



## EDUCATION AND LABOR CABINET

**Andy Beshear**  
Governor

**Department of Workplace Standards**  
**Kimberlee C. Perry**  
Commissioner  
500 Mero Street, 3<sup>rd</sup> Floor  
Frankfort, Kentucky 40601  
(502) 564-3070

**Jamie Link**  
Secretary

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via Internet Submission  
OSHA Docket Office  
OSHA Docket No. OSHA-2025-0041

RE: Comment addressing “**Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities**” proposed rule

Docket Officer:

On behalf of the Kentucky Education and Labor Cabinet’s Department of Workplace Standards the following comments are provided to the Occupational Safety and Health Administration (“OSHA”) regarding the aforementioned proposed rule published in the July 1, 2025, *Federal Register*.

The Kentucky Occupational Safety and Health Program (“Kentucky OSH”), fully operative since 1973, is within the Education and Labor Cabinet’s Department of Workplace Standards. The Kentucky OSH Program is dedicated to reducing workplace injuries and illnesses in the Commonwealth of Kentucky through the elimination of hazardous conditions. The program accomplishes this through the dual approach of enforcement and voluntary compliance assistance. Kentucky OSH’s jurisdiction applies to all private and public sector employers, employees, and places of employment throughout the Commonwealth except employees of the United States government; and employers, employees, and places of employment over which federal agencies other than OSHA exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

Kentucky OSH has concerns with the proposed rule and the potential legal and enforcement implications. First and foremost, OSHA’s mission statement is, “to assure America’s workers have safe and healthful working conditions free from unlawful retaliation.” The proposed rule is contrary to that mission. Instead of assuring safe and healthful working conditions, OSHA would abandon those who most require protection because of the hazardous nature of his/her job. All individuals working in “inherently risky” occupations, such as, entertainers, are entitled to the same safety and health protections provided to all other individuals in any other workplace. Therefore, entertainment should not be given priority over the safety and health of any American worker.

The proposed rule, as written, applies to “professional or performance-based occupation[s].” The proposed rule does not provide definitions for “professional” or “performance-based,” but instead gives a non-exhaustive list of sectors that may qualify. “Performance-based occupations” should be defined as: “employment involving the staging or presenting of a live form of entertainment, such as, but not limited to, plays and concerts.” Presenting of pre-recorded forms of entertainment, such as movies at theaters, should be excluded. Or, in the alternative, “Performance-based” should be edited to be “performing arts based” or “entertainment-based.” “Professional occupations” should be defined as: “employment requiring a high degree of education, specialized training, and advanced expertise in an entertainment-based field.”



However, even if these words are defined, there will undoubtedly be litigation attempting to expand the scope of any definition created. The potential for this rule to be applied to unintended sectors is high, which may result in protections being stripped from sectors that are intended to be excluded from this rule. For example, law enforcement, utility workers / linemen, doctors, engineers, lawyers, behind-the-scenes individuals (such as ticket salesmen and props person), etc. These sectors may be seen as “professional occupations” due to their need for enhanced specialized training. Some jobs could also be seen as “performance-based” due to the requirement to meet a deadline. The potential for unnecessary hazardous conditions, injuries, and illness exists if the proposed rule is promulgated.

Kentucky OSH is also concerned about employment sectors more specific to Kentucky, including but not limited to, the horse-racing and bourbon industries. These industries sometimes necessitate the need to issue general duty citations due to the unique hazards associated with them. Under the proposed rule, both of these industries could arguably be classified as “professional or performance-passed” occupations, therefore excluding them from the general duty citation. This would result in a partially unregulated, hazardous workplace.

Kentucky OSH also has concerns with the proposed rule as it applies to the currently proposed sectors. The mission of Kentucky OSH’s program is to eliminate hazardous conditions in the workplace to reduce injuries and illnesses, and this proposed rule would prevent Kentucky OSH from executing the mission when there are no applicable standards. Kentucky would no longer provide complete protection for occupations such as entertainers, animal trainers/handlers, or live media reporters to name a few. Individuals working in these sectors deserve protections just as much as any other individuals in any other workplace.

This proposed rule is against current precedent and will result in litigation. Our agency will ultimately bear the cost of this litigation. The majority holding in *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014) was to uphold the general duty citation. Then-Judge Kavanaugh’s dissent is not binding precedent. Formulating a rule based on non-binding precedent sets the stage for litigation on the constitutionality of this proposed rule. Furthermore, this case is over eleven (11) years old. It is questionable that a rule based on a dissent written over a decade ago is now being used to justify a rule stripping protections from employees in their workplaces. Especially when many of the individuals engaged in the sectors the proposed rule aims to eliminate protections from are independent contractors outside of OSHA’s jurisdiction to begin with. Many of the examples of dangerous professions listed by then-Judge Kavanaugh, such as NASCAR drivers, professional athletes, actors, and musicians would not be cited by OSHA.

At a minimum, definitions for “professional or performance-based occupations” and an exhaustive list of sectors the rule applies to are necessary to protect employees and would allow Kentucky OSH to continue to fulfill its mission to make workplaces safer, as well as prevent the proposed rule from being applied to unintended sectors of professional occupations. We propose the following:

If the proposed rule should become a final rule, which Kentucky OSH opposes, there should be an exhaustive list of sectors the rule applies to. This is necessary to prevent the proposed rule from applying to any sector that simply requires advanced training, and/or is in the entertainment sector.

OSHA seeks comment on whether its determination that the proposed rule would not result in any diminution of the effectiveness of a State Plan compared to OSHA, and therefore State Plans are not required to amend their program to include the proposed rule. Here, Kentucky OSH agrees that its State Plan would still be as effective as OSHA without the adoption of the proposed rule because Kentucky OSH maintains its own general duty statute. However, by not adopting the proposed rule, Kentucky OSH would be operating in conflict with Kentucky Revised Statute (KRS) 338.062, which prohibits Kentucky’s State Program from enforcing any occupational safety and health administrative regulation that is



more stringent than the corresponding federal provision enforced by the United States Department of Labor under the Occupational Safety and Health Act of 1970. Therefore, adopting the proposed rule would require legislative action to amend the parameters of Kentucky OSH's general duty statute, which does not include the current proposed employer exceptions.

In addition, if adopted, the proposed rule would also create a chaotic legislative problem in Kentucky OSH due to its existing general duty statute, specifically KRS 338.031(1)(a), which places general duty workplace obligations to Kentucky employers. For instance, Kentucky OSH has no equivalent regulation to 29 CFR 1975.7. Therefore, Kentucky OSH cannot adopt the proposed rule without being in conflict of KRS 13A.130, which prohibits administrative bodies from expanding on or limiting a statute. As such, adopting the proposed rule would modify the scope of Kentucky OSH's current general duty statute, which would be in violation of KRS 13A.130.

The proposed rule, and any variation of the proposed rule, is contrary to Kentucky OSH's Mission. Kentucky's General Assembly stated that, "it is the purpose and policy of the Commonwealth of Kentucky to promote the safety, health and general welfare of its people by preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work...." See, KRS 338.011. Kentucky OSH currently provides no caveat to its safety and health protections, and neither should OSHA.

As always, Kentucky OSH appreciates the opportunity to comment and offers any assistance to OSHA.

Sincerely,



Kimberlee C. Perry  
Commissioner  
Department of Workplace Standards