PUBLICCITIZEN

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

October 31, 2025

Via Electronic Submission to Regulations.gov

Amanda Wood Laihow
Acting Assistant Secretary of Labor for Occupational Safety and Health
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Occupational Safety and Health Standards; Interpretation of the General Duty Clause: Limitation for Inherently Risky Professional Activities (Docket No. OSHA-2025-0041)

Dear Ms. Wood Laihow:

Public Citizen, a consumer advocacy organization with more than one million members in every state, writes to urge the Occupational Safety and Health Administration (OSHA) not to proceed with its proposed interpretation limiting the applicability of the General Duty Clause to "inherently risky activities that are intrinsic to professional, athletic, or entertainment occupations." OSHA's proposed interpretation is based on flawed reasoning, fails to define key terms, and relies upon a deficient economic analysis.

Background

The General Duty Clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970, provides that every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[1] For decades, the Department and courts alike have recognized the breadth of this duty, and its applicability where "(1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed."[2]

---

[1] 29 U.S.C. § 654(a)(1).

[2] Fabi Const. Co. v. Sec'y of Lab., 508 F.3d 1077, 1081 (D.C. Cir. 2007); see also U.S. Occupational Safety & Health Admin., Letter of Interpretation (Dec. 18, 2023), https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1; Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902, 909 (2d Cir. 1977).

In this proposed rule, OSHA seeks to, for the first time, limit the applicability of the General Duty Clause to certain occupations, by establishing 29 C.F.R. 1975.7(a) and (b).[3] Subsection (a) would provide that "[t]he General Duty Clause does not require employers to remove hazards arising from inherently risky activities, where: (1) the activity is integral to the essential function of a professional or performance-based occupation; and (2) the hazard cannot be eliminated without fundamentally altering or prohibiting the activity; and (3) the employer has made reasonable efforts that do not alter the nature of the activity to control the hazard (e.g., through engineering controls, administrative controls, personal protective equipment)."[4] Subsection (b) would provide a non-exhaustive list of sectors that may be covered by this subsection (a).

OSHA grounds its proposal in the dissenting opinion in *SeaWorld of Florida, LLC v. Perez*, a D.C. Circuit case involving a General Duty Clause citation against SeaWorld following an incident during which a trainer was killed while working in close contact with an orca during a live performance.[5] There, the majority held that "the nature of SeaWorld's workplace and the unusual nature of the hazard to its employees performing in close physical contact with killer whales do not remove SeaWorld from its obligation under the General Duty Clause to protect its employees from recognized hazards."[6] While noting that there was evidence in that case that the employer could have taken steps to abate danger to employees without altering the inherent nature of its business, the court also recognized "that had Congress intended all unsafe and unhealthy performances in the entertainment industry to be beyond the scope of employee protection, it could have included such an exemption in the Occupational Safety and Health Act, and it did not."[7]

Then-Judge Kavanaugh dissented, stating his view that, where dangerous activities are "intrinsic to the industry," such as in certain sports and entertainment jobs, those activities do not constitute a recognized hazard, and to regulate such activities would be overly paternalistic.[8] OSHA's proposed rule now relies on the *SeaWorld* dissent to support a novel interpretation of the General Duty Clause that would impose different standards for a subset of occupations. OSHA claims that the dissent's reasoning in *SeaWorld* became binding precedent when the Supreme Court invalidated OSHA's COVID-19 rulemaking in *National Federation of Independent Business v. OSHA*, under the "major questions" doctrine.[9] Simply put, OSHA now claims that whether it can issue citations under the General Duty Clause for inherently risky activities is a question of "vast economic and political significance" for which it does not have an express congressional mandate.

[3] 90 Fed. Reg. 28,370, 28,372 (proposed July 1, 2025).
[4] 90 Fed. Reg. at 28,372; *see* SeaWorld of Florida, LLC v. Perez, 748 F.3d 1202 (D.C. Cir., 2014) (Kavanaugh, dissenting).
[5] 749 F.3d at 1202.
[6] *Id.* at 1211.
[7] *Id.* at 1213.
[8] 748 F.3d 1216-1222 (Kavanaugh, dissenting).
[9] 142 S. Ct. 661 (2022).

