such as general industry versus construction versus agriculture. Each sector may need to approach heat illness and injury prevention differently based on the workplace, job tasks, physical location (indoors, outdoors, both). In addition, the amount of paperwork employers will need to generate turns this into, essentially, a recordkeeping rule, just to prove compliance. In reading through the rule, I noted that OSHA does not require employers with 10 or fewer employees to develop their heat injury and illness prevention plan (HIIPP) in writing, although OSHA assumes that these employers would choose to use OSHA's template to guide development of an unwritten HIIPP. 89 Fed. Reg. at 70857. Employers with eleven or more will need to have the plan in writing and identify the name of the heat safety coordinator in the plan itself.

But this supposed option for small employers puts them at risk for failing to comply. That is because the text of the proposed regulation itself is internally inconsistent. Here is the issue: OSHA purportedly does not require smaller employers, those with 10 or fewer employees, to have a written HIIPP, but the proposed regulatory text explicitly states, "The employer must make the HIIPP readily available at the work site to all employees performing work at the work site."

Next, the text states, "The HIIPP must be available in a language each employee, supervisor, and heat safety coordinator understands." 89 Fed. Reg. at 71070 (proposed § 1910.148(c)(8) and (c)(9) respectively). I am concerned with the internal inconsistencies in the proposed regulation because if OSHA does not require a written HIIPP for employers that meet the size threshold, yet requires the plan to be posted at the jobsite, and available in a language the employees understand, how will employers in this category ever be able to demonstrate their compliance? The answer is they will not unless they have a written plan. In reality, this is a *de facto* requirement to have a written plan to be able to meet the extensive list of requirements as

outlined in the proposed regulation. This is not a straightforward or easy to implement regulation. If the rule goes into effect as written, all it will create is confusion. Throughout all stages of the heat rulemaking process, the consistent theme from multiple stakeholders was the request that OSHA avoid a one-size fits all approach, and to tailor the regulation to specific industries, like construction, which have fluid jobsites. So far, OSHA has ignored these requests. Many employers in the construction industry have focused on providing water, rest, and shade for their employees for years. OSHA itself has incorporated these fundamental principles into its National Emphasis Program on Outdoor and Indoor Heat Hazards where the Agency relies on these same principles of "water, rest, shade" and adding adequate training and acclimatization procedures for new or returning workers. These are all important components that assist employers in providing appropriate protections for their employers. Unfortunately, the language used in the proposed regulation is not as clear and concise as it needs to be.

In my view, OSHA should withdraw the rule as proposed. Should the agency engage in a new rulemaking, OSHA should develop separate standards for industries such as construction, so that employers know how to comply, and the Agency does not have to issue concurrent guidance explaining what the standard means, as is the case with the Worker Walkaround regulation.

In conclusion, we already have the tools to address the issues raised in the regulations and policies described above. Instead of focusing on the citations that have been issued, OSHA would be better served identifying solutions to correct them. OSHA's focus has shifted from a solution-based system to a punitive based system. That is not the mission of the OSH Act. It cannot keep going in that direction.

I welcome the Subcommittee's questions.

Chairman MACKENZIE. Thank you. Under Committee Rule 9, we will now ask questions of the witnesses for 5 minutes, and I will recognize myself first. First, Mr. Parson, if the Department of Labor were to move forward with establishing a heat standard, your written testimony calls for a performance-oriented approach to mitigate heat related hazards.

What are the benefits of that kind of approach versus the approach that the Biden administration proposed under their heat standard?

Mr. Parson Thank you for the question. It really provides flexibility. A performance-oriented approach would tie specific standards to specific areas, and help industry craft a solution that makes sense for where they are and so, an overall standard sets it up really to fail, and the record keeping associated with it, and the time taken to administer it would almost be impossible.

It is not a novel ideal necessarily for OSHA. Most employers take great care at looking after heat exhaustion of their employees as it is, and so a real local performance-based approach makes a lot more sense.

Chairman MACKENZIE. Well, I appreciate that. Again, I think we share the desire for worker safety and having standards in place to protect against heat related hazards, but again, I think you correctly identified the lack of flexibility, the overzealous paperwork requirements that kind of bog down this proposal, and ultimately make it unworkable across the country.

Mr. Tresselt, in your written testimony you highlight the benefits of putting a Federal tree care standard in place. Those benefits would likely extend to employers, employees, and even OSHA compliance and safety officers conducting inspections, or helping with compliance assistance efforts. Can you further explain how creating a standard would be a win/win for everybody involved?

Mr. TRESSELT. Thank you, Congressman, for the question. The standard, as you know in our industry, is very hazardous. We have a lot of things going on. We have many workplace problems. A standard would help unify that so that we can work in conjunction with our employees, our employers, and OSHA. By unifying this standard, we would get rid of the patchwork that occurs right now.

We do not really have a standard that addresses all of our concerns as far as what we see on a daily basis in safety. I know in my business we have a lot of concerns because if we had an OSHA inspection, we might be called out on things that might not pertain to exactly what we are doing, and we might be doing something that is completely safe under the Z133 but may not be a standard that is already in the OSHA Rule.

Unifying this would help us protect our workers. It would help employers have a guideline on how to help their workers and would give all the citation over to the OSHA people a clear picture of what we are doing, and judge us on that, not on a standard that would not reflect what we actually do out in the workplace.

Chairman MACKENZIE. Well, thank you for that. That was a prime example of where I think we can improve worker safety, and do it in partnership, in conjunction with the feedback that we are getting from the industry. It has been a missed opportunity I think

for a long time that administrations in the past have talked about it, ultimately been unsuccessful in doing that.

In the last administration, my opinion is they were again, because of their overreach and focus on things that OSHA should not have been doing, they were missing the actual opportunity to protect and improve worker safety in an industry like yours, so thank you for that.

Final question goes to Ms. Watson. Your background includes decades of experience with home builders. Can you speak to the elements of the Biden proposed Heat Rule that would have had a significant impact on the construction industry?

Ms. WATSON. Thank you for the question. Yes. The elements of that rule that would affect the home building industry, residential construction, actually all construction when you think about it. You have got to have a written heat plan if you have ten or more employees on the job site. Most residential home builders do not have that many employees.

Oftentimes, that is an industry that is filled with specialty-trade subcontractors, and so, they would not be their employees, so a small home builder might only have two or three or four people, so in theory they would only need to have a verbal plan. To show compliance and demonstrate compliance with all of the requirements in the proposed heat rule they would effectively have to have a written plan, because otherwise how can they demonstrate to OSHA that they have analyzed all the jobsite hazards for those workers that they have trained them on heat, and all the 16 elements in the training requirements that they have done the emergency response, that everybody knows what the phone numbers are to summon emergency medical services.

All of those things can be extremely burdensome, and then the fact that they would have to, per the regulation, post it at the jobsite. If they do not have to have a written plan, per the proposed regulation, how are they going to post something that is not required to be written?

Chairman MACKENZIE. Appreciate your feedback there. Housing affordability is a critically important issue for so many people all across the country, and we hear time and time again that one of the things impeding home building is the amount of regulations, just a pile of regulations that make it difficult for them to operate.

Next, I will go to our Ranking Member for her 5-minute questioning.

Ms. OMAR. Mr. Barab, in your testimony, you stressed the critical partnership of NIOSH with OSHA and MSHA. What happens to the work of OSHA and MSHA to protect workers, including firefighters and miners, if the Trump administration continues down the path to fire large numbers of NIOSH employees?

Mr. BARAB. Yes. NIOSH plays an extremely critical role in protecting both miners, as you have mentioned, and firefighters. Let me start with firefighters. Firefighters are known to suffer a very high incidence and disproportionately from cancers as well as respiratory disease.

NIOSH basically assembles a register of firefighters that protects them and identifies the risks that firefighters face. They are the only agency that does this, and although some positions at NIOSH

have been restored, the firefighter registry has not been restored yet, which leaves firefighters across the country—these are the guys that rush in to homes to protect us, you know, without the kind of knowledge and protections they need to prevent them from getting cancer and heart disease.

The mine issue is much more critical. Miners are suffering a much higher rate of black lung disease because of their exposure to silica in the mines these days. A disease called progressive massive fibrosis, which hits miners at a much younger age, you know, miners in their 30's and 40's are unable to climb the stairs. They end up dying many decades earlier than they would have.

It is a tragedy, and a preventable tragedy, and NIOSH provides the kind of—they provide surveillance, health care to miners, they require miners to be transferred to less dusty positions. They are critical for the safety of miners.

Now, some of those positions have been restored as well, but none of the mine functions that deal with safety in mines, with the machinery in mines, other things like developing technology that will measure silica exposure on a daily basis, instead of having to send the samples out and waiting weeks until you find out if you were overexposed 2 weeks ago. All of those functions are gone.

Ms. OMAR. Yes. I know that yesterday Secretary Kennedy announced a reinstatement of around one-third of the NIOSH staff who were targeted for reduction in force. What are some of the NIOSH workers that will be left unstaffed if the NIOSH employees are not reinstated immediately?

Mr. BARAB. Yes, well I mentioned firefighter staff, and some of the—a lot of the mine safety staff, but also NIOSH does health hazard evaluations, for example. They go in, and they investigate when you find a lot of workers getting sick in a workplace for no discernible reasons.

NIOSH will go in there and try to figure out what is happening. NIOSH plays a role in preventing the transmission of Avian Influenza in workplaces. Fishermen and agricultural workers have some of the highest death rates and injury rates in the American economy. NIOSH works on technical issues and researching ways to make jobs safer for those workers.

There is just an enormous number of things that NIOSH does that nobody really knows about, except for the workers whose lives are extended and the injuries are prevented from the work of NIOSH.

Ms. OMAR. Thank you. I ask unanimous consent to enter into the record a letter from the National Safety Council of the importance for business leaders of the work of OSHA and NIOSH.

Chairman MACKENZIE. Without objection.

[The information of Ms. Omar follows:]

National Safety Council

May 13, 2025

The Honorable Robert Aderholt
Chair
House Subcommittee on Labor,
Health and Human Services, Education,
and Related Agencies
Washington, D.C. 20515

The Honorable Rosa DeLauro
Ranking Member
House Subcommittee on Labor,
Health and Human Services, Education,
and Related Agencies
Washington, D.C. 20515

Dear Chair Aderholt and Ranking Member DeLauro:

Thank you for allowing the National Safety Council (NSC) to submit this statement for the record on today's hearing titled: "Hearing on Fiscal Year 2026 Department of Health and Human Services Budget." This hearing could not come at a more needed time given the current workforce and programmatic challenges facing the Department of Health and Human Services (HHS). NSC looks forward to your leadership in addressing these challenges through robust oversight of HHS to ensure its continued support for proven public health programs and strategies that detect and eliminate disease and illness in the United States.

National Safety Council

The National Safety Council (NSC) is America's leading nonprofit safety advocate – and has been for over 110 years. As a mission-based organization, we work to eliminate the leading causes of preventable death and injury, focusing our efforts on the workplace and roadway. We create a culture of safety to protect people from hazard and injury in the workplace and beyond so they can live their fullest lives. Our more than 13,000 member companies and federal agency partners represent employees at nearly 41,000 U.S. worksites.

The HHS Mission is Critical to Millions of Workers in the United States

HHS agencies, including the Centers for Disease Control and Prevention (CDC) and the Substance Abuse and Mental Health Services Administration (SAMHSA), are vital to the health of America's workforce. Most recently, the United States saw the havoc infectious disease and illness can cause on the workforce through the COVID-19 pandemic. The COVID-19 pandemic shuttered businesses and was responsible for the death of over one million people in the United States as of March 2023.[1] However, it was the work of the dedicated public servants within the HHS workforce that partnered with private industry and the safety community to facilitate return-to-work policies that

[1] https://coronavirus.jhu.edu/map.html

National Safety Council

kept America's workforce safe on the job.[2] NSC implores you to utilize your congressional oversight authority to ensure any forthcoming or previously instituted reductions in force (RIFs) at HHS do not exacerbate the safety challenges businesses and workers are already faced with.

Prioritizing Occupational Safety and Health Within HHS

Created in 1970 by Congress, the National Institute for Occupational Safety and Health (NIOSH) has been the federal government's leading research expert on keeping America's workforce safe and healthy. The Institute has conducted research, facilitated countless on-site inspections and ensured equipment used to protect workers from respiratory threats are safe and properly functioning. No other entity within the federal government is equipped to tackle this worthwhile challenge and NIOSH functions cannot be smoothly integrated into other departments. Additionally, other federal agencies such as the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) rely on NIOSH research for the promulgation of their safety standards. RIFs cause the enforcement of these standards to be delayed, potentially costing numerous lives.[3]

Two research functions impacted by the previously announced RIFs at HHS include the National Personal Protective Technology Laboratory (NPTTL) and the Fatality Assessment and Control Evaluation Program (FACE). These programs are exemplary examples of how federal investment in occupational safety and health ensures the safety of America's workforce.

Through NPTTL, NIOSH certifies respirators which are used by thousands of workers including those in the manufacturing, health care, construction and mining industries. For the mining industry, these respirators protect miners from deadly diseases such as black lung and silicosis. Illness from faulty or fraudulent respirators can lead to employees needing to leave the workforce, economic losses in medical expenses and lost wages and painful death. The potential for faulty or fraudulent respirators entering the United States market has greatly increased given NIOSH is no longer accepting new respirators for testing and respirator costs could increase due to potential tariffs.

The FACE Program is another storied program at NIOSH which aims to prevent serious injuries and fatalities at jobsites through investigations, hazard identification and public findings.[4] By publicizing reports on hazard analysis, NIOSH research is helping to prevent future workplace injuries and fatalities which cost the United States economy $176.5 billion in 2023.[5] NIOSH prioritizes efforts for this program by the focus areas of participating states and overall federal goals. Without FACE and

[2] https://www.nsc.org/getmedia/f5dfd05d-83bf-4753-8903-538a24157725/safer-framework-summary.pdf
[3] https://www.safetyandhealthmagazine.com/articles/26676-msha-temporarily-pauses-enforcement-of-silica-final-rule
[4] https://www.cdc.gov/niosh/face/about/index.html
[5] https://injuryfacts.nsc.org/work/costs/work-injury-costs/

other NIOSH safety programs, America's workers and employers will be more at risk.

NIOSH Areas of Influence

The work of NIOSH does not exist in a silo, instead, it permeates throughout the federal government and private industry alike with a singular focus: protecting America's workforce. NIOSH research has been critical to establishing heat acclimatization recommendations which are currently being used by businesses to prevent heat illness among their workforce population.[6] NIOSH research has consistently shown a link between "exposure to physical factors at work" and musculoskeletal disorders (MSDs).[7] NIOSH also established a recommended exposure limit (REL) to prevent hearing loss in occupational settings. While all industries are at risk, specific hazard risks exist for workers in the mining, manufacturing and construction industries.[8] Furthermore, NIOSH research was critical to OSHA's "Guidelines for Health Care and Social Service Workers" – a framework to prevent workplace violence in the health care industry.[9] The National Children's Center for Rural and Agricultural Health and Safety (NCCRAHS), a NIOSH-funded Agricultural Center, developed age-appropriate guidelines to prevent injuries from heavy machinery, chemicals and heat stress.[10] Sadly NIOSH-funded research efforts into opioid overdose prevention programs for commercial fishermen have been discontinued.[11] Research and practitioner efforts to combat the opioid epidemic have been of great importance to this committee, the Trump Administration, and the employer community. With opioid deaths decreasing in the United States, now is not the time to back away from efforts that will keep employees safe from harm – especially in high-impact industries such as fishing, construction, manufacturing and transportation.[12]

These safety topics are all critical to the success of America's workforce, including the ability to compete in product production on the world stage. When industries see skyrocketing rates of severe injuries and fatalities, it prevents the incoming workforce from seeing that industry as a valuable career option. Today, the industries with the highest number of deaths include:

1. Transportation and warehousing
2. Construction

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[6] https://www.cdc.gov/niosh/heat-stress/recommendations/acclimatization.html#cdc_health_safety_special_topic_types-acclimatization-schedule
[7] https://www.cdc.gov/niosh/docs/97-141/default.html
[8]https://www.cdc.gov/niosh/noise/about/noise.html#:~:text=Take%20precautions%20when%20noise%20is,loss%20over%20their%20working%20lifetime.
[9] https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit5_5
[10] https://www.cdc.gov/niosh/docs/2011-129/default.html
[11] https://deohs.washington.edu/pnash/evaluating-opioid-overdose-prevention-program-commercial-fishermen-cdc-program-evaluation-framework
[12] https://www.cdc.gov/media/releases/2025/2025-cdc-reports-decline-in-us-drug-overdose-deaths.html#:~:text=New%20provisional%20data%20from%20CDC's,compared%20to%20the%20previous%20year.

National Safety Council

3. Agricultural, forestry, fishing, and hunting
4. Government
5. Professional and business services
6. Manufacturing[13]

NIOSH efforts on critical safety topics are of immense importance to private industry and the safety community. The House Appropriations Committee has, in a bipartisan manner, continued to recognize the importance of a safe and healthy workforce on the United States economy. NSC asks the committee to continue to recognize that truth and ensure NIOSH is positioned to shape the conversations surrounding occupational safety and health within the federal government.

Conclusion

NSC, and our member companies, recognize the importance of NIOSH and the federal workforce that supports the agency's mission. Employers want to prioritize safety, but some do not know where to start. NIOSH resources are a great opportunity for entry for organizations building safety and health programs at their jobsites. Only with a strong culture of safety will American businesses thrive and compete on the world stage.

NSC is grateful to the committee for the opportunity to share this statement for the record and looks forward to continued engagement with the committee and HHS on priority safety topics that affect safe business operations for employers.

[13] https://injuryfacts.nsc.org/work/industry-incidence-rates/most-dangerous-industries/

Ms. OMAR. As I mentioned in my opening statement that there is a NIOSH-funded Education and Research Center in my district that will be impacted by these cuts. This center, and others like it are in universities around the country, fulfill NIOSH's responsibility under the Occupational Safety and Health Act, not only to facilitate important research, but also to ensure a steady supply of experts.

Mr. Barab, how important is it to have a field of experts trained specifically in occupational safety and health?

Mr. BARAB. It is crucial. I mean these are the people that run our health and safety system, and not just at OSHA, or not just in NIOSH, throughout industry as well. You know, these are people that received their education largely through NIOSH Education and Research Centers, Resource Centers.

You can look at doctors and occupational physicians, NIOSH runs these ERCs, run the residence programs for the ERCs to get to train occupational physicians. I went to a conference, actually a New York City conference a couple of weeks ago in New York, and I asked—so this is probably a couple hundred people there—I asked how many of their—and these were people from I mean they were from businesses, from unions, from universities, from health groups, I asked how many of them either in whole, or in part whose careers depended on the work that the ERCs did. Every single person in the room raised their hand.

If we lose this pipeline, if we lose those people we will have a major shortage of health and safety professionals in this country, and that can do nothing but not only endanger workers, but also raise the price, you know, for companies who are trying to hire health and safety professionals who have to deal with these shortages.

Ms. OMAR. Thank you, I yield back.

Chairman MACKENZIE. Next, we will go to Mr. Messmer from Indiana.

Mr. MESSMER. Thank you, Mr. Chairman, and thank you for all the witnesses for being here today. As currently proposed, OSHA's Heat Illness and Injury Prevention Rule is unworkable, overly prescriptive, and out of step of the practical realities of balancing regulatory compliance and operational needs.

It is a one-size-fits-all framework. It fails to account for a wide variation in work environments across the industries, including differences in job functions and geographic climates. Ms. Watson, while we all agree on the importance of protecting workers' health and safety, how could this rule be revised to allow employers to tailor compliance strategies to their specific circumstances?

Ms. WATSON. Thank you for the question, sir. I think one of the main reasons, or one of the main ways that it can be revised to actually be workable is to really focus on even something that formed the basis of OSHA's national emphasis program on heat, and that is water, rest, shade, but also having training, which is also part of OSHA's existing national emphasis program.

Really focusing on what it means, what it looks like, how to recognize the signs and symptoms of heat illness, and heat stroke, what to do in that emergency, and focus on those elements, providing water, providing shade.

Many of the home builders I have spoken with across the country when this first—when this rule first hit OSHA's radar of doing a rulemaking, prior to even the advanced notice of proposed rulemaking was how do we keep this simple? How do we get this so everybody understands what they are supposed to do, and that they can comply with it, and it needs to be flexible.

I have talked to builders in New Mexico who say 80 degrees is a great day to build. It is perfect weather. You might have something completely different in Florida, so the heat triggers are a little bit difficult, but really the focus of a program, or a regulation should be water, rest, shade, rest breaks when they need them, not necessarily mandated every 2 hours, under the heat trigger is proposed.

Having something that is clear and straightforward and provides that flexibility for the type of jobsite it is, or workplace it is, but also, that the employees can understand. It needs to use terms that are simple and clearcut. A lot of employees struggle with that word "climatization." How do you say it? What does it mean? What does it really look like in practice?

That reality needs to be that it has to be something that is workable that everybody understands. It is simple and straightforward. The more complex, the more burdensome the regulation is for rulemaking and record keeping. That just makes it harder for small businesses, especially to handle. Thank you.

Mr. MESSMER. Mr. Parson, the Biden OSHA ignored calls from employers to consider the climate, that the climate varies from region to region. What may be considered an extreme temperature in one part of the country could be normal in another. How does the geographic location of employees determine the best way to protect them from heat related injuries and illnesses?

Mr. PARSON. I think it is similar to what Ms. Watson said, the challenges in Texas are different than the challenges in Maine, and the geographies are different. The employees are different, and they are used to working in different climates, and so having a standard that says this fits everybody and is going to work for everybody makes no sense.

In my career, we are paving roads in Austin, Texas in July, and you could imagine the heat involved with that. Local management, providing local solutions, and looking after your own employees there on the ground makes much more sense than prescription in this case, and so trying to figure out what that means is going to be important.

Mr. MESSMER. OK. Thank you. Could you go into detail on if the Heat Rule was enacted, you know how the Heat Rule would negatively impact members of your Association, and what changes you would have to make to comply with the rule?

Mr. PARSON. It would definitely increase costs, and likely decrease productivity, so it is going to get in the way of making progress on the things that we are trying to do.

Mr. MESSMER. OK, thank you. Ms. Watson, is there a way under existing law that the Federal Government could supersede State heat standards to regulatory action?

Ms. WATSON. Your Honor, excuse me, sir, I think the problem with that potentially is in not having looked at this issue in detail,

is that the OSH Act itself allows states to come up with their own plans, provided that they are at least as effective as Federal OSHA. Now, while Federal OSHA has never identified or defined what, at least is effective as means, the states do have the ability to come up with their plans.

With respect to any type of preemption, that would be difficult, and that would take thorough analysis, which I do not think the Committee needs to hear at this point, but it should be something that is focused and consistent across the states. I mean I think that is one of the issues with a lot of the people I have spoken with that fall under the scope of this is that the rules in all these different states are conflicting.

If a business has multiple locations, each one is going to be slightly different, and I think that inconsistency is extremely problematic.

Mr. MESSMER. Thank you, I yield back my time.

Chairman MACKENZIE. Thank you. Mr. Casar from Texas.

Mr. CASAR. Thank you, Chairman. Mr. Parson, so to be clear, your organization, you all are advocating against the heat standard as proposed under the last administration. Is that correct?

Mr. PARSON. That is correct.

