CONN
MACIEL
CAREY

Eric J. Conn
(202) 909-2737 (direct)
(617) 256-8666 (mobile)
econn@connmaciel.com

May 12, 2025

Mr. Russell T. Vought
Director of the United States Office of Management and Budget
The Office of Management and Budget
725 17th St NW
Washington, DC 20503

Ms. Kelsi Feltz
Policy Analyst
The Office of Management and Budget
725 17th St NW
Washington, DC 20503

Dear Mr. Vought and Ms. Feltz:

We are pleased to provide comments in response to OMB's Request for Information, Docket No. OMB-2025-0003-0001, requesting information on regulations that should be repealed, rescinded, or reformed. These comments are exclusively focused in the area of occupational safety and health regulation.

We represent the Employer OSHA Modernization Coalition that is composed of a broad array of businesses and associations in the manufacturing, retail, petrochemical, telecommunications, aerospace, agricultural, airline, and many other industry sectors. The common throughline for Coalition members is that they have a deep commitment to the safety and health of their employees. Their priority, *above all others*, is to ensure their employees work in safe and healthy workplaces, and that they go home to their families in the same or better shape than when they arrived at work. As their counsel in this area, our clear and abiding objective is to support this priority to keep our clients' employees safe.

We are extremely pleased that OMB is seriously considering the burden that select regulations place on American businesses and industry. While clear and robust regulation is essential to protecting the American workforce, we firmly believe that in the area of occupational safety and health, the business, regulatory, and worker communities can build a regulatory construct that is not unduly burdensome for American businesses while still accomplishing the common objective of ensuring the safety and health of the American workforce. This is not an either/or proposition.

Outdated regulations unnecessarily remain "on the books." Other regulations are premised on assumptions that no longer remain accurate in light of technological and societal advances that have occurred over the last half-century since Congress created the Occupational Safety

and Health Administration (OSHA) and gave it authority to promulgate regulations in this field. OSHA at times has mandated obligations based on the false dichotomy that to protect workers, employers must be weighed down in burdensome regulation.

Further, several well-intended policies or procedures adopted by the agency have outlasted their value and now impose undue burdens and significant costs on employers with little benefit to or improvement in worker safety. These policies and procedures, some of which are incorporated into agency standards, also should be revisited.

These comments identify specific OSHA standards, policies, and procedures that are ripe for modernization and reform, and in some cases, rescission. Our recommended approach to reform balances the goal of keeping workers safe with the burdens imposed on business. There is more than one way to skin a cat, and the advancements in the workplace over the last thirty years provide tools that can be used to keep workplaces safe but that are not yet recognized by antiquated OSHA regulations.

We look forward to beginning a dialogue with OMB on how to modernize OSHA's regulations without sacrificing safety. As OMB works with OSHA to address regulatory reform, we urge OMB and the Department of Labor to follow the procedural requirements set forth in the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*. (APA). Following the APA is critical to preserving a fair, thoughtful, and orderly approach to regulatory change.

SUBSTANTIVE STANDARDS

I. OSHA's Lock-out/Tag-out Standard

OSHA's Lock-out/Tag-out standard, commonly referred to as LOTO, was promulgated in 1989 and has not been updated since. At that time, reliance on the manual, administrative procedure of locking out equipment with a lock and key was the most reliable means of controlling hazardous energy. Technology has changed over 35+ years, and globally accepted, technologically based alternative methods of controlling energy can now be used to provide effective protection to employees charged with repairing or maintaining equipment and machinery.

Alternative methods to LOTO are widely in use today in nearly every industry, but case law interpreting the LOTO standard leaves little allowance for these measures. OSHA compliance officers routinely recognize the effectiveness of these controls, yet employers remain subject to legal exposure for employing them. This situation exposes American industry to legal liability for no reason and results in unnecessary citations, litigation, costs, and confusion.

The LOTO standard should not be rescinded outright; workers can be seriously injured or killed when hazardous energy is not properly controlled. However, a revision of the standard to clearly allow for the use of safe and effective alternative methods for controlling energy based on thirty years of technological advances is critical to leveling the playing field for American employers so they can effectively complete with foreign competitors who are not

limited by old-fashioned padlock solutions to controlling energy. Not only will this reform and modernization of the standard help American industry be more competitive, it will provide employers more and better options for controlling hazardous energy to protect their workers.

