Pennsylvania
Department of
Labor & Industry

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Via Federal eRulemaking Portal (http://www.regulations.gov)

The Honorable Lori Chavez-DeRemer
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Amanda Wood Laihow
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United States Department of Labor
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RE: *Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities*, 90 Fed. Reg. 28370 (Jul. 1, 2025), RIN No. OSHA-2025-0041-0002

Dear Secretary Chavez-DeRemer and Deputy Assistant Secretary Laihow:

The Commonwealth of Pennsylvania's Department of Labor & Industry and Illinois Attorney General, joined by the States of 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), and Vermont (Attorney General) (collectively, the States), appreciate the opportunity to provide this comment on the Occupational Health and Safety Administration (OSHA) of the U.S. Department of Labor's Notice of Proposed Rulemaking (NPRM) entitled *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 States oppose 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.

The OSH Act is administered by OSHA. The OSH Act's purpose is to promote safe and healthy working conditions, including "by assisting and encouraging the States in their efforts to assure safe and healthful working conditions."[1] The OSH Act's general duty clause requires employers to furnish employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[2]

OSHA's proposed regulation, stating that employers would *not* be required "to remove hazards arising from inherently risky employment activities"[3] endangers workers who arguably most need protection. The proposed regulation places the employer's convenience above the worker's safety, contrary to the purpose of the Act.

As discussed below, 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. The present proposal, however, 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. Additionally, OSHA proposes to apply this limitation on the general duty clause in sectors including, *but not limited to*, live entertainment and performing arts; animal handling and performance; professional and extreme sports; motorsports and high-risk recreation; tactical, defense, and combat simulation training; and hazard-based media and journalism activities.[4]

I. States Are Interested Parties With Responsibility For, and Expertise In, Protecting the Health and Safety of Workers.

The undersigned State Attorneys General and Labor Secretaries enforce laws that protect workers' economic security, health, and welfare. Although processes and statutes vary by state, many of the undersigned either directly investigate and prosecute violators of workplace health and safety laws or defend enforcement actions by state departments of labor in administrative or judicial appeals.

Although some States have their own safety and health provisions for public and/or private sector workers, they also rely on robust federal enforcement of OSHA's protections. Without any federal enforcement for workers in inherently risky professions, States will be forced to bear a substantially greater burden to monitor and enforce compliance with state laws. In states like Maine, for example, where the State does not have authority to enforce workplace safety laws in private industries, workers employed as commercial fishers, bush/float plane pilots, wilderness guides, professional hockey players, martial arts instructors, and other professions requiring inherently risky or dangerous activities will be left without the same protections as other workers.

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[1] 29 U.S.C. 651(b).
[2] 29 U.S.C. 654(a)(1).
[3] 90 Fed. Reg. 28370, 28372 (Jul. 1, 2025).
[4] *Id*.

Additionally, depending on the applicable state statutory and regulatory scheme, sizable enforcement gaps are likely should this proposal be finalized. This proposal will also increase the strain on state worker's compensation and healthcare systems.

II. The States Oppose OSHA's Proposal To Remove Occupational Safety and Health Protections From Workers Who Perform Inherently Risky Activities.

A. The Proposal is Contrary to the Plain Language of the Statute As Well As Congressional Intent and Decades of Case Law.

OSHA's proposal to exclude workers who engage in "inherently risky" professional activities from the scope of the general duty clause is inconsistent with the OSH Act. As currently interpreted and applied, the general safety clause covers hazards faced by workers in specialized industries who are not engaged in typical industrial operations.[5] This proposal would create an illogical carve-out from the Act's protections that is contrary to the Act's plain language, Congressional intent, longstanding case law, and the Act's broad purpose to protect "every working man and woman in the Nation."[6] Moreover, the agency's long-standing and judicially sanctioned interpretation of the clause already provides appropriate limits to its application.

The plain language of the clause itself is instructive and clear. Under the subheading "duties of employers" the statute requires "*each* employer" to "furnish to *each* of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his *employees*."[7] There is nothing in this language to suggest that Congress wanted to limit the application of the clause's protection to particular employers, employees, or industries.