Mr. CASAR. You were just talking about paving streets in Austin, Texas. I happened to be an Austin City Council member just recently, helping make sure that we pave those streets, and it sounded like you were saying that we have different conditions in Maine, as we do in Texas.

What I am confused about is when it is 90 degrees in Austin, or 90 degrees in Maine, 90 degrees is still about 90 degrees, correct?

Mr. PARSON. Correct.

Mr. CASAR. Do you think that it is appropriate for someone to have to work outdoors paving streets, or up on a scaffold in 90-degree heat, or 95-degree heat, or 100-degree heat for four or 5 hours without being allowed to come off the scaffold, or without being allowed to take a water break?

Mr. PARSON. No, sir.

Mr. CASAR. Would your organization be in favor of having a baseline requirement that let us say it is a 90-degree day that you are not allowed to have somebody out there working on the scaffold, without coming down, for four or 5 hours without taking a water break?

Mr. PARSON. Yes, I think our view would be more flexibility in the mandate, so exactly what you are saying. When does that make sense? How do you manage it? How do you implement it, rather than a hard and fast rule.

Mr. CASAR. You—so you would oppose a rule that said if you are working in 90-degree heat, and 90 degrees happens more often in Austin than it does in Maine?

Mr. PARSON. Correct.

Mr. CASAR. It does happen in both places. If you were working paving a road in Austin, Texas, or in Maine, would you be opposed to a rule that said you cannot go—have to go work four or 5 hours and without taking a drink of water in 90-degree heat paving a road?

Mr. PARSON. No. I would not be opposed to a rule that says that.

Mr. CASAR. You would not be opposed to that rule?

Mr. PARSON. Correct.

Mr. CASAR. Thank you for that. I appreciate that answer. Ms. Watson, could you tell me the same? If somebody is working in 90-degree heat for four or 5 hours paving a road up on a scaffold, would you be opposed to a rule nationwide that says no, we cannot have somebody working four or 5 hours in over 90-degree heat without being able to take a break?

Ms. WATSON. No, sir. There would be no opposition to that, and the idea being working in temperatures like that is that they take their rest breaks as needed.

Mr. CASAR. Yes. I think that people likely need to take rest breaks more often than that, but I think it is helpful to hear because I heard your advocacy. I appreciate that while there may be some differences around the Biden-era rule as it relates to acclimatization, which I understand is yes, not the easiest word to say, or differences or questions on some of the different triggers, that at least it sounds like there is some level of agreement between the witnesses here.

Me, a progressive Democrat that was for the Biden-era rule at least on saying we should not have folks out there working four or 5 hours straight in over 90-degree heat without being allowed to take a drink of water, having that kind of a rulemakes sense it sounds like to me, across industries and across the aisle, and that is very helpful, and I appreciate it.

Mr. Barab, I thought that one of the things you said earlier about OSHA was very important, when you said that at current staffing levels it was going to take a really long time for OSHA to investigate every workplace in America. Can you remind us how many years it would take for OSHA to investigate every workplace?

Mr. BARAB. Yes. In 2024, it would take 185 years, that is almost two centuries.

Mr. CASAR. With OSHA getting stretched so thin, I think that major employers that do not focus enough on workplace safety can count on their workplace never being investigated. Last year, at a Tesla factory in my district, a worker was electrocuted to death because Tesla failed to follow OSHA regulations that would have protected him.

That was the second death at that factory in my district in Southeast Austin. Tesla was fined just $50,000 for their worker's death. For a company valued at about a trillion dollars, that is a drop in the bucket. In fact, on his Federal Government contracts alone, Elon Musk makes that $50,000 back in 9 minutes, and in my view, workers' lives are worth much more than 9 minutes of that man's time.

What kind of penalty is that really? In my view, this is not—we are not facing a situation where we are talking about OSHA overreach. In my view, what we need to have is a sufficiently staffed OSHA that all employers feel like they have got to play by the rules because an employer does not feel like—they do not know if they are that one employer that gets inspected every 180 years.

We have got to be protecting workers lives, and I actually really do appreciate the testimony today, where even if there is some dis-

agreement on things like a baseline Heat Rule, that maybe we could at least agree, gosh, if you are working in Texas, where in my district in the San Antonio part of my district, we might hit 105 this week, the highest temperature ever recorded in San Antonio history in the month of May.

We have got to be able to come together and say workers' lives are worth a lot more than they are being priced right now. Thank you so much, and I yield back.

Chairman MACKENZIE. Thank you. Ms. Miller from Illinois.

Ms. MILLER. Thank you, Chairman, and thank you to our witnesses for being here today. Just to set the record straight, republicans support common sense policies that reduce regulations, while keeping our workplace environment safe. Our mission is to protect workers, not just from hazards, but also from the crushing weight of Washington's failed bureaucratic overreach.

Time and again we have seen top-down mandates that negatively impact job creation, and workers across the country. Employers are job creators and should be seen as active partners in creating safe work environments. Democrats continue to treat employers as greedy, money grabbers who do not care about the well-being of their employees.

For instance, the Biden administration's OSHA issued a rushed proposal on heat injury and illness prevention that had the potential to wreak havoc on businesses and communities across the country. Republicans, on the other hand, understand that government red tape can hinder a business, and its employees, rather than create a positive work environment.

The bottom line is that the Biden Harris OSHA drafted regulations, based on party politics for cheap votes, were not keeping workers safer. Republicans are here to fix the problem, so my question is for Ms. Watson. Your written testimony says that Biden's OSHA took the form of a "strict disciplinarian," citing the expansion of the Severe Violator Enforcement Program, and instance-by-instance citation policy.

Can you please discuss what those policies were, and how they were expanded under President Biden?

Ms. WATSON. Yes. Good morning, thank you for the question. The instance-by-instance policy used to focus on willful violations. What that meant is if there was a willful violation, that is something where an employer had been acting badly, basically, repeatedly, so that would lend itself to repeated violations that would end up putting them on the willful scope.

Those citations, they could be cited for every instance of a violation of that standard. The problem is that with the expansion it is focused on the instance by instance now also includes record keeping. Let us say for example, an employer does not fill in their 300 logs, the OSHA logs that they are supposed to complete, and maybe they do not check a box, and maybe they miss that box every single time they fill out that form.

Each one of those failures to check that box is a violation. That is an instance-by-instance. It is a paperwork issue. It is not a safety issue. Another example that I used in my testimony is, let us take OSHA's proposed Heat Rule. You have employees. You have

maybe 8 or 10 employees on a job site who run out of water, but no one tells their manager.

Nobody tells their supervisor, so the employer doesn't know about that. Then let us say that an OSHA inspector comes out and finds that they ran out of water, so the employer would get cited—could be cited ten times for failing to provide water for their employees on that job site, even though the employer did not know about it.

Let us say that that water was not suitably cool. That could be another element of another instance-by-instance violation. While the failure to provide water is a safety issue, if the employer did not know about it, and nobody told the employer that they were out of water, then obviously that is a problem, and the employee should have been able to tell the employer, but the fact is that—and they can litigate that certainly.

They have that ability to go and do that, but in that instance, in that situation they could be subject to up to 20, if you have 10 employees for each time that they violated those requirements it is per employee. That is problematic. I think the record keeping is really problematic because it is a paperwork thing.

The paperwork violations do nothing to help and improve safety.

Ms. MILLER. Well, I guess that is an example of the crushing weight of Washington's bureaucratic overreach. Mr. Parson, the Biden administration released its proposed heat standard in July 2024, but this rule was just a mandate designed to appease climate change activists. The proposed rule fails to account for the vastly different climates in different parts of the country, and so how did this—how would this proposed rule negatively impact your business?

Mr. PARSON. Yes, we talked about that a little bit earlier. I think definitely more administrative need, and more costly goods to produce. It is going to make everything more expensive. The safety of our teams is our No. 1 priority, and that is true for all businesses that I have been a part of anyway.

If you set that as kind of the baseline, we are going to try to do whatever we can to keep our employees safe and productive and willfully employed and so, trying to figure out how to craft that is priority No. 1 for us.

Ms. MILLER. Thank you.

Chairman MACKENZIE. Thank you. Next, we have Ms. Stevens from Michigan.

Ms. STEVENS. Mr. Tresselt, last night at about 10:30 I sent my dad a text message. It was a screenshot of a I guess what would look like a poster, but its title was, "Advice from a Tree. Stand tall and proud. Go out on a limb. Remember your roots, drink plenty of water. Be content with your natural beauty, enjoy the view." Would you agree with the message that I sent my dad?

Mr. TRESSELT. Thank you, Congresswoman. Absolutely I would agree with that. I think that is a lovely poem.

Ms. STEVENS. I also just messaged my father to see what he was doing because I thought he would really like to meet you. My dad is a landscaper. He loved trees. He loves arborists. He loves people who are in the business you are in. He was born in 1945 in Detroit on Comstock Street.

He has been in this tree space for a long time. He ran a landscape business. He actually still runs a landscape business. Every day I call my dad and ask him, "Dad, are you drinking enough water," because he is out there in these jobsites still, you know, he has got his Ford F–150 with Stevens Landscape on the side of it.

He is signing up jobs. Again, dad turned 80 in January, but I think you might understand why somebody like a proud Michigan man like my father loves what he does, and loves to design, and loves to work with people like yourself. I just wanted to take a moment of personal privilege to share an exchange on that, and I will have to followup with you potentially after the hearing.

Would you say you are a small business, sir?

Mr. PARSON. Yes, that is correct.

Ms. STEVENS. Yes, so you know, you are signing up jobs, you are working, you know, and you are taking care of your crew and your team I have to imagine. Look, I appreciate what Mr. Casar shared about this terrible death in the factory, and that should not have happened, and it is outrageous.

You are nowhere near the size of Tesla, is that right?

Mr. PARSON. No, ma'am.

Ms. STEVENS. Yes, so, you know, I am sure you also care that, you know, we have got these, you know, maybe some of this mismanagement, and we should not have any loss of life. To Mr. Parson, you know, what your enterprise is up to is really fantastic, you know, and we like that you are paving roads in Austin. We want you to pave roads in Michigan too, and we know you do. We know you do.

It is really quite remarkable because, you know, we have the snow and the ice, and we are always having to repave our roads. We have got a lot of potholes, OK, and we want people at work, and we are really proud of frankly the bipartisan work that you have been a part of, and I really see you as a part of it because you helped us pass an Infrastructure Bill.

We needed to do that. We need the people working in infrastructure. Now, Mr. Barab, OK, you were in charge of OSHA?

Mr. BARAB. I was Deputy Assistant Secretary.

Ms. STEVENS. Deputy, OK. You are right, you know, it is 185 years to go. We do not want it like coming down on these small businesses. We want you partnering with people properly. We want people drinking water. We do not want people in the heat. How many people from OSHA that you remember, you know, came out of the, you know, maybe the businesses that Mr. Parson and Mr. Tresselt were a part of?

Did you employ a lot of people like that at OSHA?

Mr. BARAB. We did have a lot of people that, you know, started off in business, and they are often safety managers in businesses, and then decided they wanted that as a career, yes.

Ms. STEVENS. Yes. How did we get to the place where people are not being supported in these heat environments? Not everyone has a daughter like me that cares if their dad is drinking water?

Mr. BARAB. Right. Well, that is why you need a standard because it actually tells employers what they have to do. The funny thing is we are, you know, talking about performance standards, or you know, specification standards. Small businesses usually like speci-

fication standards better, the word standard actually tells you what you have to do because otherwise they have to figure it out for themselves, and that is hard to do.

Small businesses also have something called the Onsite Consultation Program. They can get free help to comply with OSHA standards and to make sure their workplaces are safe, so OSHA is very conscious about the needs and the problems of small businesses.

Ms. STEVENS. Yes. I mean it is an absolutely fascinating topic because we are experiencing greater heat in this country and around the world, and you know, it is the next couple of decades are projected, and you know, it sounds cute, but we do need to take it seriously. You know, Mr. Chair, I am so proud to be on this Committee. I am also on the Science Committee, and I do a lot with the standards there, and standards are important. Coming out of COVID, standards, health-safety, very important. The voices on this hearing today are phenomenal, and we salute you.

From one tree gal to another, you know, man who is in the tree business, we salute you, sir, and we thank our friends in the infrastructure with CRH as well. Thank you and I yield back.

Chairman MACKENZIE. Thank you. Next, we go to Mr. Comer from Kentucky.

Mr. COMER. Thank you, Mr. Chairman, and Mr. Parson, it is great to see you here today. I am glad we have an affiliate from Hinkle Contracting in Kentucky here speaking at our Subcommittee hearing. As you know in the mountains and farmland of Kentucky where Hinkle operates, employers have adapted to muggy summer temperatures.

Kentucky businesses follow Federal OSHA standards and are able to meet the needs of their employees as they see fit. OSHA is set to conduct a public hearing on June 16th to review a proposed Federal heat standard. The proposed changes include the implementation of a mandatory 15-minute rest break every 2 hours when the heat index is 90 degrees or higher.

Could you provide some context around how this standard would disrupt employers' heat protection plans, which are working in states like Kentucky?

Mr. PARSON. I appreciate that question. It is a good one, and something I have been thinking about a lot in preparation for this testimony. It sounds easier than it would actually be to implement. If you think about how that would actually apply in a business like Hinkle, or like ours, you are out paving, or you are crushing rock in a quarry.

To be able to manage the schedule that way rather than when someone needs a break, they are allowed to take a break. I think we are not little kids, and so we do not necessarily need a rule that says everything we need to do. We do right by our people, and we put safety first, and that is worked great for us to your point. It has worked well.

Mr. COMER. I wonder if that bureaucrat that wrote that regulation had ever worked 15 minutes in 90-degree weather doing manual labor.

Mr. PARSON. I do not know.

Mr. COMER. Yes. I would not want to bet on that. During the last administration we saw one-size-fits-all standards overpower the motions of the American's business's employees. That was a huge complaint that I had, and many employers had with the Biden administration. They tried to overregulate with a one size fits all strategy.

Mr. Parson, what advice would you give the new administration when considering changes to regulations for America's diverse manufacturers.

Mr. PARSON. I think that is the key word. That is what I was going to use as well as diverse, so even in our own industry and infrastructure, we do so many different things. If you think about all of manufacturing across the United States, it varies widely. It is indoors, it is outdoors, it is freight, it is so big that it is impossible to create a standard that applies to all.

Trying to sort through and figure out something that people can—that will work, or empowering management is what I would say, to take care of their people and do the right thing, that is going to be more powerful.

Mr. COMER. I agree. I would like to say this publicly. I would strongly encourage the Trump Department of Labor to consider states which have allowed businesses to maintain flexibility in meeting the needs of their employees, when issuing their final Heat Standard Rule, and any other planned action over the next few years.

You know, some states have had great success. The employees are happy, you know, they are productive, getting good results for the taxpayers. In your case, that funding is infrastructure projects.

Hopefully, the Trump administration would deviate from the Biden administrations over—regulatory obsession and one-size-fits-all solutions, so thank you again for being here. I appreciate Hinkle in Kentucky. I yield back.

Chairman MACKENZIE. Thank you. Next, we will go to the Ranking Member of the Full Committee, Mr. Scott from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Barab, thank you for joining us again. You have done good work in this Committee. You have heard about the heat standard. What is wrong with letting the states decide what the heat standards would be?

Mr. BARAB. Well, I mean nothing is wrong with that. The problem, I mean in some states, you know, there are about a half a dozen states now that have very good heat standards that actually protect workers, but that still leaves, you know, the rest of the states that do not.

Ideally, you know, what you want is a strong national standard. If states want to have stronger standards than that, then that is fine, and that is worked out very well over the last 50 years, but you really need a strong standard. In the meantime, the states are doing what they can to fill in the gaps left.

Mr. SCOTT. Thank you. There is a Walkaround Rule which has people joining the walkaround. You mentioned that inspections can happen once every 185 years, so I suspect if an inspection is going on there is some concern that has been raised. What harm, or what good is there for the employees to be able to select a person to join in the inspection?

Mr. BARAB. Yes. The OSHA inspector, when the OSHA inspector goes to a workplace, there is only so much the OSHA inspector can figure out, you know, by him or herself. Workers provide an enormous resource to inspectors, informing them about what is going on in the workplace, things they may not see, what kind of processes may be running, or may not be running that day.

Unfortunately, what the law says essentially is that only workers in unions can have walkaround representatives, otherwise OSHA has to just kind of randomly talk to other workers.

What this does, and you know, it existed even before to a certain extent, it allows OSHA to talk to other experts, or allows—I should say allows the workers to bring in other experts to help them, maybe with language difficulties, maybe with technical issues that the OSHA inspector may not be familiar with, or to avoid retaliation.

A lot of workers really do not want to talk—do not feel safe talking to OSHA inspectors on the job. We know this is not problematic because it has been done before. The Mine Safety and Health Act, for example, allows, you know, third party worker representatives to walk around with MSHA inspectors.

There has never been a problem with that. There has never been disruption in the workplace. There has never been undercover organizing, you know, activities. This whole opposition to the Walkaround Standard is really kind of a red herring.

Mr. SCOTT. Thank you. Have you noticed any rational basis on who was being fired at NIOSH?

Mr. BARAB. No. They fired the entire agency. They brought back parts of it that had, you know, a strong interest in West Virginia, where we have some powerful Republican Senators, and there was a lot of news, a lot of media about some of the coal-related stuff, and those are the things they happen to bring back.

Unfortunately, NIOSH——

Mr. SCOTT. Well, what is wrong with letting politics decide who gets called back?

Mr. BARAB. Yes.

Mr. SCOTT. There was a news article this morning has a Republican legislator bragging about the fact that he got NIOSH programs back in his district. What is wrong with letting that happen?

Mr. BARAB. Well, you know.

Mr. SCOTT. What could go wrong?

Mr. BARAB. Unfortunately, you have districts where you do not have, you know, may not have powerful Senators or politicians. A lot of what NIOSH does is crucially important, but does not make as many headlines as, you know, coal miners, suffering from black lung. You know, the firefighters, the fisher people, agriculture, you know, those do not make as many headlines as miners.

Their lives are just as valuable, and unfortunately, they are just at risk in many places as miners are. All workers in the United States need equal protection, not just those that get the most publicity.

Mr. SCOTT. Thank you. You served in the inside at OSHA. We have asked what access DOGE has at the Department of Labor. We have not gotten an answer. What do you think DOGE has access to, and why should we be concerned?

Mr. BARAB. Well, yes, right, we do not know exactly what kind of access DOGE has, but it is extremely important that crucial information in the entire Department of Labor, but particularly in OSHA, be kept confidential. I mean you do not want business owners to know what kind of, the inside, you know, what is going on with an investigation of their own companies.

There are, you know, there are a lot of retaliation concerns among workers. OSHA enforces retaliation laws. We have 25 different retaliation laws. It is, you know, confidentiality of workers in those cases was also extremely important. You expand out, you know, from OSHA to the BLS.

I mean BLS assembles an enormous amount of confidential information, information that can, you know, as they say, move markets, so obviously you do not want business executives to know that information ahead of time, or have access to that information where they can, you know, determine, you know, what kind of investments they are going to make in the stock market.

That information needs to remain absolutely confidential to everyone.

Mr. SCOTT. Thank you. Mr. Chairman, I ask unanimous consent that the transcript of the report from this morning's news outlining the West Virginia situation be entered into the record.

Chairman MACKENZIE. Without objection.

[The information of Mr. Scott follows:]

HEALTH CARE

< RFK Jr. stands by deep cuts to health budget during contentious hearings

MAY 15, 2025 · 6:49 AM ET

2-Minute Listen PLAYLIST TRANSCRIPT

A MARTÍNEZ, HOST:

Secretary of Health and Human Services Robert F. Kennedy Jr. is standing firm on the sweeping cuts to his agency - cuts he says were suggested by Elon Musk and his team. That's the takeaway from hours of congressional testimony by Kennedy yesterday, as NPR 's Selena Simmons-Duffin reports.

SELENA SIMMONS-DUFFIN, BYLINE: The topic was the 2026 budget, but a lot of other issues came up in the hours of questions from lawmakers, including Kennedy's moves on autism and vaccines, the measles outbreak in West Texas, and the 20,000 employees that have been fired or taken buyouts from HHS. On the reorganization under way at HHS, Kennedy said he was advised by his attorneys to speak in generalities because of lawsuits under way, but he did answer some of the many questions members of Congress had about the sudden firing of staff and shuttering of some divisions and labs. Here's Democratic Representative Steny Hoyer of Maryland in the House Appropriations Committee.

(SOUNDBITE OF ARCHIVED RECORDING)

STENY HOYER: Who made those decisions - you or Musk?

SIMMONS-DUFFIN: Kennedy said he pushed back in certain cases, like preventing Head Start from being cut. That's an early education program. He did seem fuzzy on the specifics of what was cut. He said he would look into issues like delayed payments to community groups and problems with clinical trials. And he said some people who were fired were being brought back. Republican Representative Riley Moore of West Virginia thanked Kennedy for un-firing staff at a CDC lab in Morgantown that did research related to coal miner safety.

(SOUNDBITE OF ARCHIVED RECORDING)

RILEY MOORE: My understanding is that the Coal Workers' Health Surveillance Program at NIOSH will be fully reinstated. Is that correct?

ROBERT F KENNEDY JR: Yes, the program will - it will continue to function with continuity.

SIMMONS-DUFFIN: That led ranking member Rosa DeLauro of Connecticut to ask why Republicans seem to be able to call and get programs brought back.

(SOUNDBITE OF ARCHIVED RECORDING)

ROSA DELAURO: Tobacco prevention, lead poisoning, oral health. Who do we have to call to be able to get those things reinstated?

SIMMONS-DUFFIN: On vaccines, Kennedy was asked several times in the House hearing and the Senate about the measles vaccine in particular, and he did not clearly endorse it. He said instead he didn't think people should be getting their medical advice from him.

Selena Simmons-Duffin, NPR News, Washington.

(SOUNDBITE OF LUNGFISH'S "SANDS OF TIME")

Mr. SCOTT. Thank you, and I yield back.

Chairman MACKENZIE. Thank you. Next, we go to Mr. Grothman from Wisconsin.

Mr. GROTHMAN. Thank you. We will go to Ms. Watson. OSHA's proposed rule right now, and we have talked about this before, adopts a one-size-fits-all rule for heat illness and injury prevention. Identical requirements across indoor, outdoor environments, across all sectors, including agriculture, construction, manufacturing, without differentiation.

This broad application fails to consider critical distinctions in worksite conditions. How does OSHA justify imposing identical obligations on such a broad and diverse range of workplaces?

Ms. WATSON. Thank you, sir, for the question. Their justification obviously is to protect workers. I know that during the rulemaking process, during the SBREFA panels, those discussions and the advanced notice of proposed rulemaking, many, many people requested industry specific standards that apply to the unique differences among their industry.

I am familiar with construction, residential construction, so I will speak to that. Jobsites change daily, sometimes hourly, depending on what is going on. What works in manufacturing, where you might have a static situation, obviously not all manufacturing, but there are circumstances where you have a static work environment that doesn't change.

That is much easier to manage than a constructionsite where you have got roofers coming in there installing the roof, and then they are going on to the next job site, and then you have got people coming in and doing the house wrap. That constant changing is not helpful, and I think that the concern among stakeholders that I have spoken with is that if you treat everyone exactly the same with limited flexibility, it makes it difficult to get a robust plan that is specific to the industry.

Mr. GROTHMAN. It is the type of thing that causes people to hate government, right?

