Testimony of Felicia Watson

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Committee on Education & Workforce Subcommittee
on Workforce Protections

Hearing on "Reclaiming OSHA's Mission: Ensuring Safety Without Overreach"

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Chairman Mackenzie, Ranking Member Omar, and Members of the Subcommittee:

Good morning and thank you for the opportunity to testify today about the important topic of Reclaiming OSHA's Mission: Ensuring Safety Without Overreach.

First, let me begin with a brief overview of my background and commitment to increasing compliance with the Occupational Safety and Health Act (the "OSH Act"). Currently, I am a senior counsel in the law firm Littler Mendelson, P.C., and am a member of the firm's Occupational Safety and Health Practice Group. In that role, I represent and counsel employers facing a wide range of occupational safety and health law issues.

Prior to joining Littler, I worked for more than twenty years in the residential construction industry as an assistant vice president with the National Association of Home Builders of the United States in the Office of Legal Affairs, where I focused on issues affecting home building including construction liability; labor, occupational safety and health; international trade; and privacy. I wish to emphasize that my testimony and the views I express today are solely on my own behalf, and not on behalf of my firm or any of its members or clients.

I am here today because we all have the common goal of increasing compliance with the OSH Act, while safeguarding the ability of employers and employees to work and thrive in their chosen professions. I will focus on four of OSHA's recent regulatory and enforcement policies

affecting employers and workers: (1) the Worker Walkaround Representative Designation Process; (2) changes to the Instance-By-Instance enforcement policy; (3) the Severe Violator Enforcement Program; (4) and the proposed rule on Heat Illness and Injury Prevention in Outdoor and Indoor Workplaces. While OSHA is well-intentioned, there is no data to prove that these rules and policies achieve OSHA's mission: protecting workers. These are not solution-based systems, these are punitive based systems, and that is not what the OSH Act was supposed to be.

I. The Amendments to the Worker Walkaround Rule Were Unnecessary

Under the prior Administration, OSHA amended its regulation regarding the process for designating employee representatives during an OSHA inspection, known as the Worker Walkaround Representative Designation process, found in 29 C.F.R. § 1903.8(c). OSHA's stated purpose of proposing the rule change was to aid workplace inspections "by better enabling employees to select a representative of their choice to accompany the [Compliance Safety and Health Officer (CSHO)] during a physical workplace inspection." Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59,825-26 (Aug. 30, 2023). Effective at the end of May last year, the final rule clarifies that employees may designate a non-employee third party as their representative during an OSHA inspection and makes two changes to the regulation. First, employers may either select another employee or a non-employee third party to serve as their representative during an inspection. Second, the regulation no longer states that non-employee third-party representatives should be limited to individuals with formal credentials, such as safety engineers or industrial hygienists. Instead, a CSHO may now permit a non-employee third-party representative to join the inspection if the third-party representative will aid the CSHO in conducting "an effective and thorough physical inspection of the workplace" by virtue of their knowledge, skills, or experience. The revised § 1903.8(c) states that when the representative is

not an employee of the employer, the third party may accompany the CSHO during the physical inspection "if, in the judgment of the [CSHO], good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)."

This final rule largely codifies an OSHA policy from 2013 which stated that non-employees could represent employee interests in enforcement-related matters. This policy became known as the "Fairfax Memo." The Fairfax Memo suggested that the OSH Act authorized a union or community organization representative to act on behalf of employees as a walkaround representative during a physical inspection of a non-unionized worksite so long as they had been authorized by the employees to serve as their representative. The 2013 policy was challenged in federal court by the National Federation of Independent Business (NFIB). *NFIB v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017). Before that lawsuit could be decided on its merits, the first Trump administration formally rescinded the Fairfax Memo in 2017. Thereafter, NFIB withdrew the lawsuit.

Despite significant concerns from business and other industry groups expressed during the rulemaking process, OSHA moved forward with the final rule as we see it today. In the more than 11,500 comments submitted in response to the walkaround rule, those opposed to the rule raised consistent concerns particularly given that the regulatory text is so short. Here are some of the more problematic areas that I see.