Major Questions Doctrine Does Not Compel OSHA's Interpretation

Although the agency relies on the major questions doctrine, that doctrine has no applicability here. The major questions doctrine is a tool of statutory interpretation[10] that applies only in "extraordinary cases,"[11] when agencies assert powers that Congress cannot reasonably be thought to have given them.[12] Such extraordinary cases have been defined by circumstances in which "'common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue … made it very unlikely that Congress had actually done so."[13] Those circumstances include agency actions that purport to "discover in a long-extant statute an unheralded power" to effect a "transformative expansion" of regulatory authority;[14] actions that rest on the premise that "[e]xtraordinary grants of regulatory authority" have been conferred by "modest," "vague," or "subtle" statutory language;[15] and actions asserting that "oblique or elliptical language" has "empower[ed] an agency to make a 'radical or fundamental change' to a statutory scheme."[16]

None of these circumstances apply here, where the agency estimates that only "514 employers would be affected" by the change,[17] and where the agency interpretation is more than 10 years old, and it is the notice of the proposed rulemaking (NPRM) – not the existing rule – that would make a fundamental alteration to the long-held understanding of the scope of the statute.

OSHA's Exception to the General Duty Clause Fails to Define Key Terms

OSHA proposes that it will not cite "inherently risky activities" that are "integral" to the "essential function" of a professional or performance-based occupation and the hazard cannot be eliminated without "fundamentally altering" the activity. Yet OSHA fails to define any of these key terms. What does it mean for an activity to be *integral* to the *essential function*? What does it mean to *fundamentally alter* the activity? Is working in hot environments integral to performance work? What if the work requires performing on an outdoor stage? Does providing rest, water, and shade fundamentally alter the work? OSHA provides no explanation for how it would define these terms, and the *SeaWorld* dissent upon which it relies provides no support. OSHA should answer these questions and seek comment on proposed definitions before it moves forward with this rulemaking.

Further, while OSHA appears to limit this interpretation to specific industries in the current text, OSHA notes that the list of sectors included in its proposal is non-exhaustive. Accordingly, OSHA could later try to extend its interpretation much more broadly than it asserts in the proposed rule. This creates vast uncertainty about which occupations and hazards could be

[10] Save Jobs USA v. DHS, 111 F.4th 76, 80 (D.C. Cir., 2024).
[11] West Virginia v. EPA, 597 U.S. 697, 723 (2022).
[12] *Id.* at 724.
[13] *Id.* at 722–23 (brackets in original; citation omitted).
[14] *Id*. at 724 (citation omitted).
[15] *Id.* at 723 (citation omitted).
[16] *Id.* (citation omitted).
[17] 90 Fed. Reg. at 28,372.

within the scope of this rule. Maintaining the single four-factor test, which has been in place for decades, for all workplace hazards, would better serve employers' interest in certainty and workers' interest in safe workplaces.

OSHA's Economic Analysis is Insufficient

OSHA's proposed rule seeks basic information about the economic impact of its rule that the public should have before commenting on a proposal. The agency provides preliminary data on the number of employees and employers covered by the rule, and some rough estimates on cost savings from no longer needing to comply, offset by a need for employers to familiarize themselves with the new rule. However, in addition to the agency's uncertainty about the data it does provide, OSHA fails to account for loss in benefits to employers, employees, and their families from avoiding injuries, such as fewer missed workdays, reduced medical costs, lower insurance premiums, and much more.

Conclusion

For all the reasons explained above, OSHA's proposed rule rests on a flawed and unsupported interpretation of the General Duty Clause, fails to define key terms, and lacks an adequate economic analysis. Public Citizen urges OSHA to withdraw this notice of proposed rulemaking.

Respectfully submitted,

Katie Tracy
Senior Regulatory Policy Advocate, Congress Watch
Public Citizen