Ms. WATSON. Maybe, yes.

Mr. GROTHMAN. Maybe, OK.

Ms. WATSON. Sometimes, yes, sir.

Mr. GROTHMAN. OK. You raised many questions about the Walk Around Rule; we are going to touch on this again. Can you expand on potential liability, employer liability in the event of a third-party representative is injured during a walk around inspection?

Ms. WATSON. Yes, sir, thank you. OSHA actually addressed that because a number of stakeholders raised those during their comments in this process, and OSHA basically responded in the final rule saying that there were plenty of statutes available at the State and local level, tort liability, those types of things, and so OSHA was not going to comment or make a determination on that.

Essentially, OSHA is not involved in that piece of it if someone is injured, and they end up suing the employer where the jobsite was. It is up to the State Court systems to sort it.

Mr. GROTHMAN. Well, ask Mr. Barab a question here. As I understand it in my district, we had just a tragedy in which a young man died in an agriculture accident. It was a small farm, I guess the guy had maybe three or four employees. It kind of surprised his mother that OSHA would not apparently do an investigation, even if somebody died. Could you elaborate on that?

Mr. BARAB. Yes. You are talking about Stacy Sebald, and her 19 year-old son, Mitch McDaniel, who was killed by an auger in a farm in your district. Yes, OSHA, the Congress has put a rider on OSHA's appropriations bill since the 1970's, saying that OSHA cannot basically step foot on a farm with 10 or fewer employees.

They cannot go in for investigation, even a fatality investigation. They cannot even go in to pass out fact sheets. Yes, it is a terrible

injustice, and we are seeing, you know, we see a lot of workers, including young workers like Mitch McDaniel, die in these workplaces that, you know, from hazards that are preventable, and where the employer, and all employers could learn from an OSHA investigation, yet OSHA is not allowed to go onto those workplaces.

Mr. GROTHMAN. In other words, if there were 11 guys on the farm, they could have investigated it.

Mr. BARAB. Exactly. With 10, 10 workers could die on a farm, and OSHA still would not be able to go onto the farm.

Mr. GROTHMAN. Yes. You could have, if it was a little bakery with 5 employees, OSHA could get involved?

Mr. BARAB. If somebody got killed in a bakery with 5 employees, OSHA could—would get involved.

Mr. GROTHMAN. For some reason, can you think of any philosophical reason why if somebody dies, we are not even going to talk about somebody becoming a paraplegic for the rest of their life, somebody dies under the current law, but we just we apparently do not express it?

Mr. BARAB. I think we are dealing with the power of the agriculture industry and the so-called sanctity of the small farm. I do not know. This is kind of a myth again, that was created, and this again, has been on the books since the 1970's. It makes no sense, and workers are dying because of it so.

Mr. GROTHMAN. Well, thank you for pointing that out.

Chairman MACKENZIE. Thank you, and next we will go to Chairman of the Full Committee, Mr. Walberg from Michigan.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks for having this hearing today. It brings a lot of memories back to me of some of the things we have dealt with since 2006. Mr. Tresselt, I do want to start with you.

Your written testimony states that the tree care industry has a fatality rate estimated to be 10 to 30 times higher than the national average, with more than 1,000 injuries each year, all significant, all important. Do you believe there would be a significant reduction in your industry's fatality injury rate if OSHA had a significant standard in place?

Mr. TRESSELT. Thank you, Congressman. Having an OSHA standard in place would help. We are never going to unfortunately get rid of all our fatalities, but it definitely would help. It would take the ANSI Z133 Standard, which is a consensus standard in our industry, and make it the platform on which we could—which OSHA could take and distribute to all those companies.

The fatalities that we mostly see are what is called "struck by's", things falling out of the tree hitting people. The ANSI Z133 addresses that very specifically by making sure that those areas are very well defined. In our company, when we have a job briefing prior to starting a job, working the loft, we take the time to note where the things are going to fall from the tree.

We mark that area off as a no-go zone, and everybody on the crew knows that. That is one of the examples that we would utilize through the ANSI Z133, that currently OSHA does not have that in their general duty clause, that we could help a lot of our problems.

Taking this standard and making it uniform across the board, with all of the Z133 Standards would help tremendously. I would like to say that we could reduce it significantly, but there are always those things. We work with nature.

Mr. WALBERG. Yes. You have been asking for the standard since 2006.

Mr. TRESSELT. Correct.

Mr. WALBERG. As it was left out on a limb with multiple, sometimes conflicting patchwork of standards across the United States. What do you believe is the reason for the delay?

Mr. TRESSELT. I do not really have a direct answer for that. I think maybe other priorities in OSHA had taken precedent over our small industry, compared to what the broad spectrum that OSHA has to regulate.

Mr. WALBERG. Well, we are talking about lives in this case where it is amazing the industry itself is asking for it.

Mr. TRESSELT. Correct.

Mr. WALBERG. That does not happen all the time, and I think that is unique. Thank you. Ms. Watson, your written testimony highlights six concerns over the Biden administration's Worker Walk Around Rule. I want to go back to that. It greatly expands the opportunity for third parties to gain access to jobsites.

The rule seemingly opens the door for a union official to serve as a third-party employee representative when the union is not an exclusive bargaining representative at the workplace. How does this rule overstep the OSH Act, and potentially conflict with the National Labor Relations Act?

Ms. WATSON. Thank you for the question. Yes, sir. I think it is a different—OSHA has a different mission. OSHA's remit is different than the National Labor Relations Act. OSHA uses employee representative, which does not have the safeguards that are outlined and used in the National Labor Relations Act.

That Act governs workplace representation of unions. When you have got a worker walk around situation where you have got—you actually could have a couple of scenarios. You could have a non-union, you know, worksite, and maybe a union wants to get their foot in the door, and so they might come and——

Mr. WALBERG. Do you believe that would happen? Anyway, I know the answer.

Ms. WATSON. It is not a negative on union representation because they do serve an important purpose, but the point here is that a non-employee third-party is able to, you know, talk to employees, and all it takes, if you have got two people on a worksite, all it takes is one to say yes, they can come on.

That is potentially the problem. The other problem is that employee bargaining is governed by the National Labor Relations Act. It does not fall within OSHA's remit, and so that is something that is troubling.

Mr. WALBERG. OK. Thank you. Mr. Parson, I appreciate your workforce in Michigan, and I will ask you in a few seconds here about the Heat Standard, specifically as it impacts movement of freight with a truck driver. What is the problem?

Mr. PARSON. I think freight is really problematic. You are moving all kinds of different things. We move a lot of stone and as-

phalt, ready mix concrete, perishable goods, and so, to try to figure out how long can a driver be exposed to the heat when he is cleaning out his truck or whatever, and the break schedule, where does he take a break if he does not have a place to take a break? It presents a lot of problems.

Mr. WALBERG. OK. Well, thank you. I yield back.

Chairman MACKENZIE. Thank you. Our final questioner today is Mr. Kiley from California.

Mr. KILEY. Thank you, Mr. Chair, and Mr. Tresselt, I also would just like to reiterate Chairman Walberg's statements regarding a tree care standard. We did a bipartisan letter on this last year. It has been a long time coming. I would hope that OSHA would move expeditiously to finally make this happen.

You know, one of the things we saw in the Biden administration was that OSHA was focusing a lot on a lot of things that did not really relate to safety. They were doing COVID rules well after the pandemic was over. They, of course, were coming up with regulations to help out political allies.

They even, of course, did—tried to do an illegal vaccine mandate, that would have affected tens of millions of employees across the country. That was struck down by the Supreme Court. Actually, in one of the most stunning moments of the 118th Congress, the OSHA Director, Douglas Parker, who by the way had come up from California's OSHA, and had actually instituted a lot of the crazy COVID rules in California.

He came and testified before this very Subcommittee and actually tried to deny that any vaccine mandate had ever been issued. It was like something out of Orwell, who was down the memory hole. It never happened, was never initiated, was never promulgated. The Supreme Court actually took up the case and struck it down.

It was truly a remarkable moment. Getting back to the Tree Care Standard, you I think gave a very compelling explanation, Mr. Tresselt, of why this is needed, and sort of the mystifying delay that we have all experienced. I want to just give you a chance to maybe cast a little more light on your participation in the 2020 panel, because I understand there was a broad array of stakeholders, you had a lot of input.

There was a consensus standard for how we could protect workers in an industry where the chances of a fatal accident or incident are 30 times greater than any other industries, and where the work of the industry is so important toward the safety of communities when it comes to fire mitigation and other purposes, so if you wanted to share your experience.

Mr. TRESSELT. Well, the SBREFA panel was—thank you, I appreciate the question. The SBREFA panel was a very broad base of industries, and all have a stake in what we were doing, but it was very clear at the end when the conclusion was the ANSI Z133 should be the framework that we need to work with to build a standard for OSHA.

Having that in place would help us tremendously, you know, protect our workers. We are here to—I know I am for myself and my team and my company, my small company, I want people to go home, and I want them to enjoy their lives, and you know, to go

home to their kids and their families, and their dogs and their cats, and you know, their friends, and have the barbeque on the weekend.

All of this means that we have to work diligently as employers to keep them safe. The hazards that we face in tree care are tremendous. We work in public spaces. We work aloft. We work a lot of machinery. All of this being said, the SBREFA panel said you are right, we should do this, this should be happening.

As the other Congressman said, we have been fighting for this for 20 years, and we are not looking to be regulated, we are looking to be helped because we want to keep our people safe. We do not want to have fatalities. We want to reduce the amount of injuries. We want to do the things that are right for our people, and we need OSHA's help.

We are not asking OSHA to reinvent the tree care wheel. We are asking them to paint it their color. Make it something that we can all use to keep people safe.

Mr. KILEY. Right now you are sort of left to your own devices, and I would imagine that you have inspectors who come in, and are sort of trying to apply standards, regulations that are not specific to your industry, and that kind of leaves you guessing as to what exactly you are supposed to do, or maybe trying to tailor your practices to a standard that does not really fit. Is that what you have experienced?

Mr. TRESSELT. Absolutely. We do not have—there is no standards directly for tree care, so it is a patchwork of standards that they pick from, and pick and choose, and sometimes that is problematic. Take for example the use of a crane when you take down a tree.

We have trees that are very compromised, that are very dangerous to climb, we cannot climb those, or we cannot get aerial lifts to them, or things like that, so we use a crane to access a climber who will actually go into the tree, and then safety dismantle and remove it.

The general duty clause says no, you cannot do that. You are not allowed to do that, but you cannot use the crane, excuse me, to put a man or a person into the tree to do that, which then makes it almost impossible to remove the tree safely, because now we are at a crossroads where we cannot do it safely, or we have to jeopardize worker safety.

When it comes to my business, we do not jeopardize worker safety. We would either refuse to do the tree or find something else. There really is a lot. We have our hands tied at times, and we want to make sure that we are doing the right thing. Z133 supports it.

It has been approved. It is an industry consensus standard. We can do it safely. We have done it safely. Crane use has been used in our industry for over 50 years.

Mr. KILEY. Thanks very much. We will keep advocating for it, and I yield back.

Chairman MACKENZIE. Thank you. With that, we will go to closing remarks, and I would like to recognize the Ranking Member for her closing statement.

Ms. OMAR. Thank you, Mr. Chairman, and thank you once again to our witnesses for speaking with us today. Yesterday, Secretary

Kennedy sat before our Senate counterparts and tried to defend his reckless decisions to fire thousands of civil servants at NIOSH.

A decision that was partially reversed once DOGE realized that firing the people who prevent workplace injury, illness, and death might have been a mistake. We have learned today that his testimony was not even accurate. More than 60 percent of NIOSH's staff have now been returned to service—have not been returned to service, and that includes many working scientists.

Secretary Kennedy says that he cares about the harms of toxic chemical exposure, but he has fired the very scientists who assess those harms in the workplace. This fiasco with NIOSH is a prime example of the Trump administration's disregard for workers lives and livelihoods.

Today's hearing is just the latest attempt to weaken the institutions of rules that simply keep workers safe and healthy at their jobs. Since January, DOGE has fired thousands of Federal workers, targeted dozens of OSHA and mine safety Offices and hallowed out critical resources and protections for working people.

Instead of investing the real harms these cuts will cause, Republicans are once again using this hearing to demonize OSHA, rather than fund it. Investigations into workplace safety, like training, protective gear, and common-sense protections, such as the proposed Heat Stress Rule, are both morally right and fiscally savvy.

Preventing injuries could save billions of dollars in health care costs, workers' compensation, and loss of productivity. Our worker protection agencies do not just save lives, but they also deliver real financial returns for working families, and for our economy.

Undermining Federal health and safety agencies will not improve efficiency. It just puts American workers at a higher risk of preventable injuries, illnesses, and even death. Workers deserve a better treatment as pawns in a political game. Instead of taking a chainsaw to these vital programs that constituents rely on, we must fully fund these health and safety organizations to save workers' lives and finally give workers the protections they have long been promised.

I will end where I began my remarks this morning. No job should ever cost someone their life, and every worker deserves to come home every day safe, healthy, and whole. If we cannot even agree on that basic premise, then we will just continue to talk past each other in these hearing rooms.

If we can, then maybe we can start the real work of supporting the health, dignity, and well-being of all workers across this country. Thank you, and I yield the balance of my time.

Chairman MACKENZIE. Thank you. First I would like to start by recognizing everybody here today, and on behalf of the members of the Subcommittee, I want to thank the witnesses for their perspective that they gave on how we can actually help OSHA fulfill their mission of worker safety across this country.

The hearing today was very different, at least my experience, than what the Ranking Member just spoke about. I think it was a very clear mischaracterization of this testimony, and this hearing that we all experienced.

What I heard was I heard employers that are actually seeking clarity and flexibility in OSHA Standards that they can actually go

out and implement in real world applications, to provide and ensure worker safety, all across this country.

I think that is something that I think everybody in a bipartisan fashion, we heard from some of the other testifiers, or witnesses, who were talking with some of the members from the minority party about that bipartisan approach that should actually be implemented.

I thought today was actually a very constructive hearing. This was not a partisan affair. It was something where we, as the majority party, republicans are actually recognizing specific instances where we can improve worker safety. We talked about the tree care industry, and how one of the most dangerous industries out there is operating under a patchwork of applications, and that should be improved.

We think OSHA actually should be issuing regulations in that space to make sure that those workers are safe. We also talked a lot about the Heat Standard today. Again, a very serious issue that does need to be addressed so that worker safety on jobsites is carried out in a safe fashion.

We heard from testifiers how a one-size-fits-all approach is not going to work in practice. It is not going to match the reality of jobsites, and ultimately, it is going to be something that if it is not done correctly, it is not actually going to help workers because they will never see the results of it in their actual experience on constructionsites, and paving projects all across our country.

With that, I would just like to thank our witnesses again for the incredible testimony that you have provided. It is so helpful and meaningful as we do our work here as a Subcommittee, but also as we communicate with the administration on their regulations that they have proposed, and that we are going to hopefully see coming in the near future.

What we would like to see is, again, making sure that workplace safety is a key priority for all workplaces across this entire country, and that those that violate those in willful repeat violations, do face penalties.

Again, that is a balance that I think can be struck, but the way that we are going to actually come up with regulations that do that, and actually can be implemented in practice, are by hearing and listening to those that are going to be most directly affected.

I want to thank all of you again and look forward to working with my colleagues in a bipartisan fashion as we move to advance worker safety all across our country. Thank you again, and with that, without objection, there is no further business, and the Subcommittee stands adjourned.

[Whereupon, at 11:48 a.m., The Subcommittee on Workforce Protections was adjourned.]

[Additional submissions from Rep. Walberg follows:]

May 15, 2025

The Honorable Ryan Mackenzie
Chairman
House Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Ilhan Omar
Ranking Member
House Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washinton, DC 20515

Dear Chairman Mackenzie, Ranking Member Omar and Members of the U.S. House Committee on Education and the Workforce Subcommittee on Workforce Protections:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 67 chapters representing more than 23,000 members, thank you for holding today's hearing, "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach." ABC strives to provide all of its members with the knowledge and tools to achieve industry-leading health and safety in the construction industry. It is ABC's purpose to ensure all our members' construction workers get home in the same—or better—condition than when they arrived on the jobsite every day.

We strongly support comprehensive regulatory reform, which includes across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess the benefits of all regulations. Unfortunately, the Biden administration moved forward with an aggressive and burdensome rulemaking agenda, where regulations were promulgated hastily with limited stakeholder input and questionable legal authority. Many of the Biden-era regulations are currently being litigated.

Rescinding or withdrawing the below Biden-era regulations will eliminate needless red tape and uncertainty while providing clarity to the regulated community:

Heat Injury and Illness Prevention in Outdoor and Indoor Settings Proposed Rule (RIN 1218–AD39)

On Jan. 14, 2025, ABC submitted comments to OSHA on its Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings proposed rule, urging the agency to withdraw the rule as proposed and revise it to allow greater flexibility for affected industries and, at a minimum, develop a separate standard for the construction industry. OSHA's proposed rule would apply to all employers conducting outdoor and indoor work in general industry, construction, maritime and agriculture sectors where OSHA has jurisdiction and requires employers to develop programs and implement controls to protect employees from heat hazards.

ABC strongly supports worker health and safety and protection from heat injury and illness, while maintaining flexibility for the fluid nature of the construction environment. Throughout the heat rulemaking, ABC has continued to urge OSHA to focus on the key concepts of "water, rest, shade" and provide construction employers the necessary flexibility to make such a standard effective.

ABC believes employers should equip their employees and leadership teams to develop their own health and safety plans, unique to their jobsites. ABC provides tools to employers so that they can equip and empower supervisors to recognize the signs and symptoms of heat illness as well as provide necessary water, rest and shade that is dependent on local conditions. ABC's members work to ensure that jobsites are safe and strive to implement the most appropriate practices for working in extreme heat conditions that focus on the individual worker.

Unfortunately, the more than 1,000-page proposed rule imposes prescriptive, complicated requirements on construction industry employers, limiting all flexibility, which could weaken contractor efforts to prevent heat stress for workers. Flexibility is limited because OSHA has imposed rigid requirements, which include heat triggers, an acclimatization schedule for new and returning employees, mandatory rest breaks and the use of a heat safety coordinator, among others.

OSHA failed to recognize the practical applications needed on construction jobsites. Employers and employees need flexibility to account for differences among worksites, geographical locations, work responsibilities and available technology. Additionally, construction jobsites vary in size, time, scope and duration, and flexibility is needed to ensure feasibility for compliance.

ABC has consistently urged OSHA to develop a separate regulatory approach for the construction industry. Combining all employers conducting outdoor and indoor work in general industry, construction, maritime and agriculture sectors into one regulatory approach is misguided at best.

For the reasons stated above, ABC urges OSHA to withdraw the Heat Injury and Illness Prevention in Outdoor and Indoor Settings rule as proposed and revise it to allow greater flexibility for affected industries and, at a minimum, develop a separate standard for the construction industry.

Worker Walkaround Representative Designation Process Final Rule (RIN 1218–AD45)

On May 21, 2024, ABC joined the U.S. Chamber of Commerce and a coalition of business groups in filing a lawsuit in the U.S. District Court for the Western District of Texas, Waco Division against the DOL's Occupational Safety and Health Administration's Worker Walkaround Representative Designation Process final rule.

Effective May 31, 2024, the final rule allows employees to choose a third-party representative, such as an outside union representative or community organizer, to accompany an OSHA safety inspector during site inspections, regardless of whether the workplace is unionized or not. Now, construction employees and employers could face serious safety concerns because the final rule has the potential to allow anyone on a jobsite.

By allowing outside union agents access to nonunion employers' private property, OSHA is injecting itself into labor-management disputes and casting doubt on its status as a neutral enforcer of the law. This final rule negatively impacts the rights of employers while simultaneously ignoring the rights of the majority of employees who have not authorized a union to represent them.

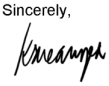
OSHA's final rule also poses unnecessary risk to the individual joining the inspection and others on the jobsite if the authorized person is not trained to safely walk a construction jobsite. The rule does not include any requirement that the authorized person be equipped or conduct themselves to the same standards as OSHA safety inspectors. Further, the final rule fails to answer who is legally responsible if the third party gets injured during the inspection or harms someone else.

OSHA can have a bigger impact on jobsite safety by fostering positive partnerships with employers and promoting safety practices that produce results. For example, according to ABC's 2025 Health and Safety Performance Report, top-performing contractors that implemented ABC's STEP® Health and Safety Management System reduced recordable incidents by up to 85%, making the best-performing companies nearly seven times safer than the industry average.

For these reasons, following the completion of the litigation regardless of which way the courts decide, the DOL should rescind the Biden administration's worker walkaround final rule.

While ABC has concerns with the aforementioned rules, we remain committed to protecting workers from hazards and promoting workplace safety and total human health. ABC looks forward to opportunities to partner with OSHA to maintain and improve safety for construction workers.

Sincerely,



Kristen Swearingen
Vice President, Government Affairs

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May 13, 2025

The Honorable Ryan Mackenzie
Chairman
House Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

The Honorable Ilhan Omar
Ranking Member
House Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

RE: Hearing on "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"

Dear Chairman Mackenzie, Ranking Member Omar, and Members of the Subcommittee:

The American Road & Transportation Builders Association (ARTBA), representing over 8,000 members in the transportation construction industry, appreciates the committee's leadership on efforts to streamline OSHA regulations.

ARTBA represents members of all sizes from every sector of the transportation construction industry, including construction contractors, materials suppliers, planning and design firms, state and local transportation agencies, and safety and equipment manufacturers. Our members are engaged in constructing and maintaining the nation's highways, bridges, and other critical infrastructure.

Federal regulations should support—not hinder—the transportation construction industry's mission to complete projects safely, efficiently, and cost-effectively. With that in mind, we've attached ARTBA's comments on OSHA's worker walkaround and heat safety proposed rulemakings. These rules are especially concerning to ARTBA's membership because they could introduce operational delays, increase compliance costs, and inadvertently compromise the flexibility needed to adapt safety protocols to the dynamic conditions of transportation construction sites.

ARTBA appreciates the chance to offer this input and remains available to collaborate on any of these matters. For additional details, please reach out to Brad Sant at bsant@artba.org or Prianka Sharma at psharma@artba.org.

Respectfully submitted,

/s/

Bradley M. Sant
Senior Vice President for Safety and Education
American Road & Transportation Builders Association

/s/

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association

Enclosures (2)

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January 14, 2025

VIA ELECTRONIC SUBMISSION

Hon. Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Occupational Safety and Health Administration
200 Constitution Ave. NW
Washington, D.C. 20010

RE: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings (Docket No. OSHA-2021-0009)

Dear Assistant Secretary Parker:

The American Road & Transportation Builders Association (ARTBA), representing over 8,000 members in the transportation construction industry, respectfully submits comments on the Occupational Safety and Health Administration's (OSHA) proposed heat safety standard for indoor and outdoor workplaces. Workplace safety – including protecting workers from heat-related illness – remains a core value of the industry we represent. However, the proposed rule is both infeasible and administratively burdensome. The proposal does not adequately distinguish between industries and their distinct work conditions, nor does it account for significant, existing efforts of employers to prevent heat stress. We urge OSHA to revise the proposal to allow greater employer flexibility. Specific comments follow below.

