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Interpretation of the General Duty Clause/Limitation for Inherently Risky Professional Activities: 16 State Attorney Generals and/or Labor Departments Submit Comments to Occupational Safety and Health Administration

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The Commonwealth of Pennsylvania's Department of Labor & Industry and 16 other state Attorney Generals and/or labor departments collectively submitted November 1st comments to the Occupational Safety and Health Administration ("OSHA") and the United States Department of Labor addressing:

Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities, 90 Fed. Reg. 28370 (Jul. 1, 2025).

The other states included:

- Illinois Attorney General
- Arizona Attorney General
- California Attorney General
- Delaware Attorney General
- Maine Labor Department
- Maryland Attorney General
- Commonwealth of Massachusetts Attorney General
- Michigan Attorney General
- Minnesota Attorney General
- New Jersey Attorney General
- New York Attorney General
- Oregon Bureau of Labor and Industries
- Vermont Attorney General

(Collectively, "the States").

The States, by way of introduction, state that they oppose what they characterize as OSHA's proposal to:

... fundamentally alter the protections of the Occupational Safety and Health Act (OSH Act), leaving millions of workers whose work includes “inherently risky” activities without adequate health and safety protections.

Section 5A1 of the OSHA Act is known as the General Duty Clause (“GDC”). It by definition means that employers must protect employees from any serious hazard once they are aware of it – whether an OSHA’s rule is specifically applicable or not.

Employers can be cited for violations of the GDC if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard. It is utilized only when there is no standard that applies to the particular hazard.

Generally, the following elements are necessary to prove a violation of the GDC:

1. Employer failed to keep the workplace free of a hazard to which the employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and,
4. There was feasible and useful method to correct the hazard.

OSHA in the previously referenced proposed rule excludes from enforcement known hazards that are inherent and inseparable from the core nature of professional activity or performance. OSHA cited then Judge Brett Kavanaugh’s dissent *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Circ. 2014), who argued that the GDC does not authorize OSHA to regulate hazards arising from normal activities that are intrinsic to professional, athletic, or entertainment occupations.

OSHA states that it preliminarily concurs with the dissent’s concerns and is proposing to codify the principle that the GDC does not authorize OSHA to prohibit, restrict, or penalize inherently risky activities that are intrinsic to professional, athletic, or entertainment occupations.

The States in the November 1st comments argue that OSHA has always recognized that not all hazards can be eliminated from “inherently risky” (or, indeed, any) employment activities, accommodating that recognition by limiting enforcement to cases where feasible means to eliminate or materially reduce hazards exist. They further argue, however, that the proposal would completely exclude from OSHA’s purview or enforcement known hazards that are inherent and inseparable from the core nature of a professional activity or performance.

The components of their argument include:

- States Are Interested Parties With Responsibility For, and Expertise In, Protecting the Health and Safety of Workers.
- The States Oppose OSHA’s Proposal To Remove Occupational Safety and Health Protections From Workers Who Perform Inherently Risky Activities.
- The Proposal is Contrary to the Plain Language of the Statute As Well As Congressional Intent and Decades of Case Law.
- If Finalized, the NPRM Would Violate the Administrative Procedure Act Because It Is Contrary to Law and Arbitrary and Capricious.
- The NPRM provides no reasoned explanation for the Department’s departure from its longstanding position.
- The major questions doctrine does not, and could not, apply.
- The NPRM’s vague and broad language is arbitrary and capricious and provides no meaningful analysis or alternatives.
- This Proposal Will Have Harmful Effects on States
- The Proposal Will Lead to Reduced Enforcement and Increase in Injuries.

- The Proposed Rule May Force States To Modify State Plans or Take Regulatory Action To Preserve Existing Protections.
- The Proposal May Erode Workplace Protections in Unintended Industries.

A copy of the States' comments can be downloaded [here](#).