First, the revisions to the regulation were wholly unnecessary because the amendment addressed a nonexistent issue. There was no actual concern to be remedied. Processes already

existed in the prior iteration of the regulation to ensure active employee participation during an inspection. Employees were, and still are, empowered to file complaints with OSHA, including anonymously; they are also provided with protection from retaliation if they report a safety concern either to their employer or OSHA. Further, CSHOs routinely interview employees without management present during the inspection process, and employees have the right to speak with CSHOs in private. For unionized jobsites the designated employee representative is given notice and opportunity to participate in all stages of the inspection. OSHA's revision to this regulation amounted to the "solution" in search of a problem that did not exist in the first place.

Second is the fact that the rule vests the CSHO with the ultimate authority to decide whether the "good cause" and "reasonably necessary" requirements have been met to permit a non-employee third-party to join an inspection. OSHA has not defined what these terms mean, nor has it provided sufficient guidance or a defined process for CSHOs to follow in arriving at their determination, other than referring to the factors already listed in the rule. This is a circular approach that does nothing to aid employers and employees.

Third, the final rule does not provide employers with any mechanism to object to the selection of that non-employee third-party representative. OSHA issued Frequently Asked Questions (FAQs) when it published the final rule. In the FAQs, OSHA indicates that employees and the employers can object to a representative by raising their concerns with the CSHO. However, the CSHO has sole authority to resolve any disputes. This leaves an employer only one option if it disagrees with the CSHO's determination: refuse to give consent to the inspection. At that point, the CSHO can either go ahead with the inspection without the non-employee third-party representative or follow the Agency's procedures for obtaining an administrative warrant to

conduct the physical inspection. But that still does not address the employer's objection to that non-employe third-party representative. Employers have no recourse.

Fourth, the rule creates unique risks for those workplaces that are multi-employer jobsites. With the increased use of specialty trade contractors in the construction industry, jobsites may have multiple contractors, subcontracting entities, and suppliers on any given jobsite, each with their own employees, policies, and procedures. Under OSHA's current multi-employer enforcement policy, OSHA inspectors will routinely open an inspection of multiple onsite entities under the direction of a single general contractor. Based on the text of the final walkaround rule, however, employees of each entity can designate their own third-party representative to assist in the inspection. The problem here is now you end up with the potential for multiple non-employee third-party representatives with no relation to the relevant controlling, exposing, creating, and correcting employers who are participating in the inspection. Moreover, the final rule fails to address the knowledge or qualifications necessary of these designated third parties. In my opinion, a non-employee third-party representative without specific education or training related to the scope of the inspection is insufficient to demonstrate that this person "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace."

Fifth, the regulation provides no clarity on what the non-employee third-party's role will be during the course of a physical inspection. The regulation is silent on the scope or extent of this individual's authority. Nor does the regulation address the type of information the non-employee third-party may access during the inspection. The fact that OSHA's final rule fails to define what level of access these individuals will have without more, raises serious concerns for me. Likewise, the rule is not clear what input the non-employee third-party may providing during the inspection nor does OSHA address how differing opinions between the CSHO and the non-employee third-

party will impact the outcome of the inspection. This is particularly troublesome given that the non-employee third-party can literally be anyone with no specified level of education, experience, or expertise so long as the CSHO authorizes their participation. A logical outgrowth of this vague, ill-defined approach is that non-employee third-party participation will vary markedly from inspection to inspection based on factors that include personality, personal agenda, and the skill and experience, or lack of same, of this individual.

Sixth, the revised regulation also requires businesses to provide personal protective equipment (PPE) to non-employee third-party representatives during an inspection. Construction industry employers, for example, may have policies requiring visitors to wear PPE on jobsites, and some may have extra PPE available for visitors in accordance with their own policies. But not all PPE is a universal fit, and some PPE requires fit testing or other training before use. Yet, OSHA may consider an employer's refusal to provide PPE to the non-employee third-party representative as interference with the inspection. OSHA also presumes that small businesses, such as small home builders or specialty trade contractors, will have extra PPE available for anyone. My 20 years of experience in this field has shown me that is not usually the case as smaller companies provide their employees with PPE and require the employees to take care of and maintain their issued equipment. Having an available supply of extra PPE for visitors is not a routine occurrence on most construction sites, especially without advance notice of the need for extra PPE.

