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October 16, 2025

Amanda Wood Laihow
Acting Assistant Secretary of Labor for Occupational Safety and Health
Occupational Safety and Health Administration
200 Constitution Ave NW
Washington, D.C. 20210

RE: Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities

Dear Acting Assistant Secretary Wood Laihow:

On behalf of more than 225,000 registered nurse (RN) members, National Nurses United (NNU), the largest labor union and professional association for RNs in the United States, submits these comments in response to the request for public comments on the Occupational Safety and Health Administration (OSHA) proposed rule, *Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities* (Docket No. OSHA-2025-0041). NNU urges OSHA to rescind this proposal because it severely undermines the agency's ability to uphold its mandate from Congress to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions,"¹ and jeopardizes worker health and safety.

I. OSHA's proposal to limit application of the General Duty Clause to exclude "inherently risky" activities would undermine the agency's ability to uphold its Congressionally mandated mission.

When establishing OSHA, Congress was abundantly clear what it intended OSHA's duty to be. Indeed, Section 651(b)(1) of the Occupational Safety and Health (OSH) Act itself explicitly provides that:²

(b) The Congress declares it to be its purpose and policy... to assure so far as possible **every** working man and woman in the Nation safe and healthful working conditions and preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions....

[emphasis added].

¹ Occupational Safety and Health Act, 29 U.S.C. §651(b) (1970).
<https://www.law.cornell.edu/uscode/text/29/651>

² Occupational Safety and Health Act, 29 U.S.C. §651(b)(1).

Congress' focus was not just on requiring employers to create workplace safety and health programs but to "perfect" them. OSHA's task, then, is to assure that employers continuously strive to make the healthiest and safest workplaces possible.

Yet, OSHA's current proposal to change the General Duty Clause would jeopardize the Agency's ability to fulfill its mission. OSHA's General Duty Clause requires that:³

(a) Each employer –

(1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;

OSHA's ability to cite employers under the General Duty Clause is a core aspect of the Agency's ability to hold employers accountable to protecting workers from hazards that are not addressed by a specific standard. In the current proposal, OSHA is now seeking to limit coverage of the General Duty Clause and to exclude "hazards arising from inherently risky employment activities" in industries 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

OSHA's proposed changes to the General Duty Clause would undermine the Agency's ability to achieve its mission because it would leave workers in, at minimum, the specified industries unprotected from hazards deemed by employers to be "inherent" to certain jobs. The proposal leaves the door open to expansion to other industries not listed. The proposal would remove enforcement capacity from the Agency if an employer has taken any action—such as providing personal protective equipment (PPE) or installing one engineering control—if the employer has deemed additional measures would "fundamentally alter" the job, even if implemented controls were insufficient to reduce risk of injury or illness to workers. This clearly does not fulfill the intent of Congress when tasking OSHA to "assure so far as possible" safe and healthful working conditions for all workers in the United States.

II. OSHA's proposal to limit application of the General Duty Clause would be subject to abuse by employers seeking to avoid responsibility for protecting employees from workplace hazards and to circumvent OSHA's enforcement processes.

OSHA's proposed criteria to limit application of the General Duty Clause—namely, hazards that are "inherent" to a job and preventive measures that would "fundamentally alter" a job—are unmeasurable and therefore subject to abuse by employers. An employer who

³ Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1).

⁴ Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities, 90 Fed. Reg. 28370 (June 30, 2025).

does not wish to spend money or time on controlling a hazard in their worksite could simply say that the hazard is “inherent” to the worksite and to intervene would “fundamentally alter” the work, without having to substantiate either claim. Ultimately, with this proposal, OSHA would be giving employers a get-out-of-citations-free card that they could play whenever and however much they wanted. This is an unacceptable proposal that would fundamentally undermine OSHA’s ability to protect workers.

Indeed, the terminology used in OSHA’s proposal is so malleable that it is hard to identify an example where abatement of a hazard would truly “fundamentally alter” a job such that it could not be performed any longer. Even the example of SeaWorld on which OSHA leans in its proposal does not appear to meet these criteria. In 2010, a SeaWorld trainer, Dawn Brancheau, was killed by an orca with a history of aggression and violent attacks on trainers.⁵ OSHA investigated the fatality and cited SeaWorld under the General Duty Clause for failing to protect trainers from hazards related to interacting with orcas. OSHA’s citation was upheld by the courts in 2014,⁶ but OSHA is now arguing that “subsequent developments in administrative and constitutional law” support the agency’s proposal to weaken the General Duty Clause.