Similarly, there is nothing in the Act's legislative history that supports the proposal to remove the clause's protection from certain swaths of industries and workers. Rather, Congress adopted the general duty clause in 1970 in order to guarantee that OSHA could address hazards not covered by specific standards. The clause "insure[s] the protection of employees who are working under special circumstances for which no standard has yet been adopted."[8] Senator Williams, one of the Act's sponsors, explained on the Senate floor that the clause was included "to provide a means for requiring correction of hazardous situations which happened not to be covered by a specific

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[5] *See, e.g., Wal-Mart Stores, Inc.*, OSHRC No. 09-013, 2011 WL 12678760, at *1 (April 5, 2011) (applying the general duty clause to hazards in a retail setting not covered by other standards). This decision was subsequently vacated because Respondent withdrew its notice of contest. *See Wal-Mart Stores, Inc., Respondent.*, 25 BL OSHC 1220, No. 09-1013, 2015 WL 1291920 (March 18, 2015).

[6] 29 U.S.C. 651(b).

[7] 29 U.S.C. 654 (a)(1).

[8] S. Rep. No. 1282, 91st Cong., 2d Sess. 10 (1970).

standard."[9] Williams emphasized that during negotiations the provision has been "clarified so that the duty is limited to maintaining the workplace free from 'recognized hazards'" thus resolving concerns raised by employers at the time.[10] This legislative history reflects Congress's intent to expand worker protections, for all workers, through a flexible general clause.

Courts have also addressed this issue. For example and as discussed in detail below, the majority in *SeaWorld of Florida, LLC* v. *Perez,* 748 F.3d 1202 (D.C. Cir. 2014) confirmed that "inherently risky" activities are not outside the scope of the general duty clause. As the D.C. Circuit Court of Appeals explained, case law does not "bar the Secretary from taking enforcement action when preventable dangerous activities in a theme park result in death or serious injury to an employee and feasible measures exist to abate the hazard."[11] The dissent in that case (upon which OSHA relies in its proposal), advocated for the same limitation that OSHA now seeks to adopt. It is notable that the majority rejected that view, finding that had Congress intended to exclude unsafe and unhealthy performances in the entertainment industry from the general duty clause, it could have included such an exemption, but did not.[12]

Indeed, courts have long recognized that the clause imposes a duty of reasonable care upon every employer to protect workers from recognized and dangerous hazards.[13] Over the last half-century, courts and the Occupational Safety and Health Review Commission (OSHRC) have developed a four-pronged test to determine whether an employer has violated the general duty clause.[14] This multi-factor test acts as an appropriate filter for employee claims, entirely obviating all of OSHA's

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[9] 91 Cong. Rec. 37326 (Nov. 16, 1970).
[10] 91 Cong. Rec. 37326 (Nov. 16, 1970).
[11] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1212 (D.C. Cir. 2014).
[12] *SeaWorld*, 748 F.3d at 1213–14. The court further noted that Congress knew how to create carve-outs in the OSH Act when it wished to do so. "For instance, Congress authorized the Secretary, after notice and hearing, to make "reasonable variations, tolerances, and exemptions to and from any or all provisions ... as he may find necessary and proper to avoid serious impairment of the national defense." *Id.*
[13] *Ellis v. Chase Commc'ns, Inc*., 63 F.3d 473, 477 (6th Cir. 1995) ("The general duty clause requires every employer to use reasonable care to protect his own employees from recognized hazards likely to cause death or serious bodily injury, regardless of whether the employer controls the workplace, is responsible for the hazard, or has the best opportunity to abate the hazard"); *Teal v E.I. DuPont de Nemours*, 728 F. 2d 799, 804 (6th Cir. 1984) ("Congress intended the general duty clause. . . to operate as a catch-all protection of reasonable care.").
[14] It also bears mentioning that over the years various employers have argued that the general duty clause is unconstitutionally vague. Courts, however, have resoundingly rejected that argument, uniformly holding that the clause is valid. *See, e.g.*, *Ensign-Bickford Co. v. Occupational Safety & Health Rev. Comm'n*, 717 F.2d 1419, 1421 (D.C. Cir. 1983); *Bethlehem Steel v. OSHRC*, 607 F.2d 871, 875 (3d Cir. 1979); *Georgia Electric v. Marshall*, 595 F.2d 309, 322 n. 32 (5th Cir. 1979).