Ultimately, the regulation in its current form does nothing to improve workplace safety. It does, however, serve as an example of the Agency's overreach.

2. The Update to the Instance-by-Instance Citation Policy was Unnecessary

In January 2023, OSHA issued a memorandum for its regional administrators announcing a significant expansion of the application of the Agency's Instance-by-Instance (2023 policy) enforcement policy. *See,* Memorandum for Regional Administrations from Kimberly A. Stille,

Directorate of Enforcement Program and Scott C. Ketcham, Directorate of Construction, Application of Instance-by-Instance Penalty Adjustments (Jan. 26, 2023) (available at: Application of Instance-by-Instance Penalty Adjustments | Occupational Safety and Health Administration).

Prior to this announcement, OSHA regional administrators relied on the Agency's instance-by- instance policy published in 1990 that only applied to willful citations. Now, under this new enforcement policy, OSHA will base decisions to use instance-by-instance citations on considerations specific to high-gravity serious violations that include falls, trenching, machine guarding, respiratory protection, permit required confined space, lockout tagout, and other-than-serious violations specific to recordkeeping. Later, in April 2024, the agency's Instance-by-Instance policy changed to provide additional discretion to issue Instance-by-Instance penalties for serious and/or repeat violations of *any* OSHA standard, the General Duty Clause, or other-than-serious violations of OSHA's recordkeeping requirements. *See,* Memorandum for Regional Administrations from Kimberly A. Stille, Directorate of Enforcement Program and Scott C. Ketcham, Directorate of Construction, Instance-by-Instance Citation Policy for Serious, Repeat, and Other-Than-Serious Violations (April 17, 2024) (available at: Instance-by-Instance Citation Policy for Serious, Repeat, and Other-Than-Serious Violations | Occupational Safety and Health Administration).

The scope of the new instance-by-instance policy applies to general industry, agriculture, maritime, and construction industries. OSHA's stated purpose for changing the policy is "to make [OSHA's] penalties more effective in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain policy workplace safety and health requirements." Press Release, U.S. Department of Labor (Jan. 26, 2023) (available at: https://www.osha.gov/news/newsreleases/national/01262023-0).

While instance-by-instance had been permitted prior to the January 2023 and April 2024

expansions, OSHA has essentially weaponized the instance-by-instance policy by giving area directors and district managers, as well as CSHOs more "tools" in their enforcement toolbox. This shift in policy casts a much wider net than what the Agency is supposed to be trying to accomplish, which is to protect workers from unsafe workplaces.

It is one thing to say, as laid out in the 1990 policy, that the Agency will use instance-by-instance if citations fall within a certain classification or category (e.g., a willful citation will include every instance of the violation). It is another to say that OSHA will do this for every classification of citation, including recordkeeping, i.e., those items not tied to safety. The 2023 policy contains an inclusion for bad actors and certain citations are heightened by past bad behavior, but that does not address the problem. Even before it was updated, the policy treated the symptom but never addressed the cause. That could be due to a number of things including perhaps not adequately conducting outreach to the employer, or the regulation at issue is too complicated, or it just includes a "gotcha" that limits an employer's flexibility, but just because an employer receives a citation does not mean they are a bad actor.

Take OSHA's pending heat rule and consider how the instance-by-instance policy can apply. Let's say that rule goes into effect as proposed and requires the employer to supply 32 ounces of suitably cool water per employee per hour. If employees run out of water part way through their shift, but no one tells management, the employer could be cited for each violation. Meaning that it could receive a separate citation for failing to provide water for each employee on that shift. If the employer had ten (10) employees on the worksite, the employer would receive 10 citations for failure to provide adequate water in violation of the regulation. The employer could also be cited for failing to provide suitably cool water for those same 10 employees leaving the employer with 20 citations. Even though the employer was not aware the water had run out. The possibilities of these type of situations occurring are endless.