In the D.C. Circuit Court decision, then-D.C. Circuit Judge Brett Kavanaugh argued in his dissent that OSHA had overreached in its enforcement of the General Duty Clause and should not have been able to cite SeaWorld. His dissent conflated high-risk hobbies done for personal gain with actual jobs that financially benefit an employer and for which the employer controls the work environment. The crucial difference being that when an employer is profiting from an employee’s risk-taking work in an area that the employer controls, Congress has determined that that employer must take feasible steps to mitigate that risk under the General Duty Clause. When he writes “to be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities” it reads more like he is referring to an Ironman competition than actual paid-employment whereby an individual takes risks to earn a living. *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1217 (D.C.Cir. 2014).

Kavanaugh also argued that OSHA’s proposed control measures would fundamentally alter the job. However, the reality is that SeaWorld continues to sell tickets to live orca shows and even “up-close” tours that promise one-on-one interactions with orcas.^{7,8} After Brancheau’s death and OSHA’s citations, SeaWorld changed its policies and trainers simply

⁵ *Secretary of Labor v. SeaWorld of Florida, LLC*, OSHRC Docket No. 10-1705 (OSHRC 2011).
<https://www.dol.gov/sites/dolgov/files/SOL/files/ATLdecisionSeaWorld.pdf>

⁶ *Seaworld of Florida, LLC v. Thomas Perez*, 748 F.3d 1202 (D.C. Cir. 2014).

⁷ SeaWorld Orlando. *Orca Encounter*. Retrieved August 20, 2025, from
<https://seaworld.com/orlando/shows/orca-encounter/>

⁸ SeaWorld Orlando. *Killer Whale Up-Close Tour*. Retrieved August 20, 2025 from
<https://seaworld.com/orlando/tours/killer-whale-up-close-tour/>

remain on the platform rather than entering the water during live shows⁹—a measure that has altered the performance so little that SeaWorld is fully able to continue selling tickets, while substantially reducing the risk of drowning and death for trainers.

These arguments could have devastating effects on worker health and safety. In health care settings where RNs, including NNU's members, work, employers often neglect, sideline, and outright ignore serious workplace hazards. Indeed, during the height of the Covid-19 pandemic, health care employers tried to deny responsibility for protecting staff from the virus and went so far as to claim that nurses were getting Covid not at work but outside of work¹⁰—yet, evidence clearly shows that health care workers were significantly more likely to have had Covid than other occupations.¹¹ Health care employers frequently denied nurses access to essential, life-saving protection like N95 filtering facepiece respirators, even while they had supplies.¹²

When it comes to workplace violence, nurses report that many health care employers ignore the issue or try to sweep it under the rug. NNU's 2023 nationwide survey of nearly 1,000 nurses working in 48 states and D.C. found that 44.8 percent of nurses said their employer ignores workplace violence compared to only 21.2 percent of nurses who said their employer changes practices to reduce the risk of violence after an incident.¹³ Even after extreme incidents, it is common to see little response from health care employers. For example, after a nurse was brutally beaten and nearly died from her injuries at an HCA hospital in Loxahatchee, Florida, the employer released a letter saying there was no need for “any corrections to policies or procedures from the incident,”¹⁴ and referred to the SAVE Act as the only action step proposed—an Act that would not require action from hospitals or other health care facilities to prevent workplace violence.¹⁵

⁹ Lee, J. (2014, August 20). *SeaWorld won't appeal ruling pulling trainers from water at killer whale shows*. USA Today. <https://www.usatoday.com/story/news/nation-now/2014/08/20/seaworld-trainers-ocsa-osha/14345341/>

¹⁰ Ryutov, A., Gai, X., et al. (2021). Utility of viral whole genome sequencing for institutional infection surveillance during the SARS-CoV-2 pandemic. *Infection Control & Hospital Epidemiology*, 43(8), 1086-8, <https://doi.org/10.1017/icc.2021.185>

¹¹ Gaffney, A., Himmelstein, D.U., et al. (2023). COVID-19 Risk by Workers' Occupation and Industry in the United States, 2020–2021. *American Journal of Public Health*, 113(6), 647-56. <https://doi.org/10.2105/AJPH.2023.307249>

¹² National Nurses United. (2020, April 4). *Providence Saint John's Health Center Nurses Declare Victory in Winning Proper COVID PPE After Suspensions, Mass Protest*. <https://www.nationalnursesunited.org/press/providence-saint-johns-health-center-nurses-declare-victory-winning-proper-covid-ppe-after>

