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

---

[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
U.S. Chamber of Commerce
World Millwork Alliance

Outside Counsel
Robin Repass
Fisher & Phillips LLP
1401 New York Avenue, N.W.
Washington, DC 20005

November 13, 2023

The Honorable Douglas Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

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.

[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