II. Annual Certifications of LOTO Inspections

OSHA requires periodic (annual) inspections of LOTO procedures due to the significant risks associated with inadequate energy control procedures and the failure to properly implement effective energy control procedures. 29 C.F.R. § 1910.147(c) requires periodic inspections to contain at least two components: (1) an inspection of each energy control procedure, and (2) a review of each employee's responsibilities under the energy control procedure being inspected.

With respect to the energy control procedure review, it is unnecessary, time consuming and devoid of any safety value to require a review of the exact same procedure each year that has been reviewed time and again and found to be compliant and adequate to properly and safety control energy. The standard should require review only if a procedure is revised, rather than requiring the annual review of a procedure that has been reviewed for sufficiency and adequacy many times prior.

With regard to the review of each employee's responsibilities under the procedure being inspected, while OSHA has confirmed that the inspector must not observe *every* authorized employee implementing the energy control procedure on the machine or equipment on which they are authorized to perform service and/or maintenance, the regulated community has long questioned how many employees must be observed each year to fulfill this regulatory requirement. OSHA has advised that the inspector may observe and talk with a "representative" number of such employees to reasonably reflect the work practices being evaluated. But this is an impossibly vague objective that imposes an excessive burden on employers without providing a corresponding safety benefit.

OSHA should revise the periodic (annual) inspection requirement of the LOTO standard so that procedures are reviewed with new employees before they are utilized for the first time to ensure that they understand them. Thereafter, the OSHA requirement should employ a management of change approach whereby LOTO procedures must be reviewed and, if necessary, revised *whenever there is a change* in: the employee's job assignments; the machines, equipment or processes that present a new hazard; or the energy control procedures. This would be consistent with 1910.147(c)(7)(iii), which governs LOTO-related retraining.

III. Worker Walkaround Rule

In May 2024, OSHA amended 29 C.F.R. § 1903.8 to expand the extent to which third parties claiming to represent employees could be involved in an OSHA inspection ("Worker Walkaround Rule"). We do not challenge the statutory right of *an* employee representative to

"accompany" a compliance officer during an OSHA inspection. 29 U.S.C. § 657(e). But the 2024 changes to the Worker Walkaround Rule subverted this statutory language by instead allowing any number of representatives to "participate" in the inspection. By expanding the number and scope of individuals who might be designated as third-party authorized representatives, OSHA created a system that now allows outsiders to access an employer's private workplace and workforce with no opportunity for the employer to meaningfully protect their rights, their employees, or their workplace. The revised standard opens the door to:

- Unions improperly soliciting and campaigning employees during work hours on company property.

- Employee-side attorneys (or their selected "experts") using their new participation rights to conduct pre-litigation discovery in personal-injury or wrongful-death actions in a manner never contemplated by the Federal Rules of Civil Procedure.

- Worker advocacy groups and community organizations without relevant safety expertise organizing employees in a non-union workplace or scrounging up potential litigation for plaintiff's attorneys.

- Competitors or other bad actors posing security threats gaining access to proprietary or confidential information.

These scenarios could all cause great economic harm and/or unfair reputational damage to American employers. The rule as revised also is arguably unconstitutional because it likely violates the non-delegation clause, could result in a *per se* taking under the Fifth Amendment, and/or an unreasonable search and seizure under the Fourth Amendment. For these reasons, we recommend the revised regulation promulgated in 2024 be rescinded.

IV. Heat Injury & Illness Prevention

As OSHA presses forward with promulgation of its heat injury and illness prevention rule, we urge a revision of the proposed rule to allow for a more flexible, performance-based, simple approach to the regulation of workplace heat illness that still maximizes protection for workers. The current proposed rule instead relies on complicated, overwrought requirements that can be extremely cumbersome and confusing for employers and leaves little room for proven heat illness programs currently relied on by employers to keep their employees healthy and free from heat stress and illness.