¹³ National Nurses United. (2024, February). *High and Rising Rates of Workplace Violence and Employer Failure to Implement Effective Prevention Strategies is Contributing to the Staffing Crisis*. https://www.nationalnursesunited.org/sites/default/files/nnu/documents/0224_Workplace_Violence_Report.pdf

¹⁴ Hussey, K. & Hoffman, M. (2025, February 25). 'MORE NEEDS TO BE DONE': Letter from HCA Florida Palms West CEO addresses security concerns. *WPTV*. <https://www.wptv.com/wptv-investigates/more-needs-to-be-done-letter-from-hca-florida-palms-west-ceo-addresses-security-concerns>

¹⁵ The Safety from Violence for Healthcare Employees Act or SAVE Act has been introduced in Congress a handful of times and proposes to establish a new criminal offense for anyone knowingly assaulting health care

Clearly, OSHA's proposal would embolden employers to ignore workplace hazards even more often than is already the case. This would have disastrous impacts on worker health and safety.

III. OSHA's proposal to limit the General Duty Clause would increase the injury and fatality rate for workers.

OSHA's proposed rule includes a list of specified occupations that OSHA envisions exempting from the General Duty Clause, including occupations in animal handling, professional sports, entertainment, and other occupations. Removing even these specified occupations—which OSHA estimates would only affect a few thousand workers—would increase the injury and illness rate for workers. Not to mention that removing some of the most dangerous professions (for which worker safety protections are most needed) from the GDC's purview is an utter perversion of OSHA's stated purpose to ensure safe workplaces for *all* employees.

OSHA's proposal would reduce the scope of the General Duty Clause and, therefore, would result in fewer inspections and citations. Fewer OSHA inspections and citations would mean employers would have less incentive to take preventive action and, as evidenced by research, this would directly correlate with increased injuries and illnesses to workers. For example, Levine et al. reported on a natural field experiment that compared establishments randomly inspected by an OSHA state plan to similar establishments that were not inspected. Inspected employers saw a 9.4 percent decline in injury rates and a 26 percent decline in injury costs compared to uninspected employers—indicating that OSHA inspections had a direct impact on improving worker health and safety.¹⁶

Indeed, a systematic literature review found strong evidence for “specific deterrence from inspections with penalties results in a decrease in injuries.”¹⁷ A separate analysis found that receiving an OSHA citation not only led employers to take action that reduced injuries related to the citations by 10 percent annually, but also led employers to reduce overall injuries by 19.5 percent over two years, including on issues unrelated to OSHA's citations.¹⁸

workers in hospitals (most recently, 2023-2024 H.R. 2584/S. 2768). There are no requirements for proactive hazard assessments or control measures to prevent workplace violence from occurring, despite ample evidence that multiple available controls are both feasible and effective.

¹⁶ Levine, D.I., Toffel, M.W., and Johnson, M.S. (2012). Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss. *Science*, 336(6083), 907-11.
<https://doi.org/10.1126/science.1215191>

¹⁷ Tompa, E., Kalcevich, C., et al. (2016). A systematic literature review of the effectiveness of occupational health and safety regulatory enforcement. *American Journal of Industrial Medicine*, 59 (11), 919-33.
<https://doi.org/10.1002/ajim.22605>

¹⁸ Haviland, A.M., Burns, R.M., et al. (2008). What Kinds of Injuries Do OSHA Inspections Prevent? *RAND Center for Health and Safety in the Workplace*.
https://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR593.pdf

OSHA's enforcement capacity is an essential element for the agency to be able to fulfill its mission from Congress. OSHA should not take any action that would undermine or lessen its enforcement capacity.

Concerningly, the real impact of this proposal could be even greater. The proposal itself lists specific industries but is also clear that the list is not exclusive (emphasis added):

(b) Such sectors may include, *but are not limited to*:

- (1) Live entertainment and performing arts;
- (2) Animal handling and performance;
- (3) Professional and extreme sports;
- (4) Motorsports and high-risk recreation;
- (5) Tactical, defense, and combat simulation training; and
- (6) Hazard-based media and journalism activities.

In the proposed rule, OSHA very clearly indicates that the agency is interested in expanding the list of occupations that would be excluded from the protections of the General Duty Clause, asking "Based on the language of the proposal, are there other occupations and industries OSHA should include in this analysis?" Any such expansion would have catastrophic effects on worker health and safety.