concerns about what "may" happen if the clause were "broadly exercised."[15] The test elements are: (1) does a condition or activity in the workplace present a hazard to an employee; (2) is the condition or activity recognized as a hazard; (3) is the hazard causing or likely to cause death or serious physical harm to employees; and (4) does a **feasible means** exist to eliminate or materially reduce the hazard.[16] Moreover, courts such as the D.C. Circuit Court of Appeals already construe the general duty clause narrowly, requiring only that employers eliminate "preventable hazards" likely to cause death or serious injury to employees.[17] Thus, the application of the general duty clause has sufficient boundaries to prevent the "unlawful extension of authority" OSHA now speculates may occur (of course, OSHA is speculating that this "unlawful extension of authority" may come from OSHA itself).[18] The longstanding framework OSHA, OSHRC, and courts have used to apply the general duty clause already contains sufficient limitations, rendering the purported concern raised by OSHA in this NPRM meritless.[19]

What's more, OSHA's treatment of this framework suggests that OSHA may apply this proposed rule to aggressively cut worker protections. By overstating the degree to which the proposed rule differs from the current enforcement regime, OSHA may be signaling that it intends to apply the rule to more sharply cut protections than might seem warranted by its text alone.

Finally, the proposal is also at odds with the protective purpose and longstanding general application of the OSH Act. Many industries traditionally covered by the OSH Act, such as construction, firefighting, electrical power line installation, and handling explosives, are inherently risky. "Yet these industries have been regulated pursuant to the Occupational Safety and Health Act, notwithstanding that employers could claim their employees were taking part in the 'normal activities' intrinsic to the industry."[20] Requiring that workers who work in "professional or performance-based" jobs forfeit the Act's protection due to dangers inherent in their professions is without support in the text, history, or application of the general duty clause.

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[15] 90 Fed. Reg. 28371 ("…regulating such activities under § 5(a)(1) could constitute an unlawful extension of authority absent a clear congressional directive.").

[16] *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (emphasis added) citing *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007).

[17] *Ensign-Bickford*, 717 F.2d at 1421 ("this Court has construed the general duty clause narrowly as requiring only that employers eliminate "preventable hazards" likely to cause death or serious injury to employees") citing *National Realty & Constr. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir.1973).

[18] 90 Fed. Reg. 28371 (stating concern that OSHA regulating certain activities under the general duty clause "could constitute an unlawful extension of authority absent a clear congressional directive.").

[19] *See, e.g., Florida Lemark Corp. v. Sec'y of Labor*, 634 F. App'x. 681, 685 (11th Cir. 2015); *Champlin Petroleum v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979).

[20] *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1212-13 (D.C. Cir. 2014) (cleaned up).

B. *If Finalized, the NPRM Would Violate the Administrative Procedure Act Because It Is Contrary to Law and Arbitrary and Capricious.*

1. The NPRM provides no reasoned explanation for the Department's departure from its longstanding position.

Under the Administrative Procedure Act (APA), "when an agency changes its interpretation of a particular statutory provision, this change . . . will be set aside if the agency has failed to provide a 'reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"[21] An agency action is arbitrary and capricious where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to evidence before the agency."[22] Additionally, the agency "must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[23] As explained by the Supreme Court, "[i]t would be arbitrary and capricious to ignore such matters."[24]

Here, among other deficiencies, OSHA has failed to offer an explanation for its decision, which runs counter to evidence before the agency. The hazards faced by workers in the entertainment, sports, and recreation industries remain serious and well-documented by OSHA itself. For example, OSHA's most recent data from 2024 shows more than 4,000 injuries and illnesses in the "Arts, Entertainment, and Recreation" sectors.[25] As recently as a few months ago, OSHA cited two event production companies after a stagehand's fatal injury at a music festival site.[26] Similarly, in 2023 OSHA cited an entertainment company in a fireworks explosion in which four were killed and others injured.[27]