OSHA defines a willful violation as one in which the employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. The bottom line is that the revised instance-by-instance policy is a punitive-based system focusing on punishing the *employer* rather than on correcting the violation. Normally intent has to be proven in punitive cases. Yet the new instance-by-instance policy bifurcates that requirement. The OSH Act is not a strict liability statute, but the instance-by-instance policy turns it in to one creating excessive penalties that have no boundaries of when or why they need to be applied. The risk of course, is that it will not be applied universally among inspectors, and there is no standard dictating when it should be applied. The original policy, applying instance-by-instance to citations when willful violations occur is much more purposeful and achieves OSHA's stated purpose of addressing those employers who do not follow the OSH Act and its regulations.

The only real reason for such a broad expansion of the instance-by-instance policy is to punish employers, even if those penalties are wholly unrelated to health and safety. Again, this is a punitive-based system rather than a solutions-oriented system and is wholly inconsistent with the purpose of the OSH Act.

3. Expansion of the Severe Violator Enforcement Program Criteria is Problematic

Turning to OSHA's Severe Violator Enforcement Program (SVEP), as with instance-by-instance, this program fails to address its underlying issues. The Agency's stated purpose for the SVEP is to focus its "inspection resources on employers that have demonstrated indifference to their OSH Act obligations through willful, repeated, or failure-to-abate violations." (OSHA Directive No. CPL 02-00-169 (effective Sept. 15, 2022). When OSHA expanded its criteria for placing employers in its SVEP, it broadened the applicability to violations of all hazards and OSHA standards, focusing on repeat offenders. As a result, many more employers could be placed on this list. More troubling is the fact that an employer can qualify for SVEP "*even if none of its own*

employees were exposed to hazards." CPL-02-00-169 at 6 (emphasis added).

Now, OSHA may add employers to the SVEP list if they meet any of the following criteria:

1. The Fatality/Catastrophe (3 or more employees hospitalized) inspection where OSHA finds at least one willful or repeated violation or issues a failure-to-abate violations.

2. The Non-Fatality/Catastrophe inspection where OSHA finds at least two willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on the presence of high gravity serious violations.

3. Egregious enforcement actions where an employer is cited for instance-by-instance violations.

OSHA then publishes information about employers on the SVEP and the related inspections on the agency's SVEP public log. This follows OSHA's standard approach in issuing press releases when it issues violations, even though the citation may ultimately be vacated or when an employer is successful in showing no violation, in fact, occurred. Publishing such information to the public does not have any relationship to improving safety. To say otherwise is disingenuous. While the updated approach identifies a mechanism for employers to be removed from the SVEP, it is extremely difficult and has additional obligations beyond the requirement that all penalties are paid, and abatement completed. Removal from the list can occur three years after an employer receives verification that their changes are acceptable. To be eligible to meet the three-year length of time, OSHA also requires employers to have no new serious citations related to the hazards identified in the original SVEP inspection or at any related establishments and receive one follow-up or referral OSHA inspection within one year of the citation becoming a final order. This inspection occurs even if OSHA receives verification of abatement of the cited violations.

One of the many issues surrounding the SVEP is that certain industries are more vulnerable to inclusion on this list. For example, OSHA explicitly states that "a general contractor may be cited for the same violations as other contractors qualifying for SVEP, and therefore may also

qualify for the program." CPL-02-00-169 at 6. I find this particularly troubling for construction industry employers, where a general contractor can end up on the SVEP merely because of the actions of its subcontractor. This eliminates any type of due process for general contractors, and effectively holds them strictly liable for the actions of subcontractors. As I have said, the OSH Act is not a strict liability statute but OSHA's approach to enforcement has morphed from identifying solutions into a role of strict disciplinarian. Moreover, the third criteria that can get an employer added to the SVEP list, egregious activity, includes recordkeeping violations. This is an example of overreach to try and control how area offices issue citations. There is nothing beneficial about recordkeeping violations because they do not improve safety. This is just a rubber stamp on official behavior, just as with the instance-by-instance policy that plays into a determination that activity is egregious. A good example of this is found in the construction industry, where an employer may have a history of injuries, which are due more to being in a high hazard industry, rather than a dereliction of commitment to safety. If these injuries are recordable, it is not truly indicative of a bad workplace appropriate for inclusion in the SVEP. Using that criteria to add an employer to a list now for an item unrelated to prior injuries has no correlation. Instead, OSHA should be working with employers to address these issues and better manage these high hazard industries. This backwards look is not helpful.