IV. OSHA's proposal to limit the General Duty Clause could prove catastrophic for RN and other health care workers.

Particularly, if OSHA were to expand the proposed limitation of the General Duty Clause to include health care operations, the impacts could be catastrophic for worker and patient health and safety. OSHA has no specific standards addressing three of the major causes of work-related injuries and illnesses to nurses—patient handling-related and other ergonomic injuries, workplace violence, and infectious diseases—meaning that OSHA must rely heavily on the General Duty Clause to enforce health care workers' right to a safe and healthful workplace. Rates of workplace injuries and illnesses among health care workers are already extremely high. According to the Bureau of Labor Statistics, the health care and social assistance industry reports the highest number of non-fatal work-related injuries and illnesses each year and the fourth highest rate out of other private industries.¹⁹ Health care employers, as noted above, already neglect workplace hazards too often in health care, even where simple, straightforward, and effective prevention measures are available. For example:

- When it comes to workplace violence, health care workers account for over 70 percent of all non-fatal workplace injuries and illnesses reported due to violence.²⁰

¹⁹ U.S. Bureau of Labor Statistics. (2023). *Graphics for Economic News Releases: Number and rate of nonfatal work injuries and illnesses in private industries*. <https://www.bls.gov/charts/injuries-and-illnesses/number-and-rate-of-nonfatal-work-injuries-and-illnesses-by-industry.htm>

²⁰ U.S. Bureau of Labor Statistics. (2020, April). *Fact Sheet: Workplace Violence in Healthcare, 2018*. <https://www.bls.gov/iif/factsheets/workplace-violence-healthcare-2018.htm>

There is ample evidence showing clearly the effectiveness and feasibility of prevention measures,²¹ including a 2017 randomized controlled trial that found implementation of a unit-specific workplace violence prevention plan incorporating input from direct care employees reduced violent incidents rates by half.²² Yet health care employers continue to neglect workplace violence prevention measures. NNU's 2023 nationwide survey of nearly 1,000 RNs working in 48 states and D.C. found low levels of implementation of basic prevention measures:²³

- Only 62.8 percent of nurses report that their employer provides training on workplace violence.
- Only 31.7 percent of nurses report that their employer provides a clear way to report incidents.
- Only 29.5 percent of nurses report that there is staff available at all times to respond to violent incidents (e.g., security guards).
- Only 26.8 percent of nurses report use of a chart or room-flagging system to indicate patients with increased risk for violence.
- Only 17.0 percent of nurses report that their employer places additional staff to reduce the risk of violence (e.g., sitters, additional nurses or techs).
- Only 7.1 percent of nurses report that their employer uses metal detectors.
- When it comes to infectious diseases, nurses and other health care workers are frequently exposed to infectious patients and contaminated environments that pose a significant risk of infection. A literature review predating the Covid-19 pandemic concluded that health care workers and a few other occupations seemed to “have the highest risk of infection by a variety of pathogens.”²⁴ The Covid-19 pandemic has only underlined this finding, with studies reporting an infection rate as much as 12 times higher among health care workers.²⁵ Evidence indicates multiple control measures—especially when combined together—can effectively protect health care workers and prevent work-related infections, including ventilation, screening and

²¹ National Nurses United. (2017, April 6). *Comment from Castillo, Bonnie; National Nurses United (NNU)*. <https://www.regulations.gov/comment/OSHA-2016-0014-0235>

²² Arnetz, J.E., Hamblin, L., et al. (2017). Preventing Patient-to-Worker Violence in Hospitals: Outcome of a Randomized Controlled Intervention. *Journal of Occupational and Environmental Medicine*, 59 (1), 18-27. <https://doi.org/10.1097/jom.0000000000000909>

²³ National Nurses United. (2024, February). *High and Rising Rates of Workplace Violence and Employer Failure to Implement Effective Prevention Strategies is Contributing to the Staffing Crisis*. https://www.nationalnursesunited.org/sites/default/files/nnu/documents/0224_Workplace_Violence_Report.pdf

²⁴ Haagsma, J.A., Tariq, L., et al. (2012). Infectious disease risks associated with occupational exposure: a systematic review of the literature. *Occupational and Environmental Medicine*, 69, 140-6. <https://doi.org/10.1136/oemed-2011-100068>

²⁵ Nguyen, L.H., Drew, D.A., et al. (2020). Risk of COVID-19 among front-line health-care workers and the general community: a prospective cohort study. *The Lancet Public Health*, 5 (9), E475-83. [https://doi.org/10.1016/S2468-2667\(20\)30164-X](https://doi.org/10.1016/S2468-2667(20)30164-X)

isolation, personal protective equipment, and paid sick leave.^{26,27} Yet, health care employers neglect these effective and feasible measures. NNU's most recent infectious disease survey of nearly 500 RNs working in 41 states and D.C. found:²⁸