In the NPRM, OSHA offers no evidence of changed circumstances, data, or case law to support reversing decades of consistent enforcement of the general duty clause. Rather, the proposal relies

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[21] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 523 (2d Cir. 2017) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)).
[22] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[23] *Encino Motorcars v. Navarro*, 579 U.S. 211, 222 (2016) (citation omitted).
[24] *FCC v. Fox*, 556 U.S. 502, 515 (2009).
[25] *See* OSHA, Establishment-Specific Injury and Illness Data (2024) available at https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data.
[26] U.S. Department of Labor Press Release, *US Department of Labor cites two event production companies after stagehand's fatal injury at Orlando music festival site | Occupational Safety and Health Administration* (June 16, 2025) available at https://www.osha.gov/news/newsreleases/atlanta/20250616.
[27] U.S. Department of Labor Press Release, *Department of Labor cites entertainment company in Orlando fireworks warehouse blaze, explosion in which 4 workers perished | Occupational Safety and Health Administration* (June 12, 2023) available at https://www.osha.gov/news/newsreleases/region4/06122023.

almost entirely upon a single decade-old dissenting opinion in *SeaWorld of Florida, LLC* v. *Perez,* 748 F.3d 1202 (D.C. Cir. 2014). In that case, OSHA successfully relied upon the general duty clause to prohibit SeaWorld from exposing its trainers to the recognized hazard of close contact with orca whales during live performances. The D.C. Circuit Court of Appeals upheld the citation, holding that SeaWorld was required to abate the hazard by requiring a barrier or minimum distance between trainers and orcas.[28] In a dissent, then-Judge Kavanaugh argued that the general duty clause did not authorize OSHA to regulate hazards arising from normal activities that are intrinsic to professional, athletic, or entertainment occupations.[29] The NPRM characterizes the dissent in *SeaWorld* as raising "serious questions" about OSHA's authority to address inherent hazards in performance or sports, yet the D.C. Circuit in that case rejected the dissent's view and upheld the citation precisely because the risk to workers in that case was a recognized hazard and feasible abatement existed, even though the hazard was certainly an inherent part of the performance. Reliance on a single dissenting opinion does not supply the "reasoned explanation" the APA requires when the agency departs from its longstanding prior position.[30]

Indeed, as noted by the majority in *SeaWorld*, OSHA has routinely and appropriately sought to protect the health and safety of workers in the entertainment and performance industries.[31] For example, in *Murphy Enters., Inc*., a citation was upheld against a carnival regarding operation of a Ferris wheel.[32] OSHA Standard 1975.3 states that "OSHA's general industry standards" apply to employees working at "carnivals, amusement parks, and water parks."[33] And in *Western World, Inc*., an ALJ upheld a citation regarding a "reenactment of an Old West-style gunfight."[34] OSHA's authority has long encompassed hazards at inherently dangerous performance and entertainment workplaces, provided that the hazard is recognized and feasible abatement exists.

Additionally, OSHA has not identified any changed circumstances that would warrant this regulatory change. The NPRM barely acknowledges OSHA's longstanding position, let alone grapples with the agency's departure from its decades-old prior position. As an example, OSHA appears to not understand its own historical position. The NPRM states that it is "not plausible" to believe that Congress intended to authorize OSHA "to eliminate familiar sports and entertainment practices, such as punt returns in the NFL [or] speeding in NASCAR."[35] That statement mischaracterizes Congressional intent as well as OSHA's own prior litigation position. In its brief in the *SeaWorld* case before the D.C. Circuit, OSHA itself distinguished certain activities from the known and abatable hazards it sought to address in the case, stating that "[b]y contrast, physical contact between players is intrinsic to professional football, as is high speed

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[28] *SeaWorld of Florida, LLC* v. *Perez,* 748 F.3d 1202, 1215 (D.C. Cir. 2014).
[29] *Id.* at 1217 (Kavanaugh, J., dissenting).
[30] *Fox,* 556 U.S. at 515.
[31] *SeaWorld*, 748 F.3d at 1212, n.1.
[32] 17 BNA OSHC 1477, 1995 WL 547935 (No. 93–2957, 1995) (ALJ)
[33] OSHA Std. Interp.1975.3, 2005 WL 3801567 (June 16, 2005).
[34] 2013 WL 7208643 (No. 07–0144, 2013) (ALJ).
[35] 90 Fed. Reg. 28371.

driving to professional auto racing."[36] This inconsistency underscores OSHA's failure to grapple with its own longstanding position.