Background

ARTBA represents public and private sector entities of all sizes within the transportation construction industry, including contractors, materials suppliers, planning and design firms, state and local transportation agencies, and safety and equipment manufacturers. They plan, design, build and maintain the nation's highways, bridges, transit and rail lines, airports, and other critical infrastructure. Our members work to deliver projects safely, efficiently, and cost-effectively. The Infrastructure Investment & Jobs Act has significantly increased federal-aid funding for this purpose, which in turn has increased the number of industry work sites nationwide.

Heat is a well-known hazard in the transportation construction industry. Our members have long implemented effective countermeasures such as providing shade, breaks, hydration, and acclimatization protocols to protect workers from heat-related illnesses. They are also

innovating with new personal protective equipment (PPE) technologies, which enhance worker safety relating to weather as well as other potential hazards. Our members undertook these practices without regulatory mandates.

ARTBA's Comments on the Proposed Rule

1. OSHA has not demonstrated a necessity for such a broad-sweeping rule.

Under the Occupational Safety and Health Act[1], OSHA may set safety standards only when necessary to address significant workplace risks. The agency must provide evidence of substantial hazards to justify regulatory action. However, OSHA has not shown a specific need for this rule within the transportation construction industry. The data cited fails to analyze heat-related injuries and illnesses by industry despite the fact that OSHA has industry-specific data that demonstrates the flaw in its one-size-fits-all mandates.

Bureau of Labor Statistics data indicates that between 2011 and 2022 (the most recent year available), there were only three recorded heat-related deaths among highway, street, and bridge workers, all occurring in the same year. While any worker illness or fatality is unacceptable, this data shows heat to be a relatively rare cause of harm in the industry ARTBA represents. Without clear, industry-specific evidence of harm, the proposed rule places unnecessary burdens on employers without delivering meaningful safety improvements.

Year	Number of Workers (Thousands)	Fatal Injuries			Nonfatal Injuries and Illnesses (Rate per 100 Full-Time Workers)		
		Total	Exposure to Harmful Substances or Environments		Total Recordable Cases	Cases with Days Away from Work	
			Total	Environ-mental Heat		Total	Exposure to Harmful Substances or Environments
2011	286	66	3	--		1.6	0.11
2012	294	86	4	--		1.3	0.05
2013	293	66	3	--		1.5	0.05
2014	294	63	--	--	3.8	1.2	0.07
2015	310	66	5	3	3.6	1.1	0.05
2016	319	69	3	--	3.5	1.4	0.10
2017	328	68	3	--	3.2	1.1	0.06
2018	341	73	4	--	3.6	1.2	0.11
2019	349	68	--	--	3.4	1.2	0.06
2020	346	87	--	--	2.7	0.9	0.05
2021	342	52	3	--	3.0	1.2	0.05
2022	351	56	--	--	2.7	1.0	0.05
Average	**321**	**68**	**4**	**3**	**3.3**	**1.2**	**0.07**

Sources: BLS Census of Fatal Occupational Injuries; BLS Survey of Occupational Injuries and Illnesses; BLS Current Employment Statistics. NAICS 2373 - Highway, Street, and Bridge Workers
Note: Dashes indicate no data reported or data that do not meet publication criteria.

[1] 29 U.S.C. §655.

2. Safety standards issued by the agency must balance feasibility with practical implementation.

Safety standards established by OSHA must be both technologically and economically feasible, as required by the OSH Act.[2] This proposal fails to meet either criterion. ARTBA members have expressed significant concerns about the associated costs and operational challenges, including reduced production, the need for additional hires, and extended project timelines. Many disadvantaged business enterprises (DBEs) and other small businesses, in particular, would have to incur substantial new expenses to adapt practices – such as training, recordkeeping, and employee rotation – complying with scheduled break requirements.

OSHA's proposal would require breaks every two hours. This mandate would proves particularly impractical for the transportation construction industry without demonstrably enhancing worker safety. For example, asphalt must be placed while hot, and concrete hardens quickly, requiring continuous work to meet quality standards. Roadway contracts often prohibit "cold seams" in asphalt and unreinforced seams in concrete, making rigid, prescriptive breaks unworkable. Breaks should instead be flexible and provided "as needed," tailored to specific operations and employees. While ARTBA supports appropriate breaks, a rigid mandate presents significant challenges, especially for small businesses with limited crews. Required breaks could also extend traffic disruptions, increasing safety risks from frustrated motorists who may throw objects, drive through active work zones, or bypass traffic controls, and in so doing, endanger workers.

Crews working in high-risk areas like intersections and interstate ramps face even greater dangers. Requiring them to stop tasks and relocate to cooling locations, such as vehicles or tents, adds risks and imposes substantial costs to establish safe ingress and egress routes. These hazards outweigh the minimal heat-related risks reported in this industry. Data shows few heat-related deaths in highway, road, and bridge construction annually, compared to 50-60 workers killed each year in vehicle "struck-by" incidents. The proposed rule could inadvertently worsen these risks.

Additionally, the rule may push projects to nighttime hours to avoid heat, introducing new hazards. Night work carries greater risks due to low visibility and increased incidents of drowsy, impaired, or distracted drivers. Fatigue from night shifts further compromises worker safety and health, raising serious concerns about the unintended consequences of this rule.

Ambiguity also remains regarding whether workers handling hazardous materials, such as during sandblasting or asbestos and other hazardous material removal, would be required to decontaminate, take a scheduled break, and then reapply all of their hazmat gear. This process

[2] 29 U.S.C. § 655(b)(5)).

could significantly extend work hours, necessitating complete revisions to project timelines and budgets. Moreover, repeatedly removing, and reapplying hazmat gear could exacerbate heat exposure issues for workers, potentially causing greater harm than allowing them to complete their tasks before taking a break. All these issues underscore the infeasibility of the proposed rule and its failure to meet OSHA's requirement for standards that are both practical and achievable.

3. OSHA should establish regional heat triggers that account for variation in geography and climate.

A one-size-fits-all approach to heat triggers fails to account for regional variability and practical challenges. OSHA's proposed nationwide heat triggers, set at a heat index of 80°F and a high heat trigger at 90°F, are impractical in regions with warm weather most of the year. In such areas, these triggers could apply on over 200 days annually, including extended periods under high heat conditions, creating an undue burden on employers. Natural acclimatization also varies significantly by region. For example, 80°F feels temperate to workers in Arizona or Florida. ARTBA questions whether OSHA's thresholds are actually based on sufficient data or expert consensus, as no studies that look at regional heat averages and effects are cited. To address these concerns, ARTBA strongly recommends scientifically based, region-specific heat trigger standards, a solution previously requested during the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel proceedings and in follow-up comments.

4. OSHA's proposed control measures are impractical and require greater flexibility.

a. Shade

The proposed shade requirements are unworkable for many transportation construction projects, particularly for moving operations within the right-of-way of public roads. Additionally, the rule includes ambiguous language, such as "as frequently as possible" and "as close to the worksite," which leaves critical elements open to interpretation and increases uncertainty of compliance. This raises questions about whether enough structures are needed to provide shade for the entire crew at the same time, or if the structures are meant to accommodate rotating break schedules. Further, the rule states that it prohibits the use of equipment for shade but does not specify whether a worker in an air-conditioned shaded cab must still vacate it for required breaks. Similarly, it is unclear whether umbrellas or cover-mounted equipment count as shaded structures.

Conditions on jobsites can vary significantly, even within the same area. Some may be entirely shaded, others completely unshaded, and many a mix of both. Additionally, many state Departments of Transportation (DOTs) prohibit the placement of temporary structures alongside highways due to motorist safety concerns, as these structures are not crash-tested. The proposed rule also overlooks the challenges of projects requiring work at heights, such as on bridge piers, where providing shade structures is impractical or impossible. In such cases,

requiring workers to descend from heights to take a break may be more physically taxing than allowing them to complete their tasks before resting.

Flexibility is therefore essential, including the ability to use available structures, such as equipment, to provide shade. The transportation construction industry is experienced in implementing safety procedures, including lock-out/tag-out protocols, to ensure the safe use of equipment for this purpose. Equipment should also be permitted for air conditioning and cooling, if safety measures, like stopping and locking the equipment, are in place. Additionally, moving operations, or requiring workers to walk significant distances to break areas, can be inefficient and physically taxing, exacerbating the very hazard that OSHA is attempting to regulate, and further complicating compliance with the proposed requirements.

b. Acclimatization

The proposed acclimatization requirements raise significant questions that need clarification to ensure practical implementation. First, it is unclear whether non-working exposure to the same or similar environmental conditions triggers acclimatization requirements, which could create confusion for employers. Additionally, guidance is needed to address how acclimatization should be maintained during periods of fluctuating temperatures, such as when weekly highs alternate between 70 and 80 degrees, or when there is a heat wave—both common occurrences. As written, the rule seems to suggest that acclimatization would reset every time temperatures change, potentially requiring prolonged periods to re-establish proper conditions. Furthermore, the rule does not specify whether gradual temperature increases, such as rising from 70 to 80 degrees over several days, contributes to the proposed acclimatization protocols. For instance, if a worker labors for a week in temperatures in the 70s, it is unclear whether this period counts toward acclimatization when the temperature ultimately exceeds 80 degrees. Without clarity on these points, the rule may impose unnecessary complexities and delays in compliance. ARTBA members have also expressed concern about the practicalities of implementing these requirements, particularly if determining workloads or acclimatization protocols requires the involvement of occupational health specialists or adherence to percentage-based workload adjustments, which may be impossible to calculate or enforce on dynamic jobsites.

5. <u>The proposed rule lacks clarity and practicality in key areas.</u>

The proposed rule introduces several requirements and considerations that lack sufficient clarity, creating significant challenges for employers. From documentation burdens to emergency response definitions and accommodations for existing health conditions, the rule fails to provide the necessary guidance and flexibility to address the diverse realities of workplace operations effectively. These gaps highlight the need for targeted adjustments to ensure the rule is both clear and feasible for implementation across industries. More specific examples are below.

a. Documentation

Even without explicitly mandating certain recordkeeping requirements, the proposal imposes a significant documentation burden on employers. To demonstrate compliance, and for liability purposes, employers will need to maintain evidence that breaks and water were provided to workers, effectively requiring detailed administrative tracking. This adds to the already extensive recordkeeping requirements imposed upon employers, including those related to training.

The requirement for designated heat safety coordinators also raises additional administrative and financial burdens, as ARTBA members have indicated that this would require them to hire extra full-time staff to monitor compliance with these protocols. The cumulative effect of these obligations creates new administrative challenges, particularly for small businesses that may lack the resources to manage extensive documentation while also ensuring operational efficiency.

b. Written Heat Safety Plans

OSHA's proposed requirement for written heat safety plans raises uncertainty and imposes logistical burdens, particularly for companies operating multiple jobsites. It is unclear whether employers must develop a separate, site-specific plan for each jobsite, or if a single, company-wide plan would suffice. For companies managing extensive operations—such as those with 50 crews working across 50 different sites—the expectation of site-specific customization creates confusion and could result in an unmanageable situation. Employers are left questioning where the line is drawn in terms of tailoring plans to individual sites and how detailed these plans must be. Furthermore, the rule does not specify whether written plans must be physically distributed on paper or if electronic dissemination is acceptable. Compounding this uncertainty is the requirement for heat safety training, which may need to align with site-specific conditions. ARTBA urges OSHA to provide clear guidance on these issues to ensure that written heat safety plans are practical, enforceable, and adaptable to diverse operations without imposing undue burdens on employers.

c. Emergency Response Exemption

ARTBA recommends an expanded definition of "emergency response" to encompass a broader range of industries and job types critical to addressing urgent situations. Recent events underscore the need for round-the-clock operations to ensure public safety and timely reopening of infrastructure. For instance, substantial (and successful) emergency road and bridge repairs took place on the hurricane-damaged Sanibel Causeway in Florida (September 2022), I-95 crash and fire in Philadelphia (June 2023), and I-10 fire in Los Angeles (November 2023). Note that all these incidents (and their repairs) took place during periods in which the temperature could exceed OSHA's heat triggers, whether because of the time of year or region

in which it took place. To restore these essential assets, emergency response teams, including transportation construction workers, worked extended hours under challenging conditions.

Additionally, severe natural weather events, such as storms and hurricanes Debby, Helene, and Milton in 2024, caused widespread destruction across the Southeastern United States, necessitating immediate repair of roadway and transportation infrastructure. Such events demand flexibility in emergency response to address localized hazards quickly, including hazardous debris removal, erosion control, and structural repairs. In many of these instances time is of the essence, and crews rotate and work round-the-clock. These operations are critical for community safety and recovery. Expanding the definition of emergency response is essential to reflect the realities of these necessary operations. ARTBA members have long navigated weather-related hazards while prioritizing expedited project delivery in such emergency situations.

d. Existing Health Conditions

The rule as proposed fails to account for existing health conditions that may exacerbate an employee's reaction to high temperatures. Many medical conditions and/or medications can affect heat tolerance and significantly increase the risk of heat-related illnesses. Employers often maintain limited knowledge of their employees' medical histories due to privacy regulations, making it difficult to tailor heat safety measures effectively. While they can make post-offer inquiries, employers are limited in what they can do once receiving this information from the employee. Oftentimes employers find out information about their employees only after incidents occur. Without clear guidance on how to address these individual vulnerabilities, the rule places an unrealistic burden on employers to predict and prevent adverse health outcomes. Additionally, requiring employers to make accommodations based on unknown or undisclosed conditions could lead to unintended legal and operational challenges.

e. Indoor vs. Outdoor Settings

OSHA's proposed heat standards overlook the complexities of work that may include both outside and inside work simultaneously. For example, how should an employer comply with this standard when working in tunnels, manholes, etc., where workers frequently transition between indoor and outdoor environments? ARTBA members often perform tasks in tunnels or other enclosed spaces with limited ventilation, then move to outdoor areas exposed to direct sunlight and varying weather conditions. The proposed rule does not adequately address how employers should manage these transitions, particularly when indoor and outdoor heat triggers, acclimatization protocols, and break requirements differ. For example, workers exiting a tunnel may face sudden exposure to higher temperatures or direct sunlight, but the standard offers no guidance on how to account for these shifts in environmental conditions. Additionally, it is unclear whether OSHA's confined spaces standards[3], which govern manholes and similar enclosed spaces, apply in conjunction with the proposed heat rules. ARTBA encourages OSHA to

[3] *See* 29 C.F.R. § 1926.1202

clarify these points and consider industry-specific, flexible solutions that reflect the realities of mixed indoor/outdoor work environments and similar situations.

6. OSHA should adopt an industry-specific standard that is performance and/or outcome based.

There is a long-standing practice within OSHA to create "vertical" standards tailored to the specific and unique needs of individual industries. OSHA's construction industry standards are designed to address the distinct risks associated with this sector. By the same logic, any heat injury and illness standard should follow a similarly tailored approach. Outdoor work presents unique challenges, including hazardous environments involving construction equipment and materials. These conditions are further complicated by moving operations with time-sensitive materials and proximity to the public and high-speed traffic. Such factors require a standard specifically designed to address these complexities.

OSHA's proposal attempts to regulate all covered workers with a single standard and has serious potential to create more hazards than it proports to resolve. The transportation construction industry requires a standard designed to account for its unique conditions and challenges, and that offers maximum flexibility to employers.

Most roadway and transportation construction companies and agencies have been successfully tailoring their work to ensure the safety and health of their workers for many years. Some have adopted procedures that consider the unique needs of this industry. For example, a Wisconsin-based contractor – in consultation with expert professionals – has devised a protocol through which it works at a faster pace and for longer periods than would be allowed by the proposed OSHA mandates but shuts down operations when temperatures exceed 93 degrees. They have found a way – specific to their projects, construction disciplines and climate – to protect their team members while meeting critical project timelines. Such an innovative plan would not be feasible under the proposed OSHA standard.

ARTBA therefore strongly recommends that OSHA rescind this rule as proposed and instead work with various sectors on the development of industry-specific performance-based rulemaking that emphasizes flexibility. Similar to OSHA's approach to PPE, this could include hazard assessments and tailored measures that address unique risks while providing maximum flexibility.

Conclusion

In conclusion, while ARTBA fully supports protecting workers from heat-related illnesses, the proposed rule's rigid and prescriptive requirements are impractical and unsuited to the realities of the transportation construction industry.

Furthermore, the rule does not comply with the Occupational Safety and Health Act's requirements for standards to be both technologically and economically feasible, nor does it

demonstrate a significant risk to workers within our sector as required by law. The data fails to substantiate the need for such a sweeping regulation.

We strongly urge OSHA to address the concerns outlined in these comments and collaborate with stakeholders to develop a practical, industry-specific standard that ensures worker safety while recognizing the operational demands of transportation construction. ARTBA stands ready to assist in revising the proposal to achieve these objectives. For any questions or additional information, please contact Brad Sant at bsant@artba.org or Prianka Sharma at psharma@artba.org.

Sincerely,

David Bauer
President and CEO
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November 13, 2023

VIA ELECTRONIC SUBMISSION

Hon. Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Occupational Safety and Health Administration
200 Constitution Ave. NW
Washington, D.C. 20010

RE: Worker Walkaround Representative Designation Process (Docket. No. OSHA 2023-0008)

Dear Assistant Secretary Parker:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members in the transportation construction industry, we respectfully submit the following comments to the Occupational Safety and Health Administration (OSHA) on its proposed "Worker Walkaround Representative Designation Process" regulation.[1]
ARTBA's members have been tasked with deploying the bulk of record federal investments within the Infrastructure Investment & Jobs Act, which President Biden signed into law almost exactly two years ago. ARTBA members seek to deliver projects safely, efficiently and cost-effectively.

Because safety is the top priority for ARTBA and its members, we maintain a strong working relationship with OSHA and have always respected the core purpose of the agency to ensure the safety of workers and worksites. Regrettably, OSHA's current proposal is not in keeping with that mission and spirit. Instead, it would create significant and unnecessary challenges for employers, distracting from the core purpose of worksite safety. In fact, the proposal appears inappropriately intended to promote unrelated policy priorities, risking a severe undermining of both OSHA's credibility and its inspective processes. For these reasons and those detailed below, ARTBA respectfully recommends that OSHA rescind this rule.

Background

ARTBA represents members in all facets of the transportation construction industry, including contractors, materials suppliers, state and local transportation agencies, planning and design firms, safety and equipment manufacturers and more. The top priority for ARTBA and its members is safety. Accordingly, our association has enjoyed a long and productive relationship with OSHA to

[1] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825, (August 30, 2023).

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further our mutual objectives. It should also be noted that our members operate in both union and non-union environments, and we have consulted with both sectors in the preparation of these comments.

OSHA's proposed rule would revise the current language regarding when a third-party is allowed to accompany an OSHA inspector during a worksite inspection. Currently, the Occupational Safety and Health Act[2] allows a representative of the employer and/or a representative authorized by employees to accompany an OSHA inspector during a physical inspection of a workplace.[3] Third parties are permitted to serve as an employees' representative when "good cause" has been shown for their participation.[4]

OSHA's proposal would expand eligibility of those who could accompany inspectors. First, OSHA proposes that employees may authorize either an employee of the or any third party designee "reasonably necessary to aid in the inspection."[5] The agency alleges that modifying the standard from "good cause" to "reasonably necessary" is consistent with court precedence.[6] Second, OSHA would eliminate language pertaining to the skills and knowledge required for that individual accompanying an inspector, instead stating that the authorized individual be reasonably necessary to the conduct of a thorough inspection simply by virtue of their knowledge, skills, or experience.[7] OSHA does not offer any additional parameters for this third party's conduct while at the job site or otherwise.

ARTBA's Comments on the Proposal

<u>OSHA's proposed revision is not needed and does not help enhance workplace safety.</u>

According to OSHA, this proposal is intended to improve workplace inspections by allowing employees' selection of third parties to accompany inspectors. However, the current rule and its longstanding interpretation already allow for a third party designated by employees to accompany an OSHA inspector when *good cause* is shown, while also incorporating important safeguards that the agency now wants to eliminate.[8]

[2] 29 U.S.C. § 657 (e).
[3] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825, (August 30, 2023).
[4] *Id.* at 59827.
[5] *Id.* at 59829.
[6] *See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022).
[7] 88 Fed. Reg. 59825 at 59829.
[8] *Supra* note 4.

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It is OSHA's practice to demonstrate a need for a new rule when addressing industry failure relating to safety and health. The agency has justified a new or revised regulation with relevant statistics and demonstrated harms, backed by examples. This new proposal fails to demonstrate any scenario in which an employee's representative was denied access to an inspection. OSHA does not provide any empirical evidence of harm or failure that needs to be addressed by issuing a new regulation.

Furthermore, the proposed changes would actually harm this process. The rule raises serious concerns about the motivation for an inspection and undermines the expertise and credibility of the inspector. It diminishes OSHA's reputation as a safety advocate and distracts from the real purpose of the visit by opening the door to those with divergent agendas.

a. *OSHA must retain language that demonstrates the purpose for having the third party on site.*

This proposed rule would remove longstanding language enumerating the types of designated third parties "reasonably necessary" to include in the inspection (e.g., industrial hygienists and safety engineers). Such qualifiers demonstrate the level of sophistication and integrity needed to enhance the value of safety inspections. Instead, OSHA would allow virtually any third party to participate in the inspection, regardless of whether they have any training or knowledge of safety procedures. This practice would provide opportunities for individuals – particularly those with motivations unrelated to workplace safety or assisting the inspection in good faith – to access an employer's sensitive business information without recourse. Examples could include representatives of labor unions, law firms, or even competitors of the employer. These individuals would serve no credible purpose, while indulging policy priorities unrelated to the OSHA inspection process.

These third parties could attempt to influence the OSHA inspector, distract from the inspection, and/or inject thoughts and opinions outside its scope. Furthermore, they could undermine the credibility of the OHSA inspector and their final product. The purpose of an OSHA inspection is to monitor the safety of the jobsite. A third party with no expertise in the safety principles the inspector is assessing adds no value to the inspection. Moreover, as noted, these third parties may participate to further their own purposes, unrelated to safety objectives. ARTBA members have shared past experiences with bad actors attempting to access their job sites for reasons unrelated to worker safety and health, including seeking proprietary information or evading privacy safeguards in place to protect both the employer and employees. OSHA would become a conduit for those seeking entry to a jobsite for those purposes. The proposed rule would politicize and damage the credibility of an agency created to protect worker safety and health on an objective basis.

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b. OSHA must retain defined parameters for third parties that are granted access to jobsites.

This rulemaking offers no parameters for third parties provided access to a jobsite. Instead, these guidelines are left to individual OSHA inspectors. The lack of clarity within the rule makes it ripe for misapplication and inconsistency. OSHA offers no guidelines for what third parties can and cannot do once they gain access to a jobsite. For example, will these third parties be able to wear clothing that promotes a labor union, law firm, or competitor? Will there be limitations on materials they can or cannot distribute? Will they have access to employees and confidential business information? Without limitations in these areas, third parties may attempt to further their own agendas through the inspection, including advertising business services, union messaging, and/or seeking information to use against the employer. For OSHA to maintain its integrity, the agency must avoid the perception of helping facilitate these types of activities, and instead should only allow those third parties who can demonstrate a legitimate purpose for being present, as is provided in the existing rule.

In the case of non-unionized jobsites, the federal government does not have authority to assist or facilitate their unionization. At a minimum, OSHA must make clear in this rulemaking that it will not permit a union representative to be present at a non-union facility. To do otherwise would betray an ulterior motive for this rulemaking and conflict with established principles of labor law.

c. Third parties with inadequate expertise can endanger a jobsite.