- More than half of RNs (55.4 percent) report that patients are inconsistently or never screened for respiratory infectious diseases at the point of entry to their health care facility, including TB, influenza, Covid-19, and RSV. Only 37.1 percent of RNs report that patients are always or often screened.
- Only about half of RNs (49.2 percent) report that their facility always isolates patients who have or might have a respiratory infectious disease.
- Less than half of RNs (41.9 percent) report that AIIRs or negative pressure rooms are used to isolate infectious patients at their facility.
- Only a small proportion of RNs report that their employers had implemented other, proven measures to improve air hygiene: higher ventilation rates than minimally required (4.8 percent); higher filtration level for recirculated air than minimally required (5.6 percent); additional rooms and/or entire units have been converted to negative pressure isolation (8.9 percent); portable HEPA filters are utilized (16.7 percent).
- For three major aerosol-transmissible diseases — TB, measles, and Covid — RNs report inadequate PPE use. Respirators should be used for each of these pathogens, but only 65.3 percent of RNs report that their health care facility uses a respirator for TB, only 36.1 percent for measles, and only 63.5 percent for Covid-19.
- Only 60.5 percent of RNs have access to sufficient supply of N95s or other kinds of respirators on their unit.
- More than one in six RNs (18.4 percent) have not been fit-tested in the previous year.
- RNs are still being required to reuse PPE designed for single use, which is an unacceptable and dangerous practice. Only 68.8 percent of RNs report they do not reuse any single use PPE. Nearly one in five RNs (18.8 percent) report that they are still required to reuse single-use N95 respirators — a practice that has been shown to leave health care workers unprotected.^{29,30}
- More than half of RNs (64.5 percent) report inconsistent, infrequent, or non-existent notification from their employers regarding infectious disease exposures.

²⁶ National Nurses United. *Covid-19 Bibliography*. <https://www.nationalnursesunited.org/covid-19-bibliography>

²⁷ Letter from Nancy Hagans to Douglas Parker. (2024, September 4). https://www.nationalnursesunited.org/sites/default/files/nnu/documents/NNU_Letter_to_OSHA_ID_standard_content_09042024.pdf

²⁸ National Nurses United. (2024, November). *NNU Infectious Diseases Survey: November 2024 Preliminary Results*. <https://www.nationalnursesunited.org/infectious-diseases-survey-november-2024-preliminary-results>

²⁹ Wang, R.C., Degesys, N.F., et al. (2024). Incidence of Fit Test Failure During N95 Respirator Reuse and Extended Use. *JAMA Network Open*, 7 (1), e2353631. doi:10.1001/jamanetworkopen.2023.53631

³⁰ National Nurses United. (2021, April). *Study confirms: N95 respirators are for single use only!*. https://www.nationalnursesunited.org/sites/default/files/nnu/documents/0421_Covid19_H%26S_N95ReuseFlyer.pdf

- Only 24.7 percent of RNs report that their employer always notifies them of exposures to infectious diseases in a timely fashion.

Limiting OSHA’s ability to use the General Duty Clause, as proposed by the agency, would give health care employers free reign to ignore hazards that threaten the health and safety of nurses, other health care workers, and their patients. This would place health care workers and patients at even higher risk of injury and illness— the opposite of what OSHA is mandated by Congress to strive for.

V. OSHA’s proposal to limit the General Duty Clause runs counter to and would undermine fundamental principles in the practice of occupational safety and health.

The primary focus of the occupational safety and health field is on protecting worker health and safety—not protecting business interests. The history of the practice of workplace health and safety tracks closely with that of industrial hygiene.³¹ The boards of multiple industrial hygiene organizations adopted a joint Code of Ethics to which members of each organization are expected to conform, including stating:³²

Industrial hygienists shall practice their profession following recognized scientific principles with the realization that the lives, health and well-being of people may depend upon their professional judgment and that they are obligated to protect the health and well-being of people.

The code very clearly prioritizes the health of workers, going on to specify that, “in the event this Code of Ethics appears to conflict with another professional code to which industrial hygienists are bound, they will resolve the conflict in the manner that protects the health of affected parties.”³³ OSHA’s proposed limitations to the General Duty Clause would violate this tenet of occupational safety and health by allowing employers to select which hazards they want to abate and to avoid enforcement action on hazards on which they don’t wish to take action—rather than prioritizing hazard abatement based on the principle of protecting worker health and safety.