2. The major questions doctrine does not, and could not, apply.

Regarding the proposal's half-hearted invocation of the major questions doctrine, any reliance on that doctrine is misplaced. The major questions doctrine is a tool of statutory interpretation that the Supreme Court has used in certain "extraordinary cases" to determine whether an agency has the statutory authority it asserted.[37] The major questions doctrine applies when an agency makes an "unprecedented" assertion of authority to regulate a matter of vast economic or political significance.[38]

The doctrine has only been applied to a narrow set of cases, and these cases have been both novel and of enormous magnitude. In *West Virginia v. EPA*, for example, the Supreme Court emphasized that the Clean Power Plan at issue would have "substantially restructure[d] the American energy market" and was estimated to "reduce GDP by at least a trillion 2009 dollars by 2040."[39] Similarly, in *Biden v. Nebraska*, the Supreme Court emphasized that the student-loan forgiveness plan at issue would have "canceled roughly $430 billion of federal student loan balances" and was estimated to "cost taxpayers between $469 billion and $519 billion."[40]

The issues raised by this proposal bear no resemblance to the cases in which the Supreme Court has invoked the major questions doctrine. The statutory provision at issue here, and the agency's interpretation of it, has been in place for more than half a century, making clear that it is not the type of "politically significant" issue to trigger the doctrine.[41] Moreover, because the proposal largely fails to quantify the effects it cannot be said that the "economic significance" prong of the doctrine applies. Based on the few data points the proposal does supply, the scope of this proposal does not come anywhere close to triggering the major questions doctrine.[42]

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[36] Appellee Br., *SeaWorld v. Perez*, 2013 WL 5720154, at *52.
[37] *See West Virginia v. EPA*, 597 U.S. 697, 721 (2022).
[38] *West Virginia v. EPA*, 597 U.S. 697, 716, 721, 728 (2022) (quotation marks omitted); *see also, e.g., Biden v. Nebraska*, 600 U.S. 477, 501 (2023) (emphasizing that the Secretary had "never previously claimed powers of this magnitude" under the statute at issue).
[39] 597 U.S. at 715, 724.
[40] 600 U.S. at 483, 502 (quotation marks omitted).
[41] *See, e.g., Mayfield v. USDOL*, 117 F.4th 611. 617 (5th Cir. 2024) ("This is not an instance where the agency discovers in a long-extant statute an unheralded power to regulate a significant portion of the American economy.") (cleaned up).
[42] OSHA attempts to have it both ways, arguing that this proposal is necessitated by the major questions doctrine and simultaneously arguing that it will have a negligible effect on a small number of workers. *See, e.g.*, 90 Fed. Reg. 28372 ("OSHA preliminarily estimates that this proposal would affect one percent of employees in affected occupations, or about 1,100 employees who are entertainers and performers, sports and related workers.").

Finally, the Supreme Court has never applied the major questions doctrine to limit an agency's ability to carry out statutorily delegated responsibilities. While the doctrine may prevent agencies from claiming authority Congress did not grant, it does not curtail authority that has been explicitly granted. The OSH Act clearly authorizes OSHA to assure that "*every working man and woman*" has safe and healthful working conditions, including workers who work in risky occupations. This proposal concerns a long-standing statutory provision interpreted consistently for decades, affects a relatively small group of workers, and poses no "vast economic or political significance." As such, any reliance on the doctrine here is misplaced and provides no justification for narrowing the OSH Act's protections for workers.