All this is to say that both policies, the instance-by-instance and the SVEP, can be addressed by rules we currently have. Neither of these policies add anything to improving safety and are unnecessary.

4. As Proposed, OSHA's Heat Illness and Injury Prevention in Outdoor and Indoor Workplaces is Unworkable

As discussed above, although OSHA's rulemaking is still ongoing, and the Agency has its informal public hearing scheduled for June, I have several concerns with the proposed regulation. The primary concern is that it is much too complicated and overly prescriptive, especially for

smaller businesses who want to ensure they are meeting their compliance obligations. It is also a once-size fits all approach that fails to differentiate between covered industries, such as general industry versus construction versus agriculture. Each sector may need to approach heat illness and injury prevention differently based on the workplace, job tasks, physical location (indoors, outdoors, both). In addition, the amount of paperwork employers will need to generate turns this into, essentially, a recordkeeping rule, just to prove compliance. In reading through the rule, I noted that OSHA does not require employers with 10 or fewer employees to develop their heat injury and illness prevention plan (HIIPP) in writing, although OSHA assumes that these employers would choose to use OSHA's template to guide development of an unwritten HIIPP. 89 Fed. Reg. at 70857. Employers with eleven or more will need to have the plan in writing and identify the name of the heat safety coordinator in the plan itself.

But this supposed option for small employers puts them at risk for failing to comply. That is because the text of the proposed regulation itself is internally inconsistent. Here is the issue: OSHA purportedly does not require smaller employers, those with 10 or fewer employees, to have a written HIIPP, but the proposed regulatory text explicitly states, "The employer must make the HIIPP readily available at the work site to all employees performing work at the work site."

Next, the text states, "The HIIPP must be available in a language each employee, supervisor, and heat safety coordinator understands." 89 Fed. Reg. at 71070 (proposed § 1910.148(c)(8) and (c)(9) respectively). I am concerned with the internal inconsistencies in the proposed regulation because if OSHA does not require a written HIIPP for employers that meet the size threshold, yet requires the plan to be posted at the jobsite, and available in a language the employees understand, how will employers in this category ever be able to demonstrate their compliance? The answer is they will not unless they have a written plan. In reality, this is a *de facto* requirement to have a written plan to be able to meet the extensive list of requirements as

outlined in the proposed regulation. This is not a straightforward or easy to implement regulation. If the rule goes into effect as written, all it will create is confusion. Throughout all stages of the heat rulemaking process, the consistent theme from multiple stakeholders was the request that OSHA avoid a one-size fits all approach, and to tailor the regulation to specific industries, like construction, which have fluid jobsites. So far, OSHA has ignored these requests. Many employers in the construction industry have focused on providing water, rest, and shade for their employees for years. OSHA itself has incorporated these fundamental principles into its National Emphasis Program on Outdoor and Indoor Heat Hazards where the Agency relies on these same principles of "water, rest, shade" and adding adequate training and acclimatization procedures for new or returning workers. These are all important components that assist employers in providing appropriate protections for their employers. Unfortunately, the language used in the proposed regulation is not as clear and concise as it needs to be.

In my view, OSHA should withdraw the rule as proposed. Should the agency engage in a new rulemaking, OSHA should develop separate standards for industries such as construction, so that employers know how to comply, and the Agency does not have to issue concurrent guidance explaining what the standard means, as is the case with the Worker Walkaround regulation.

In conclusion, we already have the tools to address the issues raised in the regulations and policies described above. Instead of focusing on the citations that have been issued, OSHA would be better served identifying solutions to correct them. OSHA's focus has shifted from a solution-based system to a punitive based system. That is not the mission of the OSH Act. It cannot keep going in that direction.

I welcome the Subcommittee's questions.