Further, the hierarchy of controls is a well-recognized fundamental framework for selecting control measures to correct workplace hazards. The National Institute for Occupational Safety and Health (NIOSH) and OSHA both have extensive resources on the

³¹ Rosner, D. and Markowitz, G. (2020). A Short History of Occupational Safety and Health in the United States. *American Journal of Public Health*, 110 (5), 622-8. <https://doi.org/10.2105/AJPH.2020.305581>

³² AIHA BC-Yukon Local Section. *Code of Ethics for the Professional Practice of Industrial Hygiene*. <https://www.aihabc.org/code-of-ethics>

³³ *Ibid.*

hierarchy,^{34,35} as does AIHA.³⁶ OSHA has, in fact, incorporated the hierarchy of controls explicitly into multiple standards, e.g., the PPE Standard,³⁷ the Occupational Noise Exposure Standard,³⁸ and the Lead Standard.³⁹ The hierarchy of controls ranks methods to abate workplace hazards by effectiveness, starting with elimination and substitution, followed by engineering and administrative controls and PPE. Only a few hazards in select workplaces can be truly eliminated or substituted, so employers largely must rely on the remainder of the hierarchy to prevent injuries and illnesses to workers, typically using multiple measures at the same time to achieve sufficient risk reduction. OSHA's proposal to limit the application of the General Duty Clause runs directly counter to this fundamental principle in the practice of occupational safety and health by allowing employers to evade enforcement actions (and associated obligations to abate the hazard) if they have taken but one step to attempt to abate the hazard, even where that step was insufficient to protect workers.

By allowing employers to, in effect, decide which hazards they want to abate and which they don't, OSHA's proposed limitations to the General Duty Clause would allow employers to prioritize business interests over worker health and safety, violating fundamental tenets of the field of occupational safety and health. OSHA is essentially proposing that the agency thinks it is acceptable for an employer to profit from a known danger in the workplace because they choose not to abate the hazard. This is unacceptable and runs directly counter to the mission Congress entrusted to OSHA.

VI. OSHA's proposal seeks to inappropriately apply the major questions doctrine to the General Duty Clause.

In the proposed rule, OSHA turns the major questions doctrine on its head. Federal government agencies often must interpret statutes passed by Congress that grant the agencies regulatory authority to achieve a particular end. If an agency's action is challenged, courts review agency interpretations to determine whether the agency has exceeded its authority. Under the major questions doctrine, courts hold that on questions

³⁴ U.S. Centers for Disease Control and Prevention, National Institute of Occupational Safety and Health. (2024, April 10). *About the Hierarchy of Controls*. <https://www.cdc.gov/niosh/hierarchy-of-controls/about/index.html>

³⁵ Occupational Safety and Health Administration. *Identifying Hazard Control Options: The Hierarchy of Controls*. https://www.osha.gov/sites/default/files/Hierarchy_of_Controls_02.01.23_form_508_2.pdf

³⁶ AIHA. (2024, August 8). *The Hierarchy of Controls as a Risk Management Tool*. <https://www.aiha.org/blog/the-hierarchy-of-controls-as-a-risk-management-tool>

³⁷ 29 C.F.R. §1910.134

³⁸ 29 C.F.R. §1910.95.

³⁹ 29 C.F.R. §1910.1025.

of major economic or political significance, agency action must be supported by sufficiently clear and explicit authorization from Congress.⁴⁰ OSHA is now arguing that the General Duty Clause must be limited because of Supreme Court precedent applying the major questions doctrine to various agency actions, including OSHA's vaccine-or-test mandate which was struck down by the Supreme Court during the Covid-19 pandemic emergency as an overreach of OSHA's statutory authority.

NNU strongly disagrees with OSHA's interpretation on this point. Congress laid out in clear and plain language its intent for OSHA to enforce the General Duty Clause fully and for all employees without exception. First, Congress envisioned the General Duty Clause to have broad coverage, stating in the Congressional record:⁴¹ "This bill applies to all employment performed in a business setting affecting commerce among the states"

Only a few specific industries were exempted from the OSH Act, such as mining (which was to be covered under a separate act), small farms with ten or fewer employees, certain small businesses with ten or fewer employees in low-hazard industries, and certain domestic workers in private residences.⁴² OSHA's proposal to add limitations to the General Duty Clause that would not only exempt the list of specified industries but would also leave the door open to much broader exemptions directly contradicts Congress' vision and intent for the agency.