3. The NPRM's vague and broad language is arbitrary and capricious and provides no meaningful analysis or alternatives.

The proposal's broad and undefined language proposes an unreasoned weakening of worker protections for a wide swath of workers. The language in the NPRM does not provide adequate notice to the regulated community about key provisions and in fact acknowledges that "OSHA did not define key terms in the regulatory text."[43] Operative terms such as "inherently risky," "integral," "reasonable efforts," and "professional or performance-based occupation" are all left undefined, with the proposal lacking even general explanations of what those terms mean and what the boundaries should be for each. Additionally, the sector list of those industries that will be subject to this rollback of protections is expressly non-exhaustive and expansive and includes everything from live entertainment to professional sports to "high-risk" recreation and hazard-based journalism. Again, rather than setting forth a substantive proposal or range of potential options, the agency instead simply states that it "seeks public comment on whether and how the regulatory text could be revised to make it clearer or more specific" and asks whether it should "consider limiting the application of this proposed rule to only those industries identified in the regulatory text" or if the list should "be expanded to reflect that it is exclusive rather than illustrative."[44]

The proposal also contains no qualitative or meaningful quantitative assessment of what kind of workers, specifically, would be losing this safety and health protection, as well as what or how many hazards would now be free from regulation, despite feasible methods of abatement being available. As a practical matter, it is foreseeable that hazards previously known and recognized as preventable would now be ignored as "inherent" to the work. For example, the animal trainer that was killed by an orca in *SeaWorld* or the entertainer who was shot and gravely injured in *Western World* may not have any recourse should this proposal be finalized—both instances involved situations inherent to risky work.[45] Additionally, OSHA's assertion that the rule would create "no new costs" ignores the obvious potential economic and worker-borne costs and increased

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[43] 90 Fed. Reg. 28372.
[44] *Id.*
[45] *See generally SeaWorld*, 748 F.3d at 1214; *Wild Western World, Inc.*, 2013 WL 7208643 at *9 (No. 07–0144, 2013) (ALJ).

enforcement costs borne by the States that will come with this rollback of worker protections.[46] Indeed, the proposal only assesses costs to employers and fails to analyze any costs to employees.

In view of the above, it is difficult to provide substantive comment on the rule, and the range of potential outcomes. Of course, under the APA, any final rule must be a logical outgrowth of the proposal.[47] Should OSHA decide to include definitions for key terms without providing any information as to what those definitions may be, or significantly expand the already-expansive list of sectors to be affected, without providing notice to the regulated community (aside from an invitation to define), it is questionable whether such final rule would be valid.[48]

III. This Proposal Will Have Harmful Effects on States

The proposed rule threatens to harm the States' interests in maintaining strong workplace protections for their residents. For the last 55 years, the general duty clause has been used to hold employers accountable for failing to take feasible measures to abate recognized hazards in the workplace. The text and the scope of the general duty clause has not changed since the OSH Act was passed in 1970, and the States have relied on its broad mandate to ensure workers enjoy strong, general occupational health and safety protections in the absence of specific standards by OSHA. The proposed rule will cause an increase in injuries, force States to take administrative action to preserve existing protections, lead to a patchwork of enforcement, and result in a general erosion of workplace safety in unintended industries and occupations.

A. The Proposal Will Lead to Reduced Enforcement and Increase in Injuries.

The States are concerned that the proposed rule will empower employers to ignore known hazards in inherently risky employment activities, regardless of the feasibility of abatement. This change will increase the likelihood that workers—in undetermined numbers and industries due to OSHA's refusal to quantify—will be exposed to unmitigated, recognized hazards in the workplace.

The proposed rule will reduce the number of workplace incidents that result in liability for employers who fail to abate recognized hazards through feasible means. Employees may also, in turn, be less willing to file complaints about unsafe work conditions in industries where the proposed rule applies or could apply. Overall, this could lead to a decrease in OSHA onsite inspections in workplaces with inherently risky activities. Because onsite inspections encourage employers to adopt safety measures, it is reasonable to conclude that the proposed rule could result in industries with inherently risky activities becoming even less safe since employers would be

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[46] 90 Fed. Reg. 28372.