Third parties without knowledge of the complexities of a transportation construction job site add nothing to the value of a safety inspection. Moreover, they pose a safety risk to themselves and others through their lack of expertise in the protocols unique to those jobsites. It is disconcerting and – once again – raises suspicions about the true motivation of this proposal when OSHA has provided no information about potential liabilities for injuries of these third parties on a job site. Especially if these incidents occur due to their own negligence or lack of awareness. It should not be an employer's responsibility to train a third party in necessary, standard safety protocols simply to participate in an inspection. This scenario also underscores the illogicality of including such an individual in the inspective process.

Conclusion

This proposed OSHA rule appears to be an overtly political attempt at policymaking by an agency charged with objective implementation of safety principles. It seems intended to further the priorities of individuals and organizations with no legitimate relationship to safety inspections. The

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proposal also provides no credible justification for overturning current and longstanding interpretation of the "walkaround" process, while lacking clarity in key aspects.
ARTBA members remain committed to ensuring the safety of their employees on transportation construction jobsites. Unfortunately, the OSHA proposal will not further this critical objective. For the many reasons described, the agency should rescind this proposal.

If you have any questions or require additional information, please contact Brad Sant, senior vice president for safety and education, by email at bsant@artba.org or Prianka Sharma, vice president and counsel for regulatory affairs, by email at psharma@artba.org. Thank you for considering the views of ARTBA's members on this important matter.

Sincerely,

/s/
Bradley M. Sant
Senior Vice President for Safety and Education
American Road & Transportation Builders Association

/s/
Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association

May 14, 2025

Honorable Ryan Mackenzie
Chair
House Education and the Workforce Committee
Subcommittee on Workforce Protections

Honorable Ilhan Omar
Ranking Member
House Education and the Workforce Committee
Subcommittee on Workforce Protections

Dear Chair Mackenzie, Ranking Member Omar, and members of the Subcommittee on Workforce Protections:

The Coalition for Workplace Safety (CWS) thanks you for holding your hearing, "Reclaiming OSHA's Mission: Ensuring Safety without Overreach." We appreciate the subcommittee's careful review of the Occupational Safety and Health Administration's (OSHA) policies and priorities as it focuses on ways the agency can improve workplace safety while also minimizing potentially unnecessary regulatory burdens. With respect to the latter, CWS and its members would like to share with the subcommittee our comments on two OSHA rulemakings - the Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Proposed Rule and the Worker Walkaround Representative Designation Process Final Rule. As explain in the attached comments, the heat rule is inflexible and unworkable and will hit small businesses and their employees particularly hard, while the worker walkaround rule is more likely to interfere with OSHA inspections than enhance them.

CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone's concern. Improving safety can only happen when all parties – employers, employees, and OSHA – have a strong working relationship.

CWS members agree that heat can pose risks to workers in a range of workplaces around the country. We have significant concerns, however, with the inflexible, "one-size-fits-all" principles reflected in OSHA's heat proposed rule, which do not take geographical and other variables into account. As we explain in our comments, which 81 other employer organizations joined, "Without the flexibility to tailor heat illness programs based on an employer's unique use environments, including geography and employee tolerances, a rigid rule carries the risk of being unduly burdensome and cost prohibitive, while failing to effectively protect workers from the specific hazards that would be identified through a site specific and tailored risk assessment." OSHA should withdraw the proposal, and "[a]ny standard that OSHA pursues should be substantially modified to create a more flexible approach that will allow employers to tailor heat illness prevention programs based on their unique work environments and employees' needs."

Additionally, the worker walkaround final rule does not further the interests of workplace safety. CWS and 74 other employer organizations explained in our comments that the rule "would allow third-parties with ulterior motives to take advantage of OSHA's legitimate enforcement processes to further their unrelated interests, which very likely could be hostile to the employer." "By amending its regulations to allow more third-parties to enter an employer's worksite and accompany Compliance Safety and Health Officers on inspections, OSHA diminishes its credibility as a neutral enforcement agency, discourages employer cooperation in the inspection process and disregards employer property rights." The worker walkaround final rule is currently under litigation, as several employer organizations have questioned the legality of the rule. The case has been fully briefed, and a decision is pending.

Thank you again for holding this important hearing. CWS looks forward to working with the subcommittee on these and other workplace safety issues moving forward.

Sincerely,

Coalition for Workplace Safety

January 14, 2025

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Douglas Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Room S2315
200 Constitution Avenue, NW
Washington, DC 20210

VIA ELECTRONIC SUBMISSION TO https://www.regulations.gov/commenton/OSHA-2021-0009-4761

RE: **Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Proposed Rule, Docket (OSHA-2021-0009)**

Dear Acting Secretary Su and Assistant Secretary Parker:

The Coalition for Workplace Safety (CWS) and the 81 undersigned organizations respectfully submit these comments in response to the Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings standard proposed by the Occupational Safety and Health Administration (OSHA) (Docket No. OSHA-2021-0009). See also the feedback presented by CWS during the Small Business Regulatory Enforcement Fairness Act (SBREFA) process on December 20, 2023. These comments supplement observations presented by the CWS on February 4, 2022, regarding OSHA's Advance Notice of Proposed Rulemaking on Heat Injury and Illness Prevention in Indoor and Outdoor Settings, 86 Fed. Reg. 59309 (October 27, 2021). We appreciate OSHA's consideration of our input.

The CWS is a coalition of trade associations and companies, representing many industries with millions of employees in every state in the nation who are focused on establishing reasonable and responsible workplace safety standards across the country. We are comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

CWS members agree that heat can pose risks to workers in a range of workplaces around the country. We have significant concerns, however, with the inflexible, "one-size-fits-all" principles reflected in OSHA's proposed rule, which do not take geographical and other variables into account. We request that the proposed rule be withdrawn for the purpose of significantly

revising it for the reasons discussed below. The proposed rule creates requirements that are unworkable for many businesses, while providing little commensurate benefit to workers. We respectfully request that the rule be substantially modified to create a more flexible approach that will allow employers to tailor heat illness prevention programs based on their unique work environments, employees' needs, and tolerances.

(1) **The proposed rule should be withdrawn because it fails to consider the extensive concerns provided during the SBREFA process regarding the inflexibility of the requirements.**

In August 2023, OSHA convened a Small Business Advocacy Review (SBAR) Panel to provide comments on OSHA's potential standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings ("heat standard" or "proposed heat standard"). OSHA then sought input from Small Entity Representatives (SERs) on various options included in the proposed heat standard, gathering input from eighty-two SERs.[1] OSHA concluded the SBREFA process on November 3, 2023 and released the SBAR Panel's Report ("Panel Report"). The CWS supports recommendations expressed in the Panel Report recognizing that flexibility, rather than a "one-size-fits-all" standard, is necessary for employers to most effectively prevent or mitigate heat-related injuries and illnesses in their workplaces. While OSHA did reconsider the overly burdensome and unnecessary proposed recordkeeping requirements in the draft heat standard, most of the recommendations of the Panel were largely ignored. None of the following concerns noted by SERs in the Panel Report are reflected in the proposed heat standard:

- *Flexibility and Scalability:* The standard should be flexible with a programmatic approach that allows employers to tailor their program to their particular workplace(s).

- *Heat Triggers*: The heat triggers suggested by OSHA are too low and confusing. The Panel recommended that OSHA reconsider and simplify the presentation of heat triggers and provide additional data supporting the levels selected.

- *Temperature Measurement*: More flexibility should be provided in monitoring methods, with clarity requested on requirements for those with indoor settings and mobile workforces.

- *Rest Breaks*: The Panel requested that OSHA consider allowing employers some flexibility in the frequency of rest breaks and clarify what activities employees can engage in during rest breaks.

- *Acclimatization*: The Panel recommended that OSHA provide flexible options for acclimatization to enable employers to determine the best method for acclimatizing workers.

[1] *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness in Outdoor and Indoor Work* (Nov. 3, 2023), ("Panel Report") at ii.

- *Solo and Mobile Workers*: The Panel recommended that OSHA offer employers with solo and mobile workers who work alone or travel between jobsites flexibility related to supervision, temperature monitoring, and rest breaks.

- *Engineering and Administrative Controls:* The Panel recommended that OSHA offer flexibility to employers in implementing controls that are feasible and appropriate for their workplace, versus prescribing specific engineering controls (e.g., A/C, fans, etc.) and administrative controls, such as adjusting start times and monitoring employees, that would be difficult or infeasible to implement.

The SBREFA process was created by Congress in response to concerns expressed by the small business community that federal regulations were too numerous, too complex, and too expensive to implement, and that certain agencies were not considering the concerns of small businesses.[2] When OSHA determines that a proposed regulation is expected to have a significant impact on a substantial number of small business entities, OSHA is required to convene a panel to listen to small entities that would be affected by the proposal express their views on the impact that proposal would have. OSHA made that determination and convened the panel process. CWS is concerned that the proposed rule, as published, did not modify the rule in reaction to the well-informed concerns identified by the SERs.

(2) **OSHA's existing "Water.Rest.Shade" resources provide excellent guidance, while the proposed rule creates more burdens than it solves**.

In addition to the concerns noted above in the Panel Report, SERs voiced strong concern regarding whether the underlying data on heat-related injuries from the Bureau of Labor Statistics (BLS) supports the need for a national heat standard.[3] While OSHA has provided data related to heat injury levels, the agency has not demonstrated that this proposed standard, with its specification-oriented detail, is the best response. CWS members believe the flexibility needed by employers to effectively tailor heat illness prevention programs to their unique environments and employees' is already available in OSHA's "Water. Rest. Shade"[4] heat illness prevention materials. However, OSHA's prior work in creating the "Water. Rest. Shade" materials has been totally sacrificed in the proposal in the pursuit of nailing down every last detail. CWS members are using combinations of "Water.Rest.Shade" materials to prevent heat illness. The current landscape is not one where employers are generally ignoring the hazard. Instead, it is one where employers would benefit from clear guidance and reasonable requirements, in contrast to how the proposal operates. Employers who participate in the CWS are implementing practices such as the following:

- Ambient temperature control in indoor work settings
- Provide cool drinking water to employees that is readily available. Several members reported that, in addition to providing water, they also provide electrolyte-containing fluids, popsicles, coolers with ice and water, air-conditioned break rooms, cooling rooms,

[2] https://www.osha.gov/smallbusiness/sbrefa
[3] Panel Report at 45.
[4] https://www.osha.gov/heat-exposure/water-rest-shade (last accessed 12/22/2024).

and vehicles, climate controlled operational control rooms, fans, and other approaches to minimize heat illness.

- Protective clothing, such as dry fit work shirts
- Job rotation
- Rest breaks as needed
- Training employees and supervisors on heat illness prevention and how to respond if an employee exhibits symptoms.

We encourage OSHA to take a closer look at the data collected during the SBREFA process that has been ignored in the proposed standard. During the SBAR Panel review process, the SERs found little quantifiable support for a national heat illness standard like the one OSHA has proposed.

The CWS strongly urges that the proposed rule be withdrawn so that OSHA can significantly modify it and take the Panel Report into consideration. This is necessary to closely examine the impact of unintended consequences related to lack of flexibility, and to the confusion created by several of the topics discussed further below. In its current form, the proposed standard creates significant compliance hurdles for employers, while providing little additional protection to employees beyond that already available through OSHA's "Water.Rest.Shade" framework, the General Duty Clause, and OSHA's National Emphasis Program for Outdoor and Indoor Heat-Related Hazards.[5]

(3) **To move forward with the proposed rule, OSHA should substantially modify it with flexibility as the guidepost.**

While CWS and its members support the mission of heat illness and injury prevention, CWS urges OSHA to revise the proposed standard considerably to provide a more flexible performance-based approach that will allow employers and employees to create heat illness protocols that take the needs of individuals, their unique workplaces, and geographical considerations into account. CWS joins the concerns voiced in the Panel Report that the proposed heat triggers are too low, and not appropriate for all regions and use environments.

The proposed standard ignores the fact that risks for heat-related injury and illness can vary significantly based on the individual, environmental, and work-related factors. Employers and employees need flexibility to account for differences among work sites, geographical locations, worker(s) unique risk factors and tolerances, work responsibilities, and available technology.

Whether any given employee is susceptible to heat illness, and at what point, is the product of performance-based individual health and fitness factors that are far outside the control of the employer. Yet, the proposed standard applies an unworkable "one-size-fits-all" approach to acclimatization, rest breaks, and other topics in the rule based only on environmental temperatures. These rigid requirements ignore the fact that individual employees will not have the same reaction to environmental temperatures.

[5] https://www.osha.gov/enforcement/directives/cpl-03-00-024

Seven main factors are associated with heat stress: temperature, air velocity, humidity, radiant heat, clothing, metabolic rate, and acclimatization.[6] Two additional factors – body weight and work-rest schedule – affect metabolic rate.[7] The significant contribution of metabolic rate to heat stress is recognized by the National Institute for Occupational Safety and Health (NIOSH). NIOSH defines occupational heat stress as "the combination of metabolic heat, environmental heat, clothing, and personal protective equipment (PPE), which results in increased heat storage in the body."[8] An employee's personal risk factors, such as physical fitness and underlying health conditions, also present individualized factors. Yet, the proposed standard remains rigidly tied to environmental temperature, while ignoring geographical and other individualized differences.

The rigid focus on temperature also disregards regional differences. Ninety degrees may be considered a high temperature in one part of the country, but feel moderate in another state, like Arizona. As *Bloomberg Law* reported in its interview with a climatologist and researcher from Arizona State University, there is not a universal heat index temperature degree trigger point that would be equally effective nationwide.[9] This is due to regional climate, amount of solar radiation, humidity, and an individual's characteristics.[10] Therefore, the researcher noted, "even if there were national trigger points, they would have to be adjusted regionally to account for local climate differences, working conditions, and workforce characteristics."[11]

With these individual and geographic differences in mind, definitions in the standard based only on heat exposure triggers need significant revisions. For example, the exemption available for "short duration" exposure at or above the initial heat trigger at 15 minutes or less in any 60-minute period is excessively limited and will not be applicable to many work environments if tied only to time of exposure versus a risk-based approach. A good example of the practical application of a "short duration exposure" assessment is found in maintenance personnel who occasionally service equipment outside during the summer. If they are outside for more than 15 minutes in a 60-minute period, then the standard is triggered, even if they are otherwise working in an air-conditioned building for the remainder of the day.

Consider also the scenario of what happens if an air-conditioning unit malfunctions and an indoor workplace gets hot briefly while the unit is being repaired. All of the requirements of the standard would then apply if the conditions last for more than 15 minutes during a 60-minute period, even if the building's temperature is brought under the heat trigger for the remainder of the day. For a final example of the impracticality of temperature-based heat triggers, many employers utilize delivery drivers with air-conditioned vehicles. Even though the drivers are in their climate-controlled vehicles for the majority of their workday, which would remove them from the application of the proposed rule, the "short duration" exception will not apply when they are outside of the vehicle for more than 15 minutes over a 60-minute period. If a driver also chooses

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[6] *"It's the Heat – And* the Humidity: Critical Factors for Heat Stress Assessment and Prevention," by Robert N. Phalen and Catherine L. Besmar, https://synergist.aiha.org/202004-heat-and-humidity (last accessed 12/20/2024).
[7] *Id.*
[8] https://www.cdc.gov/niosh/heat-stress/about/ (last accessed 12/20/2024)
[9] "Workers Want Flexible Heat Standard as OSHA Eyes Trigger Temp," *Bloomberg Law Occupational Safety and Health Reporter*, 9/3/2024 (last accessed 12/20/2024).
[10] *Id.*
[11] *Id.*

to eat lunch outside for more than 15 minutes during a hot day because they enjoy doing so, then the requirements of the proposed standard arguably would also be triggered.

Rather than imposing a one-size-fits-all approach to rest breaks and acclimatization, CWS proposes that the proposed standard be withdrawn, and revised to provide a flexible approach that will allow employers to use the existing "Water.Rest.Shade" framework to provide the most benefit to employees based on a consideration of the work environment, geographical location, and other individualized risk factors.

(4) **The proposed rule creates substantial confusion and burdens for employers in several areas, without proof of commensurate benefit to employees.**

Several elements of the proposed rule create unnecessary burdens and compliance impediments to employers due to ill-defined requirements that cannot be applied in all work environments. While there are several areas of the proposed rule that raise more questions than they solve, we have focused the discussion that follows on the top concerns expressed by our members.

(a) *Rest break requirements at the high-heat trigger create substantial operational challenges and implicate additional risks.*

The overwhelming majority of members we surveyed indicated that providing mandatory rest breaks of 15 minutes at least every two hours creates significant operational challenges. For example, in work environments depending on trucks to load and unload products, workers unload trucks when they arrive. Otherwise, trucks are left waiting, creating the potential for traffic disruptions and related safety issues. Other members reported that, during summer months, they stagger work times so that strenuous outdoor work is done in the morning hours to avoid exposing workers to peak afternoon heat. If break times are rigidly applied in these environments, the outdoor work periods have the potential of being extended to account for mandatory 15-minute breaks, creating exposure during the higher heat periods.

Our members' concerns are consistent with employer voices from the Panel Report noting that there are scenarios where it is not feasible to take prescriptive breaks while doing specific tasks, such as pouring concrete or being in the middle of a production run in a manufacturing operation. Requiring regimented rest breaks of 15 minutes during defined time periods can result in lower manpower than necessary to safely conduct an operation, and the loss of a critical co-worker with experience and operational knowledge at the exact "wrong" time to complete a job safely.[12] As SERs in industries working from heights noted, the unintended consequence from the rigid application of rest breaks is that a greater hazard is likely to be created when workers are required to frequently climb up and down a ladder to take prescriptive breaks, exposing them to additional fall hazards.[13] CWS strongly urges OSHA to provide employers with more flexibility to provide break times tailored to the needs of the specific workplace and employee tolerances.

[12] General comments from Heat Illness SBAR/SBREFA Panel (10/3/2023), at 33.

[13] *Id.* at 34.

(b) *The requirements for the heat safety coordinator are unclear and are challenging for small businesses to implement.*

The proposed standard requires that employers designate "one or more" heat safety coordinators to implement and monitor the Heat Injury and Illness Prevention Program (HIIPP). CWS requests that OSHA provide more clarity around the heat coordinator's role. In its current form, the proposed standard does not clarify what other job responsibilities the heat safety coordinator may have, or, whether this role must also be staffed year-round, including during times when temperatures will not reach initial trigger or high heat trigger thresholds. Companies with dedicated workplace safety staff may be able to designate existing trained safety team members as heat safety coordinators, if OSHA refines the language in the proposed standard to clarify other job duties that the heat safety coordinator may have. However, smaller businesses without such roles will have to hire new staff to file this role, creating significant financial burdens and hiring difficulties in a time when many employers are already facing workforce shortages.

(c) *Exemptions for work-activities in indoor work areas and in air-conditioned vehicles will be impossible to apply in all but the most sedentary of work environments.*

Due to inflexible and unrealistic descriptions in the proposed standard regarding the applicability of exemptions to indoor work areas and air-conditioned vehicles, exemptions from HIIPP and other requirements are unusable for all but the most sedentary of roles in air-conditioned workplaces. The majority of CWS members who responded to survey questions indicated that they would have significant hurdles in taking advantage of the exemptions, given the fact that almost any level of work involving more than sitting would remove their work environments from the exemption.

Consider the example of a forklift operator who works in a temperature-controlled building with the majority of their work taking place indoors. The forklift operator must continually stand and move on and off the forklift for operational needs. The forklift operator also frequently moves loads on the forklift weighing more than 10 pounds, sometimes requiring some manual effort to position pallets on the forklift. In another example, employees work in an indoor location. Though most of the work is done while sitting, employees periodically will have to lift materials weighing up to 25 pounds to process customers' orders. In these examples, the exemptions do not clearly apply.

Employers will be substantially burdened in assessing whether the exemptions apply to them. And if the exemption does not apply, the employers in these examples would be required to follow all requirements in the proposed standard, including developing and implementing the HIIPP, designating heat safety coordinators, and frequently monitoring heat levels. CWS recommends that the rule be revised significantly to provide employers with flexibility to determine when heat poses health and safety risks to employees in their work environments, rather than having to follow the rigid requirements that carry the threat of undue burden.

(d) *The requirements for conducting heat assessment and monitoring plans are unrealistic, overly burdensome, and expose the heat monitors to additional risks.*

The proposed standard requires that employers identify heat hazards in outdoor work areas "as close as possible to the work area" and "with sufficient frequency" to determine employees' exposure to heat with reasonable accuracy. In indoor work settings, employers must identify each "work area" where there is a reasonable expectation that employees are or may be exposed to heat at or above the initial trigger. The vague nature of the wording creates compliance challenges in that "frequency" and "work area(s") are not well-defined. In a multi-level work location, each level could potentially be a different "work area," requiring its own separate monitoring. Not only does the wording lack specificity to instruct an employer as to how frequently monitoring should be conducted and where, but the requirements as written in the proposed standard carry risks for employees performing the monitoring tasks. Applying the rule as written would require employers to send a person to conduct a risk assessment each time someone ventures into a potential new "work area," thereby exposing the heat monitor to additional risks, such as when the heat monitor must climb ladders or work from heights to conduct heat assessments. This risk increases each time the heat monitor must "frequently" measure the heat.

The recordkeeping requirements regarding heat assessments and measurements will also create excessive administrative burdens for employers. The proposed rule requires employers to create and maintain "written or electronic records" of indoor work area measurements and retain those records for six months. This requirement creates significant ongoing administrative burdens for employers, coupled with compliance risks if all measurements are not documented.

(e) *The acclimatization requirements do not account for temperature fluctuations*.

In addition to its overall concerns regarding the inflexible approach taken by OSHA regarding acclimatization, CWS requests clarity around how to account for temperature fluctuations. The proposed rule requires gradual acclimatization for new and certain returning employees. However, the rule provides no guidance for how this is to be applied for brief spikes in temperature. The proposed standard reads that acclimatization is required whenever the heat index is at or above the initial heat trigger "during the employee's first week at work." However, the proposal makes no mention of how this is to be applied if the heat falls below the initial heat trigger on the remainder of the employee's first week on the job. It would be overly burdensome to require an employer to rigidly follow all prescribed acclimatization steps in such a scenario where the initial heat trigger threshold is reached in only one day of the workweek.

(f) *The proposed rule creates substantial costs for employers that have been downplayed and/or overlooked.*

A standard must be economically feasible.[14] The proposed standard does not meet this requirement. We request that OSHA also re-visit economic assessment data while revising the

[14] *Forging Indus. Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1453 (4th Cir. 1985).

proposed rule. As the above examples illustrate, employers will incur significant compliance costs. While the health and safety of workers is a priority for CWS members, the standard must be economically feasible. Yet, OSHA grossly underestimates compliance costs at only $3,085 per establishment.[15] The cost of hiring just one additional full-time employee to serve as a heat safety coordinator would easily total at least ten times this amount. This figure continues to increase when you add expenses for heat monitoring equipment, engineering and administrative controls, plus the considerable time and expense that it will take to create the HIIPP.

CONCLUSION

The CWS and the undersigned organizations oppose the creation of a prescriptive "one-size-fits all" approach to heat illness. Without the flexibility to tailor heat illness programs based on an employer's unique use environments, including geography and employee tolerances, a rigid rule carries the risk of being unduly burdensome and cost prohibitive, while failing to effectively protect workers from the specific hazards that would be identified through a site specific and tailored risk assessment. We respectfully urge withdrawal of the proposed standard so that it can be significantly revised to reflect OSHA's "Water. Rest. Shade" program. Any standard that OSHA pursues should be substantially modified to create a more flexible approach that will allow employers to tailor heat illness prevention programs based on their unique work environments and employees' needs.