The absence of a federal heat illness standard has resulted in a growing patchwork of state rules and laws that layer burdensome and often conflicting requirements on employers that have workplaces across the affected states. Without federal preemption, state regulation of heat illness is proliferating. These circumstances create unnecessary burdens on employers by forcing them to comply with starkly different heat-related mandates across different

states. We therefore recommend that OSHA revisit its proposed heat injury and illness prevention rule to provide clear guidance to employers on how to keep their employees safe while granting employers more flexibility in how they achieve that important goal.

V. COVID-19 Recordkeeping and Reporting

With the COVID-19 pandemic thankfully behind us, we urge OSHA to issue a Letter of Interpretation confirming that the Agency will treat COVID-19 as it treats the common cold and flu by exempting it from injury and illness recordkeeping requirements. Alternatively, OSHA could use its enforcement discretion to declare that it would no longer issue citations associated with COVID-related recordkeeping and reporting. COVID-19 is now commonly included in the panel of tests administered to a patient exhibiting symptoms of common respiratory illnesses such as the cold, flu, and strep. Even the CDC no longer issues standalone COVID guidance, instead incorporating the virus into the broad category of "respiratory viruses" that also includes the flu and RSV. COVID-19 is now more akin to a generic cold virus (long exempt from OSHA recordkeeping) than it is to "tuberculosis, brucellosis, hepatitis A, or plague," which must be included on OSHA logs. The COVID-19 virus has changed, along with its ability to cause severe health problems. That change should result in COVID-19 related illnesses being exempted from OSHA's recordkeeping requirements.

VI. Miscellaneous Recordkeeping

In July 2023, OSHA significantly expanded its data collection beyond the 300A Annual Summary level data to instead require select establishments with 100 or more employees to submit the detailed data from their 300 Logs and 301 Incident Reports. The intent in collecting this case-specific injury data was to help OSHA identify establishments with specific hazards and aid in enforcement priorities. However, the collection of 300 and 301 level data does not better aid OSHA in targeting its enforcement resources than the 300A level data OSHA already collects, and submission of the more detailed data has been exponentially more onerous and expensive for industry.

300 and 301 level information does not provide any meaningful value to OSHA's enforcement targeting strategies or decisions. This is because the Section 1904 recording criteria neither assume nor require any correlation between a recordable incident and any regulatory non-compliance or employer fault. In particular, the geographic presumption for determining work-relatedness and the broad definition of work-relatedness require employers to record injuries that don't necessarily reveal anything about the effectiveness of their safety and health programs or the status of compliance at that workplace. In fact, only a very small percentage of recordable injuries and illnesses relate to conduct or a condition that could be considered a violation of an OSHA standard or OSH Act obligation.

Moreover, by the time this data could be evaluated for use in selecting OSHA's enforcement targets, the data would surely be stale and provide no useful basis for the Agency to initiate enforcement against employers within the six-month statute of limitations set forth in the OSH Act.

Additionally, OSHA has neither the budget nor resources to analyze and process 300 and 301 level data in a manner that would allow it to be used in a meaningful way. The large swath of information that OSHA proposes to collect cannot be segregated by numbers, averages, or some type of algorithm that can be used for enforcement targeting, like the 300A summary can be and has been. The 300 and 301 forms contain hand- or type-written narrative information that does not conform to any pre-selected options like 300A summary data, and contain employee-identifying personal and medical information, which takes employers significant time and resources to scrub and complete.

The requirement to submit detailed 300 and 300A log data should be rescinded.

VII. Blocked Electrical Panels

OSHA currently requires employers to always maintain a requisite amount of empty space in front of electrical equipment. *See* 29 C.F.R. § 1910.303(g)(1). This standard does little to protect employees from an electrical hazard, but it has an outsized effect on employers by forming the basis of "serious" citations that can easily become "repeat" citations carrying significant penalties. It is the type of requirement that is extremely easily and quickly violated (i.e., employee leaves rolling cart or box in front of the electrical panel), and it is often impossible for an employer to know of the violation.