[47] *See, e.g.*, *Long Island Care at Home v. Coke*, 551 U.S. 158, 174 (2007).

[48] The NPRM also states "many employees in these occupations are engaged in employment activities that are covered by existing OSHA standards" but does not articulate what these standards are. 90 Fed. Reg. 28372.

less likely to adopt safety measures if they were excluded from liability.[49] An increase in injuries not only harms the States' interest in the physical safety and wellbeing of their residents, it also threatens to increase the States' administrative burdens relating to workers' compensation claims that are filed as a result of increased workplace injuries.

B. The Proposed Rule May Force States To Modify State Plans or Take Regulatory Action To Preserve Existing Protections.

The proposed rule threatens to upend the States' reliance on OSHA's enforcement of the general duty clause by narrowing its scope and application for the first time in 55 years. Because the proposal would take away worker protections, it will have a negative impact on the occupational health and safety of workers engaged in inherently risky work activities in each of the States. States that desire to counteract any regressive effect of making the general duty clause less stringent in their jurisdiction will need to assess whether any recourse is available to maintain current levels of occupational protections.

The States collaborate with OSHA to protect workers and rely on OSHA to establish strong, minimum occupational health and safety standards. While OSHA is the primary enforcer of the standards and regulations set out in the OSH Act, many States have assumed enforcement obligations under Section 18 of the OSH Act that provides for State Plans. Section 18 encourages States to adopt State Plans for the development and enforcement of occupational health and safety standards within their jurisdictions.[50] State Plans must be approved by OSHA and must meet, among other minimum standards, requirements that provide for standards that are "at least as effective" as federal standards and regulations, including the general duty clause.[51] OSHA provides as much as 50% of the funding for each approved State Plan program.[52]

Through their State Plans, States directly enforce occupational health and safety standards that meet or exceed OSHA standards. Twenty-one states and Puerto Rico have OSHA-approved State Plans that cover workplace safety in both the private and public sectors.[53] These States currently enforce equivalent general duty clauses in their State Plans that are at least as effective as the federal general duty clause. Some states, including Illinois and Maine, have OSHA-approved State Plans covering workers in the public sector only and enforce general duty clauses for employers

[49] *See, e.g.*, Thomas H. McQuiston et al., *The Case for Stronger OSHA Enforcement—Evidence from Evaluation Research*, 88 Am. J. Pub. Health 1022, 1023 (1998).
[50] 29 U.S.C. 667.
[51] *Id*.
[52] OSHA Frequently Asked Questions, https://www.osha.gov/stateplans/faqs.
[53] Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. https://www.osha.gov/stateplans/faqs

in the public sector that are at least as effective as OSHA's General duty clause.[54] These states rely on OSHA to enforce occupational standards and general duties in the private sector. The remaining 29 states do not have State Plans and rely entirely on enforcement efforts by OSHA to enforce occupational health and safety standards in their jurisdictions. For the millions of workers in those states, including private sector workers Pennsylvania,[55] there is no back up at all, and the proposed rule would remove the only statutory protection for workers whose jobs require risky activities.

The proposed rule also poses potential confusion in its application. Notwithstanding OSHA's preliminary determination that the proposed rule will not require States to modify their State Plans to remain in compliance, States may need to modify their State Plans if they wish to preserve the status quo of their general duty clauses. State Plans need only be "at least as effective as" federal OSHA standards, and some State Plans mirror the language of the federal general duty clause, which has permitted those States to interpret and apply their general duty clauses in alignment with OSHA. However, it is uncertain whether the proposed rule will also change how the general duty clauses of State Plans will be interpreted and applied in the future.

States may expend resources to assess the potential impacts the proposal will have on their State Plans if the proposed rule is made final. States operating a State Plan desiring to preserve the full protections of the existing general duty clause may determine it is necessary to take regulatory action, whether by modifying their State Plan, issuing guidance, or taking other actions, to clarify the scope and interpretation of the general duty clauses in their State Plans. States that do not operate State Plans will also need to expend resources to determine how the proposed rule would impact their interests in protecting workers within their jurisdictions. In some cases, that may involve States seeking authority from OSHA to assume enforcement authority and develop State Plans with more stringent general duty protections, while in other cases, States may determine there is no recourse to the gaps in worker protections that will be created by the proposed rule.