Second, Congress intended for the General Duty Clause to apply to hazards intrinsic to certain industries. Indeed, in 2020, the Occupational Safety and Health Review Commission noted this very intent in a decision upholding the agency's General Duty Clause of the U.S. Navy's Space and Naval Warfare Systems Command after an employee drowned during a sea lion training exercise:⁴³

The parties were also asked to address, regarding the hazard recognition element, the issue of whether some activities, though dangerous, are among the normal activities intrinsic to an industry such that they cannot be regulated under the general duty clause. To the extent this question bears on the jurisdictional issue, the scope of the general duty clause is limited to

⁴⁰ Bowers, K.R. (2022, November 2). The Major Questions Doctrine. *CRS Products (Library of Congress)*. <https://www.congress.gov/crs-product/IF12077>

⁴¹ S. 2193, Legislative History of the Occupational Safety and Health Act. (1971). https://archive.org/details/legislativehisto0000unit_u2u4/page/162/mode/2up?view=theater

⁴² Balser, J. (2024, December 6). The Occupational Safety and Health Act of 1970 (OSH Act): A Legal Overview. *CRS Products (Library of Congress)*. <https://www.congress.gov/crs-product/R48292>

⁴³ *Sci. Applications Int'l Corp.*, 2020 OSHC (BNA) 23; (No. 14-1668, 2020), fn. 4.

'hazards that arise out of (that is, have a sufficient nexus with) the work at issue.' *Integra*, 27 *BNA OSHC* at 1845. Thus, there is 'no basis for [the] implication that, beyond [this restriction], there are other, implicit jurisdictional limitations that exclude certain types of workplace hazards, particularly in light of the broad language of the general duty clause.' *Id.*

The decision goes on to note that the legislative history of the OSH Act demonstrates that Congress rejected the idea that dangers inherent to work should be accepted and cannot be mitigated. The Congressional record is clear on this point:⁴⁴

The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees through the course of their employment. Employers have primary control over the work environment and should insure that it is safe and healthful.

OSHRC further notes that the OSH Act granted OSHA authority to adopt specific standards addressing hazards intrinsic to an industry, which the agency did:⁴⁵

In addition, numerous hazards regulated under established federal standards or industry consensus standards were eligible for adoption as OSHA standards under section 6(a) of the Act. *See, e.g.,* Point of Operation Guarding, 41 *C.F.R.* § 50-204.5 (1969), promulgated under *Walsh-Healy Public Contracts Act* at 34 *Fed. Reg.* 788, 789 (1969), and then substantially adopted by section 6(a) of the OSH Act into 29 *C.F.R.* § 1910.212; Safety requirements for Transportation, Storage, Handling, and Use of Commercial Explosives and Blasting Agents in the Construction Industry, ANSI A10.7-1970, substantially adopted by section 6(a) of the OSH Act into 29 *C.F.R.* § 1910.109.

Accordingly, OSHA's proposal to limit the application of the General Duty Clause to exclude certain industries is more likely to *violate* the major questions doctrine because the agency is proposing to create a regulatory exemption where Congress envisioned there should be none.

VII. The General Duty Clause already has a measured approach built in and OSHA has used enforcement of the General Duty Clause to improve health and safety conditions for workers.

⁴⁴ *Id.* citing S. 2193, Legislative History of the Occupational Safety and Health Act. (1971). https://archive.org/details/legislativehisto0000unit_u2u4/page/162/mode/2up?view=theater

⁴⁵ *Id.*

Limiting the agency's use of the General Duty Clause is inappropriate and unnecessary. OSHA already has a high burden of proof to substantiate a General Duty Clause citation. In order to apply the General Duty Clause to an enforcement action, OSHA must not only identify the hazard and establish that the employer failed to protect employees, but also demonstrate the hazard was recognized, the hazard caused or was likely to cause death or serious physical harm, and that there was a feasible and useful method to correct the hazard.⁴⁶ The requirement of feasibility acts as a guardrail so that the Agency cannot require actions that intrinsically change the employer's business operation. Thus, the alleged harm the NPRM seeks to remedy is already adequately addressed in this feasibility prong.