Importantly, it is unclear how material being stored near or even in front of an electrical panel poses an electrical safety hazard to employees. Rather than punishing employers for occasionally blocking such spaces, OSHA should instead focus on ensuring those spaces are not being blocked *while work is being done on the subject electrical panels*. There would not be an *emergency* need to access electrical panels during the normal course; the need for clear access would be limited to times when the panels are open and being accessed by maintenance employees. Therefore, the occasional storage of some materials in front of these panels should not result in thousands of dollars in penalties. We recommend that OSHA revise 29 C.F.R. § 1910.303(g)(1) by requiring clearance around electrical panels only when work is being done on those panels.

ENFORCEMENT POLICIES

VIII. "Repeat" Classification

OSHA's current criteria for classifying a violation as "repeat" are overly broad and pose undue risk to employers. A "repeat" classification carries the same maximum penalty as "willful" violations – in both cases, ten times the maximum penalty for a serious violation. Yet, currently, OSHA can classify a violation as "repeat" if the employer was previously cited for a violation of the same or substantially similar standard in the past *five* years at any worksite, nationwide. Such wide latitude for claiming that an employer has repeatedly violated OSHA requirements can have a profoundly adverse effect on employers, especially those with multiple, geographically dispersed locations. We recommend a mandated revision to OSHA's policy that limits OSHA to a look-back period of *three* years and further limits the "repeat"

classification to apply only where the violative action occurs at the same facility location as the prior violation. Further, OSHA should be required to establish that the totality of the circumstances surrounding the prior, predicate violation and the current violation are *substantially similar*. If an employer was cited 5 years ago in Idaho for an in-going nip point hazard on a conveyor belt (with a $10,000 penalty), it is unduly burdensome to that employer to now be slammed with a $100,000 penalty for a missing guard on a press in Massachusetts.

IX. Unforeseeable Employee Misconduct Defense

Good employers work very diligently to maximize their employees' safety. In some instances, no matter how diligent and committed the employer, an employee engages in unforeseeable misconduct that violates safety requirements and results in the employer receiving OSHA citations. The employer can assert the affirmative defense of unforeseeable employee misconduct, but it is currently very difficult to prove. The most difficult element of this defense is the requirement for the employer to demonstrate that it effectively enforced an applicable safety rule – most often proven through evidence of discipline. But principles derived from the Human and Organizational Performance ("HOP") approach to safety stress the importance of understanding systemic factors that lead to unsafe work and deemphasize discipline (i.e., "blaming and shaming") because it is often counterproductive. OSHA should modernize its view of the employee misconduct defense by expanding the types of evidence it would accept in inspections to demonstrate that an employer is sufficiently enforcing its safety rules. A modernized approach should be based on a more holistic review of how the employer developed, adopted, and implemented its safety and compliance programs. Examples include the use of comprehensive supervisory audits, anonymous peer-to-peer work rule monitoring, or employee-management meetings to review audit and monitoring findings. This modern approach allows an employer to implement the enforcement measures most effective to its worksite without depriving the employer of a viable defense when the employee – not the employer – is responsible for the violation of a safety rule.

X. Multi-Employer Citation Policy

OSHA adopted an enforcement policy a quarter of a century ago that continues to guide the agency's enforcement personnel in evaluating which employers are subject to legal risk and penalties at multi-employer workplaces (i.e., workplaces with, for instance, a host employer, a general contractor and subcontractors). Initially, especially at construction sites, this policy was helpful in ensuring that contractors did not take action that put other employers' employees at risk without appropriate accountability. Ironically, the policy has been twisted over the years in a manner that ties the hands of good, safe general contractors and host employers who have the capability, knowledge, training and experience to ensure that less sophisticated employers understand how to keep their employees safe. As currently interpreted and applied, OSHA's multi-employer citation policy now creates a perverse incentive that limits and hamstrings companies from helping protect contractor employees at their worksites, the precise opposite as should be allowed and encouraged under the law. The policy should be rescinded or significantly revised to prevent OSHA from issuing citations to employers who step in and provide guidance, direction and training to

subcontractor employers to ensure their safety training is sufficient, their methods for preventing exposure to hazards is adequate, and their plan for protecting their employees is robust.