We appreciate the opportunity to provide these comments and welcome the opportunity to continue to engage with the agency as it considers this important issue.

Sincerely,

Coalition for Workplace Safety
Air Conditioning Contractors of America
Alliance for Chemical Distribution
Aluminum Association
American Bakers Association
American Coke and Coal Chemicals Institute
American Forest & Paper Association (AF&PA)
American Foundry Society
American Home Furnishings Alliance
American Iron and Steel Institute (AISI)
American Pipeline Contractors Association
American Pyrotechnics Association
American Road and Transportation Builders Association
American Supply Association
American Trucking Associations
American Wood Council (AWC)
Associated Builders and Contractors
Associated Equipment Distributors

[15] *Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings*, 89 Fed. Reg. 70824, August 30, 2024 (RIN 1218-AD39).

Associated General Contractors of America
Associated Wire Rope Fabricators
Brick Industry Association
Construction Industry Round Table
Distribution Contractors Association
FMI – The Food Industry Association
Forging Industry Association
FP2 , formerly the Foundation for Pavement Preservation
Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
IAAPA, The Global Association for the Attractions Industry
Independent Electrical Contractors
Independent Lubricant Manufacturers Association
Industrial Fasteners Institute
Institute of Makers of Explosives
International Foodservice Distributors Association
International Warehouse Logistics Association (IWLA)
Manufactured Housing Institute
MEMA, The Vehicle Suppliers Association
National Association of Electrical Distributors (NAED)
National Association of Home Builders
National Association of Wholesaler-Distributors (NAW)
National Automobile Dealers Association
National Cotton Ginners Association
National Council of Farmer Cooperatives
National Demolition Association
National Elevator Industry, Inc.
National Grocers Association
National Lumber & Building Material Dealers Association
National Oilseed Processors Association
National Propane Gas Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National RV Dealers Association (RVDA)
National Stone, Sand, & Gravel Association
National Tooling and Machining Association
National Utility Contractors Association
NATSO, Representing America's Travel Centers and Truck Stops
Non-Ferrous Founders' Society
North American Die Casting Association
Outdoor Amusement Business Association (OABA)
Pennsylvania Utility Contractors Association
Petroleum Equipment Institute
Plastics Pipe Institute

Pool and Hot Tub Alliance (PHTA)
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Reusable Industrial Packaging Association
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council (SBE Council)
Steel Manufacturers Association
Technology & Manufacturing Association
Texas Cotton Ginners' Association
The Construction Leadership Council
The Fertilizer Institute
Tile Roofing Industry Alliance
Tree Care Industry Association
TRSA – The Linen, Uniform and Facility Services Industry
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November 13, 2023

The Honorable Douglas Parker
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Occupational Safety and Health Administration
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By electronic submission: www.regulations.gov

RE: Worker Walkaround Representative Designation Process Proposed Rule; Docket No. OSHA-2023-0008; 88 Fed. Reg. 59825 (August 30, 2023)

These comments are submitted on behalf of the Coalition for Workplace Safety ("CWS") and the 74 undersigned organizations ("the Commenters"), pursuant to the Occupational Safety and Health Administration's Notice of Proposed Rulemaking regarding the Worker Walkaround Representative Designation Process under the OSH Act, 88 Fed. Reg. 59825 (Aug. 30, 2023) ("Proposed Rule"). For the reasons outlined below, the Commenters urge OSHA to withdraw the proposed rule entirely. OSHA should focus on its goal of promoting workplace safety, not labor organizing, and the Proposed Rule is more likely to interfere with OSHA inspections than enhance them.

CWS comprises associations and employers focused on improving workplace safety through cooperation, assistance, transparency, clarity and accountability. CWS includes associations and employers across a range of sizes from very small businesses to larger companies.

Comments

CWS shares OSHA's goal of maintaining safe and healthful American workplaces, but the Proposed Rule fails to further that aim. By amending its regulations to allow more third-parties to enter an employer's worksite[1] and accompany Compliance Safety and Health Officers ("CSHOs") on inspections, OSHA diminishes its credibility as a neutral enforcement agency, discourages employer cooperation in the inspection process and disregards employer property rights. Alarmingly, the proposed regulation suggests OSHA believes it lacks sufficient competence to conduct thorough inspections on its own.

[1] The current regulations allow non-employee third parties in narrow, but justifiable, exceptions such as industrial hygienists and safety engineers. See, 29 C.F.R. 1903.8.

Most importantly, the proposed rule would allow third-parties with ulterior motives to take advantage of OSHA's legitimate enforcement processes to further their unrelated interests, which very likely could be hostile to the employer. The context of this proposed rule explains the trepidations and concerns of employers—it is the successor to a Letter of Interpretation issued by the Obama administration at the request of the United Steelworkers to permit a union representative to be designated an employee representative at a non-union workplace. That LOI was withdrawn by Secretary of Labor Alex Acosta and now OSHA seeks to impose the same approach through this rulemaking. Because of the anticipated scenario where the new regulation is used by a union seeking access to a non-union workplace during an organizing campaign, the proposed rule would place additional burdens on CSHOs to resolve disputes that have nothing to do with occupational safety and health. Accordingly, as the proposed rule does not further the interests of workplace safety, OSHA should abandon it.

1. **The Proposed Rule Exceeds OSHA's Statutory Authority By Placing an Undue Burden on Employers and Impermissibly Weakening the Requirement that Party Representatives Must Aid in an Inspection.**

Section 8 of the OSH Act grants OSHA the authority to inspect and investigate places of employment "with a minimum burden upon employers." 29 U.S.C. § 657(d). It further authorizes OSHA to issue regulations allowing a representative "authorized by his employees" to accompany OSHA during the physical inspection of any workplace "for the purpose of aiding such inspection." 29 U.S.C. § 657(e). Under current regulations, employees may choose a co-worker to represent them during a workplace walkaround or, when reasonably necessary, they may seek representation by a third party with safety expertise. These regulations serve the interests of workplace safety and recognize a reasonable balance between employer privacy and property rights and employee rights to participate with representation in the OSHA process.

The proposed rule lacks the necessary guardrails to protect employer privacy interests and exceeds OSHA's authority under the Act. It allows for employees to select a third-party representative when "good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough inspection of the workplace." 88 Fed. Reg. 59834. This regulatory language appears to impose several pre-conditions on the authorization of a third-party representative. First, the employees bear the burden to show "good cause" for the inclusion of the third party. Second, the CSHO must determine their participation is "reasonably necessary" to conduct an effective inspection. But the proposed rule is toothless – it contains no mechanisms to enforce the "good cause" or "reasonably necessary" requirements beyond the CSHO's discretion. As a result, it puts employers at the mercy of the CSHO's unfettered subjective decision making about the meaning of "good cause" or "reasonable necessity." It provides employers no recourse – aside from the warrant process – to challenge the CSHOs determinations. Because of that, such limitations on third-party access in the proposed rule are illusory in practice.

The proposed rule further strays from OSHA's statutory authorization because it broadly defines the types of representatives that purportedly "aid" an inspection. Specifically, the proposed rule suggests that CSHOs should determine that a third party can aid in an inspection if they have "experience with…conditions in the workplace *or similar workplaces*, or language

skills." *Id.* (emphasis added). This language vastly expands the universe of potential third-party representatives. It suggests a CSHO could welcome a third-party representative for a tour of an employer's facility merely because that third party has, at some point, worked in or visited a similar workplace. And this assumes the CSHO is willing to inquire about the qualifications of an employee's choice for a representative. The more likely scenario is that the CSHO is not going to risk the criticism of challenging the qualifications of an employee's choice for representative. Even if the CSHO makes the inquiry, general knowledge or experience in similar workplaces, of course, does not qualify someone to aid in a safety inspection. Similarly, the proposed rule suggests that OSHA could allow an unrelated, unvetted third party on a walkaround inspection if he or she speaks any foreign language that the CSHO does not know. While translators may well aid in certain OSHA inspections where many employees do not speak English, the breadth of the proposed rule again fails to place any reasonable limits on the criteria that would be used to determine when a translator will actually serve the interest of aiding an inspection.

OSHA's disregard for the limits placed on its regulatory authority is further revealed in the three questions it poses at the end of its request for comments, which suggest it could abandon or modify both the "good cause" and "reasonably necessary" qualifiers in the proposed rule. These proposals, addressed more directly at the conclusion of CWS's comment, reveal OSHA's failure to prioritize utility and workplace safety in the proposed rule. Instead, they suggest an "access at all costs" approach to the OSHA process that may further the Administration's political interests, but clearly exceeds OSHA's delegated powers.

The Supreme Court recently reined in OSHA's power to stray outside of its workplace safety purposes. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022). In striking down OSHA's vax-or-test rule for COVID-19, the Court reiterated that OSHA's standards must be "reasonably necessary or appropriate to provide safe or healthful employment." *Id* at 114. The proposed rule similarly exceeds OSHA's statutory authority because it is not tailored to serve interests of workplace safety.

2. The Proposed Rule Conflicts with the National Labor Relations Act, Lacks Necessary Structure to Determine Who Qualifies as an "Authorized Representative" and Fails to Account for the Right of Employees to Reject Representation.

The proposed rule borrows "authorized representative" language from the National Labor Relations Act without any of the procedural safeguards that exist in the context of union organizing. This presents major problems. First, OSHA's expansive interpretation of the "authorized representative" in the context of 29 C.F.R. 1908.3 inappropriately departs from the Department of Labor's definition of the same term in its regulations establishing the Occupational Safety and Health Review Commission. Second, Congress created the National Labor Relations Board to administer the nation's rules regarding exclusive representation and collective bargaining, not OSHA. OSHA does not have the expertise or authority to meddle in the relationship between employees and any authorized representative they may chose (or reject) for their mutual aid and protection. Third, even if OSHA could usurp the role of the NLRB and regulate third-party employee representatives, the proposed rule lacks any reasoned criteria to determine how employees establish their "authorized representative," how an employer may test

that authorization and what employees may do if they prefer not to have representation from a third party regarding their working conditions.

First, OSHA's broad view of the term "authorized employee representative" as used in the OSH Act departs from the Department of Labor's own definition of the same term in different parts of its regulations. The statutory basis for OSHA's rulemaking regarding authorized employee representatives on walkarounds comes from 29 U.S.C. § 657(e), captioned "Employers and ***authorized employee representatives*** to accompany Secretary or his authorized representative on inspection of workplace." (emphasis added) It states:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

"Authorized employee representative" is a term of art with a particular, limited meaning. The Department of Labor defines "authorized employee representative" under 29 C.F.R. 2200.1, which outlines the duties and authority of the Occupational Safety and Health Review Commission. "Authorized employee representative" means "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees who are members of the collective bargaining unit." *Id.* It does not mean any representative selected by a subset of employees or an individual employee for the limited purpose of an OSHA inspection. This definition is consistent with the language of the OSH Act, which clearly contemplates the existence of one "representative authorized by his employees" at a given worksite.

This suggests that Congress envisioned two scenarios for inspections – one for a represented workplace and one for unrepresented workers. Given both the language of the statute and the Department of Labor's own, conflicting definition of "authorized employee representative," OSHA's proposal to expand even further the types of permissible representatives who can attend a walkaround inspection should not pass muster under *Chevron* or similar standards of review. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (deferring to agency interpretations of ambiguous statutes only when reasonable); *Chao v. Occupational Safety & Health Rev. Comm'n*, 540 F.3d 519, 523 (6th Cir. 2008) (discussing application of *Chevron* deference to OSHA regulations).

The overexpansion of an "authorized employee representative" infringes on employee rights to reject collective representation. The NLRA provides employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. But just as

importantly, it provides the equivalent right "to refrain from any or all of such activities." *Id.* To respect employee rights to choose or reject collective representation, the NLRB created procedures to assess whether a proposed "authorized representative" actually enjoys the support of the relevant employees.

OSHA's authorized representative procedures contain no such structure. Instead, the current regulations provide CSHOs full discretion to determine whether employees have any authorized representative, and the identity of that representative. 29 C.F.R. § 1903.8(b). Under current rules, this informal determination of a representative presents only limited problems because employees have only two choices for representatives – a fellow employee or an outside party consulted specifically because of their safety expertise, like an industrial hygienist or safety engineer. Given those limited options, it is easy for a CSHO to determine whether and who employees have selected as their authorized representative.

The proposed rule presents much more complicated possibilities. Take, for example, a non-union workforce in the warehousing industry. Two rival unions have organized other employer facilities around the country and both seek to represent the employees at the facility subject to an OSHA inspection. As soon as the CSHO shows up for the inspection, employee supporters of each union contact their preferred representatives to hurry over and serve as authorized representatives for the walkaround. And, to complicate this scenario further, OSHA's authorization for the inspection is a complaint lodged by a current employee who also has a pending EEOC discrimination charge. The complainant brings his personal attorney to the site and seeks to have the attorney serve as his representative for the walkaround. Who serves as the representative? Would the CSHO wait for all of these potential representatives to arrive before conducting the inspection? Can all three representatives attend the inspection? Can a representative arrive late and join mid-inspection? What happens when the CSHO speaks to employees who claim none of the three representatives are authorized representatives? Or, what if one of the representatives is from an activist group that campaigns for shutting down the business or certain of its distributed products?

The answers to these questions have significant implications for the employer, as opening up their workplace to any such representative poses unique business risks unrelated to OSHA's enforcement purpose. The lack of any structure or defined guardrails for third-party representative status renders the rule impermissibly imprecise and prejudicial to employer rights under both the NLRA and the OSH Act.

Moreover, the proposed rule creates a real risk that OSHA will substitute its judgment about an authorized representative for the right of employees to reject such representative. Employees seeking union representation often raise their voices loudest. Meanwhile, a silent majority may sit quietly on the sidelines, preferring self-representation, but avoiding conflict with their co-workers. Under the proposed rule, a CSHO is likely to hear from the vocal minority and determine a third-party union representative or community organizer represents the employees, when in fact they enjoy only limited support. Based on that determination, the representative will receive preferred access to the employer's facility and the ability to advocate for outcomes that most employees may not want. This is precisely the result that the NLRB's election procedures seek to avoid, but OSHA's proposed rule allows. OSHA's transparent

attempt to bolster union organizing through its walkaround proposal simultaneously tramples on employee rights to reject such representation.

3. The Proposed Rule Violates Employer Property Rights and Presents Fourth Amendment Issues.

The proposed rule violates important employer property rights that OSHA must balance with its legitimate enforcement priorities. The OSH Act disclaims any intent to "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees" with respect to workplace injuries. 29 U.S.C. § 653(b)(4). By its terms, then, the Act would preserve employers' state law private property rights as a general matter. In general, members of the public have no right to access an employer's private workplace. The Supreme Court recognized these property rights shortly after the passage of the OSH Act by holding OSHA subject to the Fourth Amendment's warrant requirements. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314, 98 S. Ct. 1816, 1821, 56 L. Ed. 2d 305 (1978) (finding "[w]ithout a warrant [a CSHO] stands in no better position than a member of the public"). The Supreme Court has also held that the Fourth Amendment does not allow law enforcement to bring along any visitors it chooses on an otherwise lawful search. *Wilson v. Layne*, 526 U.S. 603 (1999) (finding Fourth Amendment prohibited police from bringing news media into private homes while executing search warrants). Thus, OSHA's proposed rule unquestionably invades an employer's general, common law right to exclude disinterested parties from their private property.

By inviting a third party to accompany CSHOs on an inspection, OSHA risks inflicting unreasonable searches on employers without any available remedy. The Fourth Amendment's exclusionary rule protects employers from OSHA if it obtains an improper warrant. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1071 (11th Cir. 1982). But if OSHA allows improper third party access to private areas of an employer's property, no exclusionary rule can cure the violation. If a union organizer gets exclusive access to employees through an OSHA inspection and uses that information to further their organizing campaign, or an employee-side attorney discovers facts that can lead to a new lawsuit, courts cannot fix the damage done to the employer through exclusion of evidence in an OSHRC proceeding.

State trespass law also allows employers the right to exclude persons from their private property. The concept of trespass includes an implicit property owner right to expel unwelcome visitors. Of course, property rights give way to legitimate law enforcement purposes, like OSHA's. Here, though, when "aiding" the inspection becomes so attenuated that it could include a third party who once shopped at the site, this "assistance" does not meaningfully further that law enforcement purpose. Employers under the proposed regulation will be forced to give up their rights to exclude members of the public from their facilities. Nothing in the statute or legislative history suggests Congress intended to grant OSHA such broad authority to interfere with an employer's state law property rights. If anything, the statute's statement about "minimum burden" to employers suggests the opposite intent. 29 U.S.C. § 657(d).

Both state and federal courts have addressed the issue of third party property access in similar federal regulatory contexts. In *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 195 (1978), the Supreme Court held that employers could enforce

state trespass law to exclude picketers from their private property, even where the picketers' conduct was arguably protected by the NLRA. The Court reasoned that federal preemption did not completely displace state laws of general applicability that Congress did not expressly intend to preempt. Thus, in *Sears*, the Court permitted the employer to seek state intervention in the union's trespass activities, even though the union could have claimed a right under federal law to access the employer's property.

In a similar case, the Maryland Court of Appeals recently determined Wal-Mart could enforce its state law private property right to exclude union organizers engaged in confrontational picketing under the local-interest exception to federal preemption. *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 228 Md. App. 203, 224, 137 A.3d 355, 368 (2016), aff'd, 453 Md. 482, 162 A.3d 909 (2017). The Court found "a state's power to regulate and sanction, by civil actions for trespass and nuisance, conduct that violates or interferes with the private property rights of its citizens is deeply rooted in local feeling and responsibility." *Id.* It further determined that the nature of the controversy – unauthorized access to the employer's property – was a unique controversy separate from any federal labor rights. Thus, the Court upheld an injunction barring access to Wal-Mart's property by union organizers.

These cases make clear that federal law should not override state property rights and trespass laws without clear Congressional intent. If Congress intended to grant OSHA a broad right to force employers to allow third party access to their property during OSHA inspections, then it could have provided as much in the OSH Act. *See Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 583, 98 S. Ct. 2505, 2521, 57 L. Ed. 2d 428 (1978) (Rehnquist, J., dissenting) (finding that Congress has Commerce Clause power to invade employer property rights, but "if Congress intended to do so, such a legislative intention should be found in some definite and unmistakable expression"). But Congress has expressed no such clear intent. Only Section 8(a)'s right to inspect and Section 8(e)'s reference to attendance by "a representative authorized by his employees," grant OSHA authority to invade state property law. And that right is limited – the statute contemplates "a" representative (not multiple) and requires authorization by employees. Given the significant property interests at stake, OSHA needs more than these limited expressions of Congressional authorization to violate employer property rights through the proposed rule.

4. The Proposed Rule Complicates and Weakens the Act's Protection of Employer Trade Secrets and Increases Employer Liability Risks.

The proposed rule also will endanger employer trade secrets and subject employers to increased liability risk based on the presence of outside third parties. OSHA's efforts to protect such rights in the proposed rule are not sufficiently strong or comprehensive. The OSH Act purports to protect employer trade secrets, stating "any information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection…which contains or might reveal a trade secret…shall be considered confidential." 29 U.S.C. § 664. OSHA's regulations establish trade secret protection through 29 C.F.R. 1903.9, which allows the employer to designate its own definition of trade secret areas and demand that any worker walkaround representative allowed in such areas "be an employee in that [trade secret] area or an employee authorized by the employer to enter that area."

The preamble to the proposed rule indicates that OSHA does not intend to reduce these trade secret protections for employers. See, 88 Fed. Reg. 59830-31. But it is not clear how the proposed rule and Section 1903.9 can co-exist in practice. Many manufacturing employers, for example, protect their entire method of production as a trade secret, along with component parts of the process. *See, e.g., United Steelworkers of Am., AFL-CIO-CLC v. Auchter*, 763 F.2d 728, 740 (3d Cir. 1985) (finding OSH Act protected information that qualifies as trade secrets under state law); *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1109 (10th Cir. 2009) (acknowledging company's "production process as a whole" can qualify as trade secret under Colorado law); *CPG Prod. Corp. v. Mego Corp.*, 502 F. Supp. 42, 44 (S.D. Ohio 1980) (finding "methods of production, the design of the production line for the stretchable toy figure, the combination of various pieces of equipment for use on the production line, the sources of such equipment" all qualified as trade secrets under Ohio law).

Undoubtedly, then, conflict will emerge between an employer's right to exclude non-employee representatives from trade secrets areas and employees' proposed right to invite non-employee third parties to attend walkaround inspections. How will CSHOs assess an employer's trade secret claims? How will third parties respond when denied access to an employer's facility on the basis of trade secrets? Will OSHA scrutinize employer designation of sensitive areas more closely because it may deprive employees of third-party representation during an inspection? The proposed rule fails to grapple with these practical issues that will certainly emerge if it is implemented, as trade secrets are yet another area of property rights that will be curtailed.

Additionally, by forcing employers to allow outside parties into their facilities, OSHA creates additional liability risks for employers.[2] At the simplest level, a third-party representative may slip and fall while attending a walkaround. Suddenly, an employer may face a costly lawsuit based on an uninvited third-party representative that OSHA welcomed to an inspection. More specifically, what if an employer manufacturers drugs or other sensitive products that require strict site access controls? How does OSHA intend to protect the interests of employers against the potential that third-party representatives put their business at risk? The proposed rule fails to address these concerns in any meaningful way, and leaves employers to bear all of this additional risk without any reasonable recourse other than requiring a warrant.

5. The Proposed Rule Discourages Employer Cooperation with OSHA and Creates Administrative Burdens that Will Slow Down Inspections.

CWS and OSHA agree that cooperation and efficiency serve the interests of workplace safety. If hazards exist in a workplace, it serves all parties for the employer and OSHA to work together to abate them quickly. Under current regulations, OSHA and employers can meet those

[2] Notably, OSHA claims the proposed rule would "not introduce a new or expanded burden on employers" and "does not impose any costs on employers." 88 Fed. Reg. at 59831. That conclusion is absurd on its face. The proposed rule will create significant additional costs for employers, including additional legal consultation costs, provision of additional PPE and increased potential liability associated with the presence of third-party representatives (whether because of injury, sabotage or other risks). OSHA's failure to meaningfully consider these additional costs undermines OSHA's mandatory economic analysis certification.

goals through rapid response investigations and consent inspections. The proposed rule puts that efficiency and cooperation in jeopardy, and without a solid safety-related justification.

According to its own data, OSHA conducted 31,820 inspections in FY 2022. OSHA can perform such a high volume of inspections annually because of employer cooperation. Most employers do not require OSHA to obtain a warrant for a CSHO to conduct a walkaround inspection of their worksite. Generally, employers recognize that harmonious relationships with OSHA are good for business and often result in safer worksites. But if consenting to an OSHA inspection means allowing a third-party union representative, a social activist, a conspiracy blogger, a plaintiff's attorney, or someone hostile to the interests of the employer onto an employer's property, thereby subjecting employers to intrusions and attendant risks unrelated to OSHA's inspection, then it follows more employers will withhold their consent and force OSHA to petition courts to obtain warrants. As a result, it will take OSHA longer to access worksites and correct any hazards, all in the name of allowing private property access to a third party who is not required to have relevant safety expertise. That outcome does not serve anyone truly interested in efficiently abating hazards and promoting workplace safety.