OSHA is far from overciting employers under the General Duty Clause. In fact, multiple investigations report that OSHA is actually *underciting* employers and that the evidentiary burden to substantiate a General Duty Clause citation is part of the challenge. Multiple investigations by the Government Accountability Office (GAO) has found OSHA's action on specific, serious hazards to be wanting because of the burdens and challenges in utilizing the General Duty Clause in the absence of a specific standard. The GAO found that OSHA must rely on the General Duty Clause to cite warehouse and delivery companies for serious ergonomic hazards and that documentation was a barrier to increased enforcement.⁴⁷ The GAO found similar challenges when it came to Covid-19 and workplace violence in health care and social assistance settings.^{48,49}

Where OSHA has been able to use the General Duty Clause, it has been effective at improving health and safety conditions for workers. Often, General Duty Clause citations are issued in catastrophic or tragic circumstances, like when a worker has died in a workplace incident or has suffered significant injuries. General Duty Clause citations have a positive impact on improving worker health and safety—OSHA's mission according to Congress. For example, OSHA issued a General Duty Clause violation to Signature Health

⁴⁶ Occupational Safety and Health Administration. *Chapter 4: Violations*. Field Operations Manual. <https://www.osha.gov/fom/chapter-4>

⁴⁷ U.S. Government Accountability Office. (2024, September 18). *Workplace Safety and Health: OSHA Should Take Steps to Better Identify and Address Ergonomic Hazards at Warehouses and Delivery Companies*. GAO-24-106413. <https://www.gao.gov/products/gao-24-106413>

⁴⁸ U.S. Government Accountability Office. (2022, May 25). *Workplace Safety and Health: Data and Enforcement Challenges Limit OSHA's Ability to Protect Workers during a Crisis*. GAO-22-105711. <https://www.gao.gov/products/gao-22-105711>

⁴⁹ U.S. Government Accountability Office. (2016, March 17). *Workplace Safety and Health: Additional Efforts Needed to Help Protect Health Care Workers from Workplace Violence*. GAO-16-11. <https://www.gao.gov/products/gao-16-11>

after a nurse practitioner was attacked by a patient and repeatedly stabbed with a knife the patient had brought into the facility. After the citation, the employer implemented multiple workplace violence prevention measures that improved safety in the workplace, including installing weapons detection equipment, strengthening its workplace violence prevention program, conducting training for all employees, and establishing workplace violence committees, among other measures.⁵⁰ In a second instance, a psychiatric and substance abuse hospital in Gainesville, Florida was cited under the General Duty Clause by OSHA after a series of workplace violence incidents left employees with serious injuries. The employer agreed to implement multiple measures to improve safety in the facility, including mandatory workplace violence training, providing information to unit employees about patients' recent history and potential for violence, and providing personal panic alarms to employees, among other measures.⁵¹

Yet, OSHA's proposal seeks to severely weaken the General Duty Clause, which would undermine OSHA's ability to carry out its mission. OSHA has standards applying to only a fraction of hazards that workers encounter. It would be nearly impossible for OSHA to create specific standards that would cover every hazard—not least because new hazards are being introduced to workplaces as technologies change, new chemicals and drugs are introduced, and the climate crisis worsens. But on top of that, OSHA's rulemaking process takes an average of more than seven years, ranging up to 19 years or more, to complete work on a final standard.⁵² Workers simply cannot wait that long for protections, which is why OSHA should be strengthening the General Duty Clause, not weakening it.

VIII. Conclusion

NNU urges OSHA to withdraw this proposal to limit the General Duty Clause immediately. OSHA's proposal would prevent the agency from fulfilling its Congressional mandate to assure "so far as possible" safe and healthful working conditions for all workers in the United States.

⁵⁰ Occupational Safety and Health Administration. (2024, November 21). Signature Health takes multiple actions to improve safety after US Department of Labor investigation of Maple Heights stabbing. *OSHA News Release*. <https://www.osha.gov/news/newsreleases/chicago/20241121>

⁵¹ Occupational Safety and Health Administration. (2023, January 26). Gainesville psychiatric hospital implements safety measures after federal investigation into series of staff injuries after violent incidents with patients. *OSHA News Release*. <https://www.osha.gov/news/newsreleases/region4/01262023>

⁵² U.S. Government Accountability Office. (2012, April 2). *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting*. GAO-12-330. <https://www.gao.gov/products/gao-12-330>

Instead, NNU urges OSHA to improve enforcement capacity and to issue additional science-based standards to enhance worker protections. Specifically, NNU urges OSHA to improve protections for RNs and other health care workers by continuing work to issue a workplace violence prevention standard for health care workers as outlined in the Workplace Violence Prevention for Health Care and Social Assistance Workers Act (S. 1232, H.R. 2531) and by issuing a science-based infectious diseases standard that follows the precautionary principle and incorporates updated aerosol transmission science.⁵³

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary Turner".

Mary Turner, RN
President, National Nurses United

⁵³ As outlined in the letter transmitted to the OSHA Assistant Secretary from NNU on September 4, 2024.
https://www.nationalnursesunited.org/sites/default/files/nnu/documents/NNU_Letter_to_OSHA_ID_standard_content_09042024.pdf