XI. Instance-by-Instance ("Egregious") Citation Policy & Grouping of Violations

In early 2023, OSHA announced it was dramatically expanding the circumstances under which it could issue "instance-by-instance" citations and also began limiting local OSHA area offices' flexibility in grouping similar citations under a single penalty. Together, these changes significantly expanded the reach of one of OSHA's most powerful tools to ratchet up civil penalties. Rather than reserving instance-by-instance citations for only willful violations, OSHA policy now allows these citations to be used for "serious" and even some "other-than-serious" violations. Instance-by-instance citations should be reserved for the "worst of the worst" offenders (i.e., "egregious" violators). We recommend that OSHA withdraw the 2023 memoranda that effectuated these changes.

INSPECTION & CONTEST PROCESS

XII. Service of Citations

Current OSHA procedures do not specify how OSHA identifies the correct address for serving a citation, which OSHA must transmit via certified mail or personal delivery. An employer may provide an alternative address to deliver a citation (i.e., corporate headquarters), but OSHA is not obligated to comply with that request. As a result, too often OSHA sends the citation to the wrong address. By the time a representative authorized to handle the citation actually receives it, the 15-working-day deadline to challenge the citation has passed. The citation becomes a final order, the penalty becomes due and payable, and the employer is left with no recourse. This problem could be easily remedied by requiring OSHA to deliver citations to an address provided by the employer at the Closing Conference or in correspondence to the OSHA compliance officer who conducted the inspection. This simple change will reduce the frequency with which citations become final orders merely because a representative with authority to do something about the citation did not receive sufficient notice about it.

XIII. Employer Participation in Non-Supervisory Interviews

OSHA uses the informers' privilege to justify conducting interviews under a cloak of confidentiality. But OSHA inspections should be treated no differently than other federal law enforcement proceedings that afford an employer the right to be present when evidence is being taken that can be used against it. For example, the Chemical Safety and Hazard Investigation Board ("CSB") allows company representatives to participate in interviews of all employees, regardless of their rank or title. CSB employee and witness interviews are just as effective as OSHA interviews. Indeed, it is unnecessary to prohibit an employer from participating in these interviews because federal law already provides robust whistleblower protection for informers if an employer were to subsequently retaliate against an employee

for providing OSHA with information relevant to an inspection. And allowing employer participation during interviews will assist OSHA in its factfinding mission by preventing OSHA from wasting its time focusing on irrelevant matters. For example, if an employee were to misrepresent an issue or give OSHA a "red herring," the employer can quickly provide accurate information to the agency rather than have the misrepresentation surface after months of costly litigation. We therefore recommend that OSHA adopt a policy allowing employer representatives to sit in on OSHA interviews.

XIV. Severe Violator Enforcement Program ("SVEP")

OSHA instituted the Severe Violator Enforcement Program ("SVEP") to target "enforcement efforts on recalcitrant employers who demonstrate indifference to the health and safety of their employees." But after many years, the program has had the unintended consequence of disproportionately targeting small employers, increasing the contest rate of OSHA citations, and failing to reach the recalcitrant employers it was designed to target. The program excessively punishes smaller employers that are unfamiliar with OSHA's vast portfolio of regulatory requirements. Importantly, an employer is entered into SVEP at the outset of an OSHA case, before it has even had an opportunity to defend itself and rebut OSHA's alleged violations. And once an employer is in SVEP, it is subject to public shaming by OSHA through inflammatory, press releases and the inclusion of its name on a public SVEP list; mandatory follow-up inspections at one or more sister facilities; and agency demands for expansive settlement terms. SVEP designation has a domino effect, adversely affecting the employer's reputation, client and employee relationships, access to credit, and insurance rates/coverage. It is also an impetus for labor organizing efforts by the employer's employees. And all of this happens *before* OSHA has even proven that a violation of the law occurred. This is an unfair, unsound, and unnecessarily punitive approach. The SVEP policy should be rescinded or significantly modified to, at minimum, impose its requirements only after a final determination of the case has been made.

The Employer OSHA Modernization Coalition appreciates the opportunity to submit comments in response to OMB's Request for Information regarding regulations that should be considered for recission or reform. We look forward to partnering with OMB and the Department of Labor to ensure that a targeted and thoughtful review is given to occupational safety and health regulations and policies to ensure that they are modernized and provide value-add to the safety and health of American workers without unduly hindering American industry.

Sincerely,

Eric J. Conn