This concern is not merely theoretical – it is documented in the case law. *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 336 (7th Cir. 1995). In *Caterpillar Inc.*, an employer consented to inspection by a CSHO, but objected to the presence of a striking union worker as the authorized representative. Rather than conducting the inspection immediately, OSHA elected to pursue a warrant allowing the presence of the striking employee. OSHA ultimately obtained the warrant, but the administrative and legal process delayed the inspection by 45 days.[3] Additionally, the Court issued a narrow warrant that precluded the CSHO from visiting areas of the facility the employer may have otherwise allowed. This scenario is very likely to occur with much greater frequency if OSHA adopts the proposed rule.

The proposed rule also adds administrative burdens to any warrant process. OSHA will not only need to prove its authority to access the employer's property, but it will also need to show that any requested third party access is reasonably necessary to the conduct of an effective inspection. How will OSHA make that showing? Will it present evidence that the third party can assist in the inspection? If so, what type of evidence? If OSHA truly believes that a third party is "reasonably necessary" to conduct an inspection, doesn't that imply that OSHA itself cannot conduct an effective inspection for that site? And doesn't that undermine the authority for an inspection in the first place, e.g., the CSHO needs help to identify hazards so perhaps no hazard exists in the first place? If an employer moves to quash a subpoena granting third party access to its site, will the court hold hearings on the third party's credentials, its representative status or any employer trade secret claims? Unquestionably, expanding the regulations allowing third party site access will result in expansion of inspection-related litigation to cover issues that have nothing to do with maintaining a safe workplace.

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[3] As discussed above, the Supreme Court has limited law enforcement's right to bring visitors to accompany it in executing lawful warrants. *Wilson v. Layne*, 526 U.S. 603 (1999). Given the vagueness in the proposed rule about the role of third-party representatives, and the lack of reasoned criteria about when CSHOs should determine such representatives are necessary to further a law enforcement purpose, CWS submits that, absent employer consent, OSHA would need to obtain specific warrant authority for any third-party representatives or risk Fourth Amendment violations.

If OSHA grants permission or obtains a warrant for third-party employee representatives to attend a walkaround, then it follows employers will also exercise their statutory right to representation under Section 1903.8(a). Under present conditions, most walkaround inspections involve only employees of the employer and members of on-site management. But if OSHA insists on allowing third-party representatives for employees, employers will seek to reduce the threats posed by such parties during an adversary inspection process. More employers will seek legal representation during walkaround inspections, increasing costs to employers and complicating the walkaround process. In the process, cooperative and trusting relationships between CSHOs, Area Directors and safety-conscious employers will suffer. Even if employers have built up trust with the agency, they will not stand idly by while third-parties parade through their worksite looking for opportunities to further an agenda hostile to the interests of the company.

Finally, the proposed rule places additional burdens on CSHOs unrelated to their training and expertise. CSHOs are safety experts, not adjudicators of disputes over workplace representation. Indeed, the current Field Operations Manual instructs CSHOs to avoid being engaged in workplace labor disputes. See Field Operations Manual, Ch. 3 (IV) (H) (2)(c). In addition to making a determination as to whether a third-party representative is "reasonably necessary to the conduct of an effective and thorough inspection", the proposed rule adds several responsibilities to their jobs, including determining whether employees want a third-party representative, who that representative is, and how to respond if employers withhold consent to an inspection on the basis of a purported third-party representative.[4] It will also require them to analyze employer trade secret claims and resolve them on the spot. OSHA will need to train CSHOs on these new responsibilities, which will cost the agency time and money that it could otherwise spend to further its workplace safety goals in more direct and tangible ways. And even with training, CSHOs will face additional pressures from employees, employers and third parties that do not exist under the current rule. OSHA should carefully consider whether it wants to subject its already limited pool of CSHOs to these additional job requirements, and whether such change would negatively impact employee retention.

6. OSHA Cannot Remove or Weaken the "Reasonably Necessary" Requirement.

As discussed above, OSHA requested comments on three proposed questions about potential modifications to the proposed rule. OSHA should not follow any of these alternative proposals because they represent bad policy, exacerbate the existing problems with the proposed rule and exceed OSHA's statutory authority.

First, OSHA sought comments on whether it should "defer" to the employees' selection of a third-party representative. Second, it asked if it should retain the "reasonably necessary language as proposed, but add a presumption that a third-party representative…is reasonably

[4] After publication of the proposed rule (and one day after the initial deadline for comments), OSHA and the NLRB announced a Memorandum of Understanding "to facilitate interagency cooperation and coordination." The MOU again indicates OSHA's ideological shift away from its legitimate workplace safety purposes to further the interests of organized labor. The MOU creates even more opportunities for labor unions or organizers to use OSHA as a means to achieve union organizing objectives.

necessary." Third, OSHA asked whether it should expand the criteria to allow third-party representatives when the CSHO determines that such participation would "aid employees in effectively exercising their rights under the OSH Act." CWS answers "No" to all of these questions because they would create even more problems than the already problematic proposed rule. While OSHA should not make any of the changes suggested by these questions, the proposed rule is fatally flawed as is and must be withdrawn. Making any changes suggested by these questions would remove any semblance of guardrails OSHA pretends are in place to limit third-party representation and access to a company's workplace.

Conclusion

In remarks to Congress on September 27, Assistant Secretary Parker pitched the proposed rule as an "effective and practical" approach to encourage "more worker participation" in the OSHA process. Secretary Parker missed the mark on all counts. The proposed rule is anything but practical – it contains no defined guardrails to prevent unions, attorneys or other third-parties from using the OSHA inspection process for their personal benefit. It includes no guidance on how CHSOs should determine who qualifies as the "authorized representative" of the employees, or what to do when competing third parties claim interests in an inspection. Rather than encourage "more worker participation," it creates an opportunity for vocal minorities to push actual workers out of the walkaround process in favor of non-employee third party representatives. And rather than support employee free choice in choosing their workplace representatives, it imposes third-party representation even in workplaces where employees may have rejected union representation. Finally, it would add burdens to CSHOs and make them the arbiter of who would qualify as an employee representative—a role they are not in a position to play.

Because the proposed rule fails to improve workplace safety and undermines OSHA's credibility by imposing workplace access to otherwise uninvited third parties, CWS strongly opposes the rule and urges OSHA to withdraw it.

Agricultural Retailers Association
Air Conditioning Contractors of America
Alliance for Chemical Distribution
American Apparel & Footwear Association
American Bakers Association
American Coke and Coal Chemicals Institute
American Foundry Society
American Hotel and Lodging Association
American Pipeline Contractors Association
American Road & Transportation Builders Association
American Supply Association
American Trucking Associations
Associated Builders and Contractors
Associated Equipment Distributors

Associated General Contractors of America
Associated Wire Rope Fabricators
Construction Industry Round Table
Distribution Contractors Association
FMI – The Food Industry Association
Foodservice Equipment Distributors Association
Global Cold Chain Alliance
HR Policy Association
Independent Electrical Contractors
Independent Lubricant Manufacturers Association
Industrial Fasteners Institute
International Dairy Foods Association
International Foodservice Distributors Association
International Warehouse Logistics Association
Job Creators Network
Manufactured Housing Institute (MHI)
Manufacturer & Business Association
MEMA, The Vehicle Suppliers Association
National Armored Car Association
National Asphalt Pavement Association
National Association of Home Builders
National Association of Wholesaler-Distributors.
National Automobile Dealers Association
National Club Association
National Cotton Ginners Association
National Council of Chain Restaurants
National Grocers Association
National Lumber & Building Material Dealers Association
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Retail Federation
National RV Dealers Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
National Utility Contractors Association
Non-Ferrous Founders' Society
North American Meat Institute
Pennsylvania Food Merchants Association
Plastics Pipe Institute
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Reusable Industrial Packaging Association
Small Business & Entrepreneurship Council
SNAC International

Technology & Manufacturing Association
Textile Care Allied Trades Association
The Air Conditioning Contractors of America
The Alliance for Chemical Distribution
The US Chamber of Commerce
Tile Roofing Industry Alliance
Tree Care Industry Association
TRSA – The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association
US Poultry & Egg Association
Vulcan Inc
Water and Sewer Distributors of America
Window & Door Manufacturers Association
World Millwork Alliance

fisherphillips.com

May 16, 2025

The Honorable Ryan Mackenzie
Chairman
U.S. House Subcommittee on Workforce Protections
Washington, D.C.

The Honorable Ilhan Omar
Ranking Member
U.S. House Subcommittee on Workforce Protections
Washington, D.C.

Dear Chairman Mackenzie and Ranking Member Omar:

On behalf of Fisher Phillips LLP, an international labor and employment law firm practicing in workplace safety law, we submit this letter for the record for the Workforce Protections Subcommittee hearing entitled, "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach." We strongly support the committee's scrutiny of OSHA's Severe Violator Enforcement Program ("SVEP"), and other instances where the agency has wielded immense enforcement power that is not rooted in a notice-and-comment regulation or enabling statute.

OSHA's SVEP is an enforcement directive the agency implemented without going through notice-and-comment rulemaking. *See Severe Violator Enforcement Program*, CPL 02-00-169 (effective September 15, 2022). Under the directive, employers may be considered for placement into SVEP if they meet any one of the following criteria:

1. OSHA conducts an inspection into a fatality and issues one "willful" or "repeat" violation;
2. OSHA issues a failure-to-abate for a serious citation directly related to an employee death or an event causing three or more employees to be hospitalized;
3. OSHA issues at least two willful or repeated violations, or failure-to-abate notices based on high-gravity serious violations; or
4. all "egregious enforcement actions" must be considered SVEP cases. Egregious enforcement actions generally involve high-profile cases where OSHA has utilized its instance-by-instance citation directive to punish what the agency deems a recalcitrant employer.

OSHA's SVEP is legally problematic for at least three reasons:

1. It is effectively an agency rule that never went through notice-and-comment rulemaking;
2. Employers are placed on SVEP based on the mere issuance of a citation, and not one that has been adjudicated on the merits. This violates procedural due process guaranteed by the Constitution; and
3. Once placed on SVEP, an employer is subject to OSHA opening inspections on the company enterprise-wide across the United States. By way of example, a citation arising from an accident at a company's Ohio location resulting in SVEP placement would open the company to potential OSHA inspections, for example, at its Wisconsin, Florida, Texas, and Arkansas facilities – even if the company never had an accident or employee complaint at those facilities.

1. SVEP Never Went Through Notice-and-Comment Rulemaking

Under the Administrative Procedure Act, 5 U.S.C. §553, before promulgating a rule OSHA must provide the public with notice of the rule and an opportunity to comment on a proposed version of the rule. Procedural rules can be exempt from this process, but the SVEP is a substantive rule. Courts have recognized that a directive that "has substantial impact upon private parties and puts a stamp of agency approval or disapproval on a given type of behavior" is a substantive rule. *Chamber of Commerce of the U.S. v. DOL*, 174 F.3d 206 (D.C. Cir. 1999). Likewise, courts have found that when OSHA uses the threat of its power to inspect to force an employer into compliance or to suffer the consequences, then the Directive is a rule. *Id.*

The SVEP Directive is a rule/standard within the meaning of 29 U.S.C. § 652(8) (the OSH Act) because it effectively obligates employers, under penalty of continued, enterprise-wide inspection to adopt abatement measures that are more demanding than those required by the OSH Act or by any pre-existing regulation implementing the Act. *Chamber of Commerce*, 174 F.3d 212; *accord Agric. Retailers Ass'n v. U.S. Dep't of Labor*, 837 F.3d 60, 64 (D.C. Cir. 2016) (citing *Workplace Health & Safety Council* v. *Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995)). Additionally, the Directive has "a substantial impact" on employers, as it "places the burden of inspection" and prolonged placement on the list upon employers who contest citations alleging SVEP violations. Employers who choose to contest SVEP citations are penalized and kept on the list for more than three years if they do not "voluntarily" provide "acceptable abatement verification" while the contest pends. Providing abatement verification during the pendency of a contest to remain off a "severe violator" list is not a requirement otherwise imposed by the OSH Act. See 29 U.S.C. §§ 651-78. Indeed, typically abatement of a citation is stayed during the pendency of contest.[1]

Finally, to be removed from SVEP, employers must also have one follow-up inspection within the three-year period, and have: (1) abated all SVEP-related hazards; (2) paid all penalties; (3) complete all applicable settlement provisions (if any); and (4) receive no additional serious citations related to the hazards identified in the original SVEP inspection or any related establishment. Requirement number four is typically the sticking point as large employers often will have at least one "serious" citation issued enterprise-wide within a three-year period.

[1] As long as the abatement is challenged, and it typically is.

Such onerous requirements are why there are presently 1039 employers on the Federal SVEP, with some of these employers having remained on the log for the past fourteen years (since 2011). *See* Public Federal SVEP Tracking Log 12/01/2024.[2] One of Fisher Phillips' clients in the food-manufacturing industry was placed on SVEP in 2015 and despite expending millions of dollars in compliance efforts, private consultants, and private audits, has not yet been removed from the list.

2. Placement on SVEP Based on Mere Allegations Violates Due Process

When issued, a citation is a mere allegation that an employer violated an OSHA standard at a particular location or establishment. The employer is entitled to due process through a hearing before an administrative law judge of the Occupational Safety and Health Review Commission ("OSHRC") before it is required to pay any penalty or abate any alleged violation.

However, an employer is placed on SVEP the moment the citations are *issued* and before those citations are adjudicated by OSHRC. This is problematic because the placement of the employer on SVEP immediately opens the employer to nationwide inspections at its other facilities – before it has had its day in court. Effectively, a mere allegation by OSHA – the unadjudicated citation – purports to allow the government warrantless entry into every establishment the employer owns and operates. This is a fundamental deprivation of employers' constitutional due process rights.

3. SVEP's Enterprise-Wide Inspections Are Contrary to the Fourth Amendment

As a corollary to the above issue, the Supreme Court has held that OSHA generally cannot conduct warrantless searches and inspections of an employer's premises. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). SVEP permits OSHA to conduct warrantless inspections at every location an employer operates – regardless of whether there has been a complaints or allegation of workplace hazards at that location. This is a violation of a company's Fourth Amendment rights, particularly when placement on SVEP occurs before the citations are ever adjudicated final.

Conclusion

In summary, the SVEP is a rule that has far reaching and potentially catastrophic consequences for employers. This rule never went through required notice-and-comment rulemaking. If it had, it is likely employers from across all industries would have submitted a plethora of concerns and comments in response. SVEP also violates the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution.

Practically speaking, employers placed on SVEP remain on the list for years and often are unable to achieve removal from the list. While on the list, these employers are subjected to nationwide OSHA enforcement actions, which results in employers expending millions of dollars in compliance costs and legal fees.

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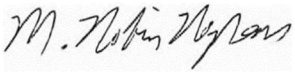
[2] Accessible here: https://www.osha.gov/enforcement/svep#v-nav-5

We welcome the opportunity to work with the Subcommittee on Workforce Protections in achieving its goal of furthering worker safety without overreach and look forward to future discussions.

Sincerely,



Robin Repass
Partner
FISHER & PHILLIPS LLP

Curtis G. Moore
Partner
FISHER & PHILLIPS LLP

May 15, 2025

The Honorable Ryan Mackenzie
Chairman
Subcommittee on Workforce Protections
House Committee on Education and Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Ilhan Omar
Ranking Member
Subcommittee on Workforce Protections
House Committee on Education and Workforce
U. S. House of Representatives
Washington, DC 20515

Dear Chairman Mackenzie and Ranking Member Omar,

The National Roofing Contractors Association appreciates the opportunity to provide input regarding regulations and policies of the Occupational Safety and Health Administration that are of importance to the roofing industry. NRCA commends you for holding a hearing entitled "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach" to review stakeholder input on workplace safety and health issues and requests this letter be included in the hearing record.

Established in 1886, NRCA is one of the nation's oldest trade associations and the voice of roofing professionals worldwide. Our nearly 4,000 member companies represent all segments of the industry, including contractors, manufacturers, distributors, consultants, and other employers in all 50 states and internationally. NRCA members are typically small, privately held companies with the average member employing 45 people and attaining sales of $4.5 million per year. The U.S. roofing industry is an essential $100 billion sector with nearly one million employees that provides critical materials and services to ensure home and business safety.

Promoting workplace safety within the roofing industry is a core function of NRCA. In furtherance of our mission, NRCA has developed more than 50 roofing safety-related publications, programs or training materials on diverse topics including asbestos, hazard communication, fall protection and cranes. We have represented our members in proceedings before OSHA's Advisory Committee for Construction Safety and Health, the American National Standards Institute's A10 Committee on Construction and Demolition Operations, ISO 45001 Occupational Safety and Health Management Systems Technical Advisory Group, and participate in other organizations that impact safety in the roofing industry.

NRCA would like to comment on several regulatory initiatives and policies that OSHA has pursued in recent years that are of great interest to our members.

NATIONAL ROOFING CONTRACTORS ASSOCIATION | WASHINGTON OFFICE
324 Fourth St., NE, Washington DC 20002 U.S.A. TELEPHONE: (202) 546-7584 FAX: (202) 546-9289 EMAIL: nrca@nrca.net www.nrca.net

Heat Injury and Illness Proposed Rule

First and foremost is the agency's Notice of Proposed Rulemaking entitled Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings released in 2024. As part of our longstanding commitment to health and safety, NRCA provides members with tools to help them prevent heat-related injuries and illnesses. We have been engaged with agency officials on this proposed regulation for many years, and in 2022, submitted comments to OSHA's Advanced Notice of Proposed Rulemaking on this topic. These comments outlined our view that any federal standard designed to guard against heat hazards must address the unique characteristics of workplaces within the construction industry. Moreover, any protective measures must be practical so that employers are not overwhelmed by regulatory complexity. Our view is that any successful regulatory approach must be kept clear and concise by integrating the key concepts of "water, rest, and shade plus training" for how to deal with potential heat stress exposures.

NRCA further engaged in the regulatory process by arranging for two of our employer members to provide detailed input to OSHA as Small Entity Representatives in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process on the proposed rule. These contractors provided agency officials with detailed information on current practices to protect workers and recommendations on how to make any regulatory standard effective and practical for small employers. During the process, they stressed that any new standard must provide maximum flexibility and contain performance-based criteria if it is to be effective. This included a recommendation that OSHA consider a separate regulatory approach for the construction industry, given the unique characteristics of construction worksites, in any new standard.

Regrettably, OSHA failed to incorporate much of the information and recommendations provided by our contractors and other employers in the SBREFA process. As a result, NRCA joined with the Construction Industry Safety Coalition in submitting comprehensive comments that outlined numerous concerns with the proposed rule. While we share OSHA's goal of protecting employees from heat illness, the proposed rule contains numerous overly prescriptive compliance requirements, severely underestimates regulatory costs and fails to provide the flexibility that small employers need to effectively comply with the standard. Critically, it does not contain a separate regulatory approach for the construction industry that is essential to making the rule effective for our construction worksites. The comments concluded by urging OSHA to "reconsider such a broadly sweeping proposed standard and reengage with stakeholders to focus on industry-specific solutions."

NRCA is pleased the incoming Trump administration has paused the rulemaking process to review this and other proposed rules, and we urge the administration to engage with NRCA and other stakeholders to fully address our concerns before moving forward with any final rule.

Worker Walkaround Final Rule

In 2024, OSHA published a final rule, commonly known as the "Worker Walkaround Rule," to revise the process for determining who may act as an employee representative to accompany agency compliance officers during routine workplace inspections. OSHA officials indicated this rule was needed to clarify the right of employees to authorize an employee or a non-employee

from a third party as their representative if the compliance officer determines a third party is reasonably necessary to conduct an effective inspection.

Based on input from our membership, NRCA has numerous concerns on how this rule may negatively affect employers and employees by broadly expanding the eligibility of who can be considered a third-party representative for workplace inspections. These concerns include increased safety risks for employees and greater exposure to liability for employers on multi-employer worksites, conflicts with longstanding agency guidance and existing federal laws, lack of clarity in how the rule will be implemented, and substantial increased costs incurred by employers. Moreover, the final rule injects a high degree of uncertainty and could, in fact, be counterproductive to OSHA's purpose of ensuring workplace safety. As current litigation challenging the rule has argued, the rule is not a reasonable interpretation of the Occupational Safety and Health Act and may be unconstitutional.

Given these serious concerns, NRCA urges the new administration to review this rule and consider rescinding it, should the current litigation challenging the rule not prevail. NRCA stands ready to work with members of this subcommittee, other lawmakers, and agency officials to craft a more balanced policy with respect to ensuring worksite inspections are effective in advancing safe work practices.

Improve Tracking of Workplace Injuries and Illnesses Final Rule

In July 2023, OSHA published the "Improve Tracking of Workplace Injuries and Illnesses" final rule, which reprised OSHA's 2016 rulemaking that requires employers to submit all three required injury records and OSHA's expressed intent to publish them on its website. NRCA had serious concerns with the proposed rule and submitted comments in June 2022 in opposition to the proposed rule as part of a coalition of stakeholders. The comments specifically addressed concerns with duplicative recordkeeping and reporting requirements; concerns regarding OSHA's ability to appropriately manage the increased data collection; continued concerns regarding confidentiality and protection of sensitive employer and employee data; and uncertainties in compliance resulting from OSHA's ever-changing recordkeeping requirements.

NRCA believes that requiring the information from OSHA forms 300, 301 and 300A be submitted by employers, and posting them on OSHA's website is not necessary for the proper performance of the agency's duties and does not serve to prevent employee injuries or illnesses in the workplace. However, it does unnecessarily expose employers to improper disclosure, mischaracterization of the data and release of sensitive employer and employee information. Small businesses are even more vulnerable to the negative impacts of the release of such information, including employee personal information being easier to identify.

Of further concern to NRCA membership is OSHA's failure to make accurate estimates of the burden and cost of the collection of information by employers, coupled with OSHA's assertion that the benefit of collecting and publishing the data for improving safety and health outweighs the potential privacy problems.

NRCA encourages the administration to review this rule and consider restructuring or rescinding it to address the concerns outlined here. As previously stated, NRCA stands ready to work with members of the subcommittee and other stakeholders to address the rule.

Thank you for your consideration of the views of NRCA members on the important issue of workplace safety. If you have questions or need more information, please contact Duane Musser, NRCA's vice president of government relations (dmusser@nrca.net) or Cheryl Ambrose, NRCA's vice president of enterprise risk management (cambrose@nrca.net).

Sincerely,

Chief Executive Officer

CC: All Members of the Subcommittee

[Additional submissions from Rep. Scott follows:]

HEALTH CARE

RFK Jr. stands by deep cuts to health budget during contentious hearings

MAY 15, 2025 · 6:49 AM ET

HEARD ON MORNING EDITION

Selena Simmons-Duffin

2-Minute Listen PLAYLIST

Secretary of Health and Human Services Robert F. Kennedy Jr. testifies before the Senate HELP Committee Wednesday. He faced questions about vaccines, measles and cuts to biomedical research.

Anna Moneymaker/Getty Images

Health Secretary Robert F. Kennedy Jr. says that Elon Musk's DOGE effort drew up the blueprint for spending cuts that are reshaping the Department of Health and Human Services — and Kennedy and his team implemented them. Kennedy also said he pushed back on some cuts and has reinstated a few programs cut mistakenly.

Kennedy faced hours of questioning Wednesday in two congressional committee hearings — one in the House Appropriations Committee and one in the Senate HELP (Health, Education, Labor and Pensions) Committee.