For example, Pennsylvania, Illinois, Massachusetts, and Maine will be harmed by the proposal because workers in the private sector are covered by OSHA. Their statutory and regulatory schemes cannot, in their current states, fill the gaps left by this proposal; the Pennsylvania General Safety Law is generally only applicable to public sector employees due to the OSH Act's preemption, and Illinois', Massachusetts' and Maine's State Plans only covers public sector employees. Additionally, various sectors of the Pennsylvania economy will be uniquely impacted by this proposal, including the professional athletics in two major metropolitan markets (Pittsburgh and Philadelphia), the outdoor recreation and tourism industries (e.g. Pocono region), and the various entertainment and amusement venues throughout the state (e.g. Hersheypark). Similarly, Illinois is home to many professional championship teams, over 250 theatre companies in Chicago

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[54] Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the Virgin Islands. *Id*.

[55] Pennsylvania has a General Safety Law that is generally applicable to public sector employees in the Commonwealth.

alone, and various amusement parks throughout the state whose employees would be negatively impacted by this proposed rule. Massachusetts, which is also a professional athletic major metropolitan market and has recreational and amusement venues throughout the state, would experience significant impacts to these industries and workers within them as well. As another example, Maine's wilderness recreation and tourism and professional hockey and soccer industries would all be negatively affected.

Because the proposed rule is vague and lacks definitions, it is difficult to determine with specificity all the potential harms to the States. However, any State activities taken to preserve or establish existing levels of care under the general duty clause would necessarily be resource-intensive and would require those States to re-direct strained and valuable resources from their normal enforcement activities.

Additionally, the States are concerned that the proposed rule will make enforcement more difficult. For example, enforcement of the general duty clause will splinter into a patchwork regime if the proposed rule is implemented. This will not only create further confusion for workers but could also require employers that operate in multiple states to develop different safety standards for different jurisdictions.

C. The Proposal May Erode Workplace Protections in Unintended Industries.

The proposed rule may result in an erosion of health and safety standards in unintended industries and occupations, even though the NPRM asserts it will only exclude from liability some employers in limited industries. Particularly for States that enforce safety standards in the public sector, there is a concern that implementation of the proposed rule will have a negative impact on the safety of public safety workers and first responders, leading to a general degradation of general duty liability for public sector employers.

States that operate State Plans in the public sector regularly investigate incidents or complaints regarding inherent hazards in risky occupations. For instance, these States enforce safety standards against employers of public safety employees and first responders, such as police officers, firefighters, emergency medical technicians, paramedics, correctional officers, and park rangers, among others, who engage in high-risk employment activities as inherent parts of their jobs. Under the current framework, the general duty clause requires a public sector employer to mitigate through feasible means recognized hazards.

The NPRM contains no express limitation that would prevent the new interpretation of the general duty clause from being applied to recognized hazards in these occupations. In fact, the proposed rule could be read to explicitly exclude these employers from having to remove recognized hazards arising from inherently risky activities. The hazards that these essential workers, such as police officers or firefighters, are exposed to could likely meet the three factors that would eliminate an employer's liability: (1) an inherently risky employment activity that is integral to the function of the professional occupation; (2) the hazard cannot be eliminated without a fundamental alteration or prohibition of the activity; and (3) the employer has potentially made "reasonable efforts," which is an undefined phrase, to control the hazard without altering the nature of the activity.

Even assuming the proposed rule was implemented in a manner that specifically excluded public safety servants or first responders, administrative law judges applying the general duty clause under State Plans may eventually need to interpret a growing body of persuasive administrative decisions narrowly interpreting the general duty clause and apply those narrowed standards to general duty citations under their State Plans.

IV. Conclusion

OSHA's proposed rule undermines Congressional intent, fails basic APA standards, leaves a segment of the workforce without an important health and safety protection, and burdens States in various ways. The States urge OSHA to rescind the NPRM and maintain its longstanding interpretation.

Sincerely,

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