The official topic was President Trump's budget for fiscal year 2026, but many other issues came up including the autism research Kennedy has launched, the measles outbreak in west Texas and the massive overhaul of HHS, where 20,000 employees have been fired or taken a buyout or early retirement.

In general, Kennedy stood behind the huge sweeping changes to his agency — though he has backtracked slightly on a case-by-case basis. Otherwise, he is staying the course with Trump's plans to cut billions more from the HHS budget, which Kennedy acknowledged will be "painful."

Congressional authority discussed

In an exchange with Rep. Rosa DeLauro, D-Conn., the ranking member on the House Appropriations Committee, Kennedy said, "You have the power of the

purse," referring to the House of Representatives. DeLauro responded, "Thank you!" and went on to say that Kennedy and the Trump administration are illegally impounding funds appropriated by congress this year. "You don't have the authority," she said.

Questions from Republicans on the panels had a gentler tone, but even the chair of the Senate HELP committee Sen. Bill Cassidy, R.-La., urged Kennedy to work with congress more.

"The Department needs to have an effective plan to fulfill statutory duties in tandem with its efforts to increase transparency and accountability, streamline programs, and root out wasteful spending," Cassidy, who is also a physician, said in his opening statement. "Congress and the administration should work together to ensure reforms strike the right balance and deliver for the American people."

Protestors interrupted the beginning of the Senate hearing yelling, "RFK kills people with AIDS." They were quickly removed by police officers and the hearing continued.

Fuzzy details

The comments about Musk came in an exchange with Rep. Steny Hoyer, D.-Md., in the House hearing. "Who made those decisions? You or Musk?" Hoyer asked. Kennedy said that he worked with Musk's team but had an ability to override

things. He mentioned preventing the Head Start early education program from being cut, for example.

At times, Kennedy seemed fuzzy on the specifics of what actually was cut as lawmakers asked him about details like delays in payments to community groups and problems with clinical trials. He said he would look into things and get back to lawmakers individually.

Senator Andy Kim, D-N.J., brought up the World Trade Center health program, where staff have been reinstated. "But why were they cut in the first place?" Kim asked.

Kennedy said the time it would have taken to prevent mistakes like this would have allowed inertia to set in and the agency would have remained too big and unable to help the American population to get healthier, which he says is his big goal.

Vaccines and an alligator metaphor

Vaccines came up most pointedly when Sen. Chris Murphy, D.-Conn., questioned Kennedy. Murphy said Kennedy was undermining public trust in vaccines, by not strongly saying they are safe. Kennedy responded: "Senator, if I advise you to swim in a lake that I know there to be alligators in, wouldn't you want me to tell you there were alligators in it?"

The Senate HELP Committee hearing was marked by testy exchanges at times.
Samuel Corum/Getty Images

Cassidy, the doctor who chairs the Senate HELP committee, returned to the hearing room to correct Kennedy. "The Secretary made the statement that no vaccines except for COVID have been evaluated against placebo. For the record, that's not true. The rotavirus, measles, and HPV vaccines have been, and some vaccines are tested against previous versions. So just for the record, to set that straight."

In an earlier exchange with Rep. Mark Pocan, D.-Wisc., in the House hearing, Kennedy said he would "probably" vaccinate a small child against measles if he was the parent of a small child today. He didn't answer about polio or chicken pox vaccines. He added, "I don't think people should be taking medical advice from me."

Kennedy also faced some questioning from Republicans in Oklahoma and Maine who were concerned about cuts to biomedical research in their districts.

DeLauro ended the House hearing noting that Republican members of congress have been able to work with Kennedy's HHS to reinstate staffing of some programs required by law while Democrats' letters and other communications have not gotten responses. "Who do Democrats have to call?" she said, before pointedly asking for reinstatement of a program for lead poisoning.

[Questions and responses submitted for the record by Mr. Barab follows:]

COMMITTEE ON
EDUCATION AND WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

May 30, 2025

Jordan Barab
6509 Westmoreland Ave.
Takoma Park, MD 20912

Dear Mr. Barab:

Thank you again for testifying at the May 15, 2025, Committee on Education and Workforce Subcommittee on Workforce Protections hearing titled "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach." Enclosed are additional questions submitted by Committee members following the hearing. Please provide a written response no later than June 13, 2025, for inclusion in the hearing record. Responses should be sent to Daniel Nadel (daniel.nadel@mail.house.gov, (202) 226-3873) of the Committee staff. We appreciate your contribution to the work of the Subcommittee.

Sincerely,

Ryan Mackenzie
Chairman
Subcommittee on Workforce Protection

Questions for the Record from
REPRESENTATIVE ROBERT C. "BOBBY" SCOTT

Committee on Education and Workforce
Workforce Protections Subcommittee hearing entitled *"Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"*

Thursday, May 15, 2025
10:15 A.M.

Representative Robert C. "Bobby" Scott (D-VA)
Question(s) for Witness Jordan Barab

1. Over the last several months, Elon Musk's so-called Department of Government Efficiency (DOGE) has listed dozens of Department of Labor (DOL) offices whose leases will be terminated. As far as we know, the offices themselves will be closed.
    a. Why do DOL agencies such as the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) need to have offices around the country in the first place?
    b. What are the consequences for workers if Elon Musk and DOGE shut down OSHA and MSHA offices?
2. In this hearing, we heard criticism of OSHA's proposed rule on heat stress as a "one-size-fits-all" rule.
    a. Would you say that a heat rule is needed?
    b. Why?
    c. Can you tell us how this proposed rule would work, and whether it truly is a "one-size-fits-all" rule?
    d. Other witnesses appeared to believe that a better version of the standard would be performance-oriented.
        i. What are the types of standards (performance, specification, etc.) that OSHA can adopt?
        ii. What considerations inform the choice of type?
        iii. How do you respond to the suggestion of other witnesses in the hearing that a performance standard would be effective and preferable for preventing heat stress?
3. Last year, OSHA finalized a rule that would simply clarify that workers, under the *Occupational Safety and Health Act of 1970*, have the opportunity, just like their employers, to authorize a representative to accompany an OSHA inspector during physical workplace inspections, or "walkarounds."
    a. What are the benefits of allowing both worker and employer representatives to accompany walkarounds?
    b. The final rule also clarifies who workers can authorize as their representatives, which includes other workers or a person with relevant language skills. How would this clarification help workers contribute to improving their workplace?

   c. One of the objections to the walkaround rule is that this will be exploited for union organizing.
      i. Can you describe for us what actually happens during a walkaround?
      ii. Would a union representative be able to have one-on-one organizing conversations during these walkarounds?
4. The Trump Administration's Project 2025 agenda would eliminate rules that keep children out of hazardous jobs. What are some of the health and safety risks to which children would be exposed in these jobs, which include handling radioactive substances, roofing, and logging.
5. Over the last two and a half decades, black lung disease among working and former coal miners is returning with vengeance. One of the reasons for this rise is that miners are increasingly breathing in silica dust, which is about 20 times more toxic than coal dust and speeds up the destruction of miners' lungs.
   a. During your time at OSHA, which regulates workplaces other than mines, you helped to develop a silica standard. Why was it so important to reduce exposure to silica dust?
   b. Last year, the Biden Administration published a silica standard for the nation's mines. Do the reasons you explained for regulating silica in other workplaces also apply to the nation's mines?
   c. Just last month, MSHA announced a four-month delay in enforcement because of the staff firings at the National Institute for Occupational Safety and Health (NIOSH), which implements elements of the MSHA silica standard. What are the consequences of delayed enforcement?
6. One of the witnesses raised concerns about the length of time that OSHA has spent without producing a vertical standard on tree care.
   a. What does it mean to have a vertical standard for an industry or occupation?
   b. Do you agree that a vertical standard is needed for the tree care industry? Why or why not?
   c. How long does it take OSHA to produce such a standard?
   d. What factors influence that timing?
7. Please explain OSHA's policy regarding assessing instance-by-instance penalties.
8. One of the witnesses sketched a hypothetical scenario in which the instance-by-instance penalty approach might be applied if the proposed heat standard were a final rule. In its essential details, the hypothetical involved a small employer required to provide water under the rule. An OSHA inspector arrives, finds that the supplied water is no longer available at a sufficient amount to meet the workers' needs, and is told by the employer that nobody informed him. The water that remains is also not sufficiently cool.[1] In the witness's scenario, the employer with 10 employees would be assessed 20 times the amount of the civil monetary penalty for running out of water, despite not being told of the insufficiency of the supply, and not having sufficiently cool water. How do you respond to this hypothetical?
9. To follow up on your colloquy with Rep. Grothman during the hearing, please address the following:

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[1] The witness actually described a scenario in which the water had run out *and* was not cool enough, but the witness did not explain how the OSHA inspector would have measured the temperature of the non-existent water. This summary is an attempt to add coherence that was missing during the hearing itself.

a. How would you characterize the safety and health risks faced by farmworkers?
b. What recourse do farmworkers have if they encounter safety and health hazards on the job but OSHA is forbidden by an appropriations rider from even so much as setting foot on the farm?

10. Rep. Kiley referred to a Biden-era rulemaking as a "vaccine mandate." Did the Biden Administration's OSHA issue any "vaccine mandate"?

1. Over the last several months, Elon Musk's so-called Department of Government Efficiency (DOGE) has listed dozens of Department of Labor (DOL) offices whose leases will be terminated. As far as we know, the offices themselves will be closed.

a. Why do DOL agencies such as the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) need to have offices around the country in the first place?

OSHA and MSHA inspections take place where work is being conducted and it is important that inspectors are able to launch investigations as soon as possible after a worker files a complaint, or a worker is injured or killed.

Closing down offices will mean that it will take longer and cost more money to reach workplaces that need inspections. Closing OSHA and MSHA offices is inefficient, costly and will lead to more worker injuries, illnesses and deaths.

b. What are the consequences for workers if Elon Musk and DOGE shut down OSHA and MSHA offices?

Inspections would be delayed, and the budgets of OSHA and MSHA would be further stressed.

2. In this hearing, we heard criticism of OSHA's proposed rule on heat stress as a "one-size fits-all" rule.

a. Would you say that a heat rule is needed?

Yes. It is long overdue.

b. Why?

c. Can you tell us how this proposed rule would work, and whether it truly is a "one-size-fits-all" rule?

Regulated industries every OSHA standard as a one-size-fits all. The heat proposal is flexible enough to address heat hazards in all workplaces in all parts of the country. Critics claim it doesn't accommodate geographical differences because workers in the south may be more acclimatized than workers in the north. But there is an exception to the acclimatization requirements if a worker is already acclimated. They claim it doesn't account for different humidity levels, but the Heat Index (and Wet-Bulb-Globe method) take humidity into account. They claim that every industry and location needs its own separate standard (e.g. construction v.

agriculture, indoor v. outdoor), but the standard has provisions to take all of this into account. Every industry thinks it's special and wants to be exempted, but the rule is flexible now, and OSHA gathered valuable information during the hearings and comments period to address any issues that may arise in different occupations.

d. Other witnesses appeared to believe that a better version of the standard would be performance-oriented.

i. What are the types of standards (performance, specification, etc.) that OSHA can adopt?

A specification rule lists a number of specific requirements that an employer must meet to be in compliance with the standard.

Performance standards list certain elements that they employer must comply with, and allow the employer to fill in the details about how they would satisfy those elements, and provide detailed documentary proof that they are in compliance.

ii. What considerations inform the choice of type?

Complexity, effectiveness, feasibility, and ability to enforce. The most well-known performance standard is the Process Safety Management standard which regulated the safety of chemical facilities. Because of the many different facilities in operation and the extreme complexity of running those facilities, it would have been impossible for OSHA to issue a specification standard that applied to all chemical facilities. Instead, the PSM standard lists 13 elements (e.g. Process Hazard information, mechanical integrity, employee participation, etc), and the employers must show that they have a program that satisfies each of these elements.

For example, because almost every chemical facility is unique, Process Hazard Information section requires employers to "document that equipment complies with recognized and generally accepted good engineering practices."

This type of complex documentation is typical of performance-based standards and is an enormously burdensome amount of work for employers (especially small employers), much more than simply complying with a specification standard that tells employers exactly what they must do to protect workers and be in compliance with the standard.

Consequently, small and medium sized employers generally prefer specification standards to performance-based standards.

iii. How do you respond to the suggestion of other witnesses in the hearing that a performance standard would be effective and preferable for preventing heat stress?

The basic elements of a heat standard are universally recognized: water, shade, heat, acclimatization, training and emergency response. And there is abundant scientific evidence, detailed in OSHA's preamble, concerning how much rest and water is necessary to protect workers, and how frequently they must be accessed.

But the business community wants to leave it up to individual employers how to provide these elements: the amount of water, the frequency of rests, the amount of acclimatization, etc., although the requirements of the OSHA standard are scientifically based and feasible to implement.

Advocates of a performance-based approach do not say how OSHA will determine whether employers are in compliance with the elements of the standard. They say compliance should be based on the "outcome" of whatever program the employer implements, of if the program is working," without defining what "outcome" or "working" means If "outcome" or "working" mean no heat illnesses, that means that OSHA would only be able to act after a worker becomes ill or dies. The goal of OSHA standard is to protect workers before they get hurt.

3. Last year, OSHA finalized a rule that would simply clarify that workers, under the Occupational Safety and Health Act of 1970, have the opportunity, just like their employers, to authorize a representative to accompany an OSHA inspector during physical workplace inspections, or "walkarounds."

a. What are the benefits of allowing both worker and employer representatives to accompany walkarounds?

There are several reasons that the OSHAct requires employers to either allow walkaround representatives or consult with workers. First, workplaces can be complex, and workers (or representatives) may be able to provide OSHA with the information and insight to conduct a thorough inspection. Workers or their representatives may know, for example, which process was operating the day of the incident, and are not operating during the inspection.

Second, some workers are not comfortable talking to government officials because they may fear retaliation from their employer. A walkaround representative can help shield workers from exposure to retaliation.

OSHA inspectors may not speak the language of some workers, or workers may not trust the translators that OSHA or the employer provides.

These are among the many reasons that the OSHAct requires employer input from workers or their representatives.

b. The final rule also clarifies who workers can authorize as their representatives, which includes other workers or a person with relevant language skills. How would this clarification help workers contribute to improving their workplace?

See above.

c. One of the objections to the walkaround rule is that this will be exploited for union organizing.

i. Can you describe for us what actually happens during a walkaround?

During a walkaround, the OSHA inspector views the area where an incident occurs, and if there are chemicals involved, may also take samples for later analysis. The inspector attempts to identify what operations were occurring when an incident or exposure occurred, who was exposed to the hazards and how the processes operate.

ii. Would a union representative be able to have one-on-one organizing conversations during these walkarounds?

Neither a union representative, nor any other walkaround representative would have any opportunity to conduct any kind of organizing activities during an inspection. The OSHA inspector has total control over the conduct of an inspection and can terminate the inspection or expel anyone who is disrupting the inspection or conducting any inappropriate activities like organizing. Union organizing during OSHA inspections does not exist, never has exists and cannot exist. It is a red herring.

4. The Trump Administration's Project 2025 agenda would eliminate rules that keep children out of hazardous jobs. What are some of the health and safety risks to which children would be exposed in these jobs, which include handling radioactive substances, roofing, and logging.

Operating hazardous machinery, working at heights on roofs, working with toxic chemicals or radioactive substances are activities that young people should not be doing and are currently forbidden by law. They are not old or mature enough to understand the hazards they are exposed to, or their rights under the law, nor would they generally have the capacity to challenge their employers for exposing them to hazards.

5. Over the last two and a half decades, black lung disease among working and former coal miners is returning with vengeance. One of the reasons for this rise is that miners are increasingly breathing in silica dust, which is about 20 times more toxic than coal dust and speeds up the destruction of miners' lungs.

a. During your time at OSHA, which regulates workplaces other than mines, you helped to develop a silica standard. Why was it so important to reduce exposure to silica dust?

Exposure to silica dust can cause cancer and serious lung disease. Preventing exposure is feasible and protects lives.

b. Last year, the Biden Administration published a silica standard for the nation's mines. Do the reasons you explained for regulating silica in other workplaces also apply to the nation's mines?

The reasons for regulating silica in construction, foundries and other general industry occupations are the same for the mines. Except that exposure in mines is far more hazardous because of the confined environment and mixture with coal dust.

c. Just last month, MSHA announced a four-month delay in enforcement because of the staff firings at the National Institute for Occupational Safety and Health (NIOSH), which implements elements of the MSHA silica standard. What are the consequences of delayed enforcement?

The consequences of this delay will mean that more miners will be exposed to hazardous, life-threatening levels of silica dust that could have been prevented if he standard was being enforced.

6. One of the witnesses raised concerns about the length of time that OSHA has spent without producing a vertical standard on tree care.

a. What does it mean to have a vertical standard for an industry or occupation?

A vertical standard covers hazards in an entire industry. In other words, instead of applying separate fall protection, electrical protection, machinery guarding and

other standards to the tree care occupation, a single standard would cover all hazards in that industry.

b. Do you agree that a vertical standard is needed for the tree care industry? Why or why not?

Tree care is an extremely dangerous occupation, and OSHA has no comprehensive standard that covers all of the hazards facing tree care workers. Even though many existing OSHA standards apply to tree care work, OSHA has had legal problems applying general standards to tree care. So, I would agree that a vertical tree-care standard is needed.

c. How long does it take OSHA to produce such a standard?

The Government Accountability Office issued a report in 2010 estimating that it takes 7 years to issue an OSHA standard. That time has lengthened since that time. It took OSHA twenty years to issue its silica and beryllium standards, for example.

d. What factors influence that timing?

There are a number of factors that influence the timing of standards. Due to various legal requirements and Executive Orders, OSHA's regulatory process is extremely lengthy and burdensome. OSHA's budget is one major factor. OSHA's budget for standards has dwindled steadily over the past decades and the Trump administration is proposing a 24% cut for FY 2026 which will make it impossible for the agency to issue any standards in a short period of time. Finally, Republican administrations rarely issue major OSHA health or safety standards despite the fact that they save workers' lives.

7. Please explain OSHA's policy regarding assessing instance-by-instance penalties.

"Instance-by-instance" (IBI) citations are a tool OSHA can use to significantly increase penalties in particularly "egregious" situations -- e.g. multiple deaths due to clear employer negligence, especially when the employer has a long history of OSHA violations.

For example, if 10 employees are put at risk due to a violation of a standard, instead of one violation (which is OSHA's normal policy), OSHA can issue ten separate violations -- one for each endangered employee.

For a willful violation, instead of a single $160,000 willful violation, the agency would issue 10 willful violations (one for each exposed worker) for a total of $1.6 million.

The original IBI policy was created by the George H.W. Bush administration. It can be highly effective in issuing large penalties against large companies (a few in the millions of dollars), but was only able to be used for willful violations.

The Biden administration expanded that policy from just applying to "willful" violations, to also apply to certain "serious" violations "when application of the IBI citation policy is necessary to achieve deterrence.".

The revised policy would apply to *"high-gravity serious* violations specific to falls, trenching, machine guarding, respiratory protection, permit required confined spaces, lockout tagout, and other-than-serious violations specific to recordkeeping, provided certain factors were present."

You can read the entire policy here.

(Gravity is a function of the *severity* of the injury or illness which could result from the alleged violation, combined with the *probability* that an injury or illness could occur as a result of the alleged violation.)

8. One of the witnesses sketched a hypothetical scenario in which the instance-by-instance penalty approach might be applied if the proposed heat standard were a final rule. In its essential details, the hypothetical involved a small employer required to provide water under the rule. An OSHA inspector arrives, finds that the supplied water is no longer available at a sufficient amount to meet the workers' needs, and is told by the employer that nobody informed him. The water that remains is also not sufficiently cool.

In the witness's scenario, the employer with 10 employees would be assessed 20 times the amount of the civil monetary penalty for running out of water, despite not being told of the insufficiency of the supply, and not having sufficiently cool water. How do you respond to this hypothetical? [1]

The witness (Ms. Felicia Watson) was describing an imaginary scenario that would not be possible under current law. In her imagination, OSHA would now be able apply the revised

[1] The witness actually described a scenario in which the water had run out and was not cool enough, but the witness did not explain how the OSHA inspector would have measured the temperature of the non-existent water. This summary is an attempt to add coherence that was missing during the hearing itself.

IBI policy to all "serious" violations -- for example where an employer who ran out of water could then be vulnerable not just to a serious violation, but to an instance-by-instance penalty totaling in the tens or hundreds of thousands of dollars.

This would not be possible under OSHA's current IBI policy for several reasons:

- The IBI policy only applies when there are "a significant number of serious violations." If running out of water was the only violation (or one of only a few violations), the IBI policy would not apply.
- The IBI policy only applies when "the violation cannot be abated by a single method of abatement." If the only violation was lack of water, the IBI policy would not apply because the problem (lack of water) could be abated by a single method: providing water.
- Running out of water is not included in OSHA's list of violations subject to the IBI policy: *"high-gravity serious* violations specific to falls, trenching, machine guarding, respiratory protection, permit required confined spaces, lockout tagout…"

The nickname for the IBI policy is the "egregious" policy, because it only applies in rare, *egregious* situations, not just when there is a "normal" serious (or even willful) violation of a standard.

Heat is not one of the hazards listed under the new IBI policy. But even if the heat standard were issued and then added to the list of covered violations, if the violation didn't result in one or more fatalities or high number of serious heat-related illnesses, and/or the employer did not have a long history of similar violations, it is highly unlikely that OSHA could apply it in this case. This is a classic example of a Red Herring.

9. To follow up on your colloquy with Rep. Grothman during the hearing, please address the following:

a. How would you characterize the safety and health risks faced by farmworkers?

Workers in the agriculture, forestry, fishing, and hunting industry had one of the highest fatal injury rates. The fatality rate for these industries in 2023 was 24.4 deaths per 100,000 workers, compared with 3.5 for all industry, according to the Bureau of Labor Statistics.

Transportation incidents were the leading cause of death for these farmers and farm workers. Other leading causes were violence by other persons *or animals* and contact with objects and equipment as well as work-related lung diseases, noise-

induced hearing loss, skin diseases, and certain cancers associated with chemical use and prolonged sun exposure. In 2014, An estimated 4,000 youth were injured while working on a farm.

b. What recourse do farmworkers have if they encounter safety and health hazards on the job but OSHA is forbidden by an appropriations rider from even so much as setting foot on the farm?

Farm workers on small farms have no legal recourse, unlike workers on larger farms or most other workplaces in the country. They cannot call for an OSHA inspection, even if they are asked to work in imminently dangerous situations, or if one of their co-workers was killed on the job.

They can refuse to work, risk getting fired, or do the dangerous job and hope for the best. But OSHA couldn't support those efforts and workers are faced with "job blackmail:" your job or your life. Workers on small farms are generally not represented by unions so they can't even file a grievance if they are faced with a life-threatening situation.

10. Rep. Kiley referred to a Biden-era rulemaking as a "vaccine mandate." Did the Biden Administration's OSHA issue any "vaccine mandate"?

No, the Biden administration did not issue a "vaccine mandate." The rule did *not* mandate that all (or any) employees receive the COVID vaccine. The rule stated that employees could "choose either to be fully vaccinated against COVID-19 ***or*** provide proof of regular testing for COVID-19."

It was therefore not a vaccine mandate, but rather a test mandate for those workers who chose not to be vaccinated.

○