TESTIMONY

OF

MANESH K. RATH

BEFORE THE

WORKFORCE PROTECTIONS SUBCOMITTEE

OF THE

U.S. HOUSE OF REPRESENTATIVES

ON H.R. 1309

"CARING FOR OUR CAREGIVERS: PROTECTING HEALTH CARE AND SOCIAL SERVICE WORKERS FROM WORKPLACE VIOLENCE"

ON FEBRUARY 27, 2019

Good afternoon, Chairwoman Adams, Ranking Member Byrne, and members of this Subcommittee. I am grateful for the opportunity to participate in this hearing.

For over twenty-five years, I have dedicated my life's work to the proposition that well-intentioned employers are uniquely well positioned to improve the welfare, safety, and health of the American workforce.

I am a partner at the law firm Keller and Heckman LLP, here in Washington, D.C. I have represented industries and employers in collaborating with labor, professional associations, the scientific community, and government to develop a safer and healthier workplace. I have taught several thousand safety and health professionals, labor-management professionals, attorneys, and university students on matters involving labor law, OSHA law, litigation, and legal ethics. With a few esteemed OSHA law attorneys, I have co-authored and edited two authoritative books in the field of OSHA law.

In my testimony today, I am expressing only my own understanding of the fields of occupational safety and health law and administrative law, and I am not here as a representative of my firm, our clients, or any other interest.

1. This Bill is a Flawed Approach to Managing a Potential Hazard About Which Stakeholder Knowledge is Essential

We all share a common goal to improve workplace safety and health for healthcare and social service workers. Furthermore, the proposition that employers have an important role to play in addressing the identifiable and manageable risks to healthcare and social service workers should be beyond dispute.

However, this Bill as drafted raises concerns on several grounds. Workplace violence is a complex area of workplace safety that falls outside the scope of traditional rules and predictable human behavior. Despite having issued a guidance document, OSHA's experience in this area is relatively limited and there is no crisis that would justify casting aside the traditional rulemaking due process.

A safety or health standard should be adopted only after gathering input from the affected stakeholder community as to the most effective way to proceed. This is a cornerstone of administrative law.

This Bill would direct the Occupational Safety and Health Administration (OSHA) to adopt and implement a final rule without the traditional rulemaking procedures[1] that Congress required of the Agency under the Occupational Safety and Health Act (OSH Act)[2] or the Administrative Procedure Act (APA)[3].

Congress is empowered to instruct an agency to skip this important element of procedural fairness by enacting its own standard, but Congress should exercise that prerogative with caution and infrequently, and only when (1) the issue to be regulated is fully understood and the remedy is obvious; or (2) there is a national emergency such as an epidemic. Workplace violence for healthcare workers does not meet either of those criteria.

2. The Issue to be Regulated is Far from Understood and the Remedy Remains Unclear

Many of the underlying factors that lead to workplace violence involve influences outside the employer's control. Before proceeding to rulemaking to develop a legally binding standard, OSHA should review its experience with the guidance issued on workplace violence and what has been learned from citing employers for workplace violence hazards under the General Duty Clause[4]. Questions such as these should be explored: What settings and conditions may have been present during the clearest alleged violations? What abatement measures were known or available but unused? What employer abatement approaches were the most successful? What are the known conditions and circumstances that lead to reliable predictions of potential violence that employers can use to evaluate their facilities and development most effective remediation?

The Government Accountability Office (GAO) report referenced in this Bill[5] stops short of calling for a new standard.[6] OSHA, in the previous administration, agreed with GAO that OSHA must develop more information to assist inspectors and assess the efficacy of its current efforts.

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[1] See H.R. 1309 § 101(a)(2)
[2] 29 U.S.C. § 655(b)
[3] 5 U.S.C. § 551 et seq.
[4] 29 U.S.C. 654(a)(1)
[5] H.R. 1309 at §2 Findings.
[6] "Workplace Safety and Health: Additional Efforts Needed to Help Protect Health Care Workers from Workplace Violence," Government Accountability Office (2016). The report found that OSHA "has not fully assessed the results of its efforts to address workplace violence in health care facilities. Without assessing these results, OSHA will not be in a position to know whether its efforts are effective." Id at p. 1.

The Centers for Disease Control in its recently issued National Occupational Research Agenda (NORA) also called for research into the causes and prevention strategies of workplace violence.[7]

Given the widely recognized need for research on this subject, Congress should refrain from dictating to OSHA that a standard should be issued or what should be in that standard, and that OSHA must do so without stakeholder involvement.

3. There is No National Emergency That Would Justify Dispensing With the Traditional Rulemaking Procedures

OSHA may establish an emergency temporary standard until a permanent standard is implemented if workers are in grave danger in the context of exposure to toxic substances or agents determined to be toxic or physically harmful, or from a new hazard.[8] OSHA must also show that an emergency standard is necessary to protect employees from such danger.[9] Workplace violence does not fit either of these two criteria. The phenomenon of workplace violence is neither a toxic substance nor is it a new hazard – indeed OSHA originally issued its voluntary "Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers" in 1996.[10] Interestingly, OSHA has not yet issued an emergency temporary standard for which the proffered emergency has been sustained by a court that believed the urgency outweighed the importance of following administrative due process.

4. Stakeholder Input Through Traditional Rulemaking Would Greatly Inform OSHA Regarding the Issue to be Regulated and the Appropriate Strategy for Intervention

The Administrative Procedure Act and corresponding procedures in enabling statutes, such as the Occupational Safety and Health Act, recognize that administrative agencies must give the affected stakeholder community an opportunity to comment upon and participate in the development of a regulatory standard.[11] These are well-established principles of administrative due process.

In enacting this statutory rule, Congress specifically adopted the Attorney General's report which stated that, with respect to a regulatory law, the government's "knowledge is rarely complete, and it must always learn the viewpoints of those whom its regulations will affect. Public participation in the rule making process is essential in order to permit administrative agencies to inform themselves…"[12]

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[7] Centers for Disease Control and Prevention National Occupational Research Agenda (NORA) for Healthcare and Social Assistance (Feb. 2019). See, e.g. report at Objective 3, "(i)nvestigate the epidemiology of workplace violence in health care and identify effective strategies for prevention and mitigation."
[8] 29 U.S.C. § 655(c)
[9] Id.
[10] Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-04R (2015), drafted in 1996 and revised in 2004 and 2015
[11] 5 U.S.C. § 551 et seq.
[12] Staff of Senate Judiciary Committee, 79th Cong., Administrative Procedure, p. 19-20 (Comm. Print 1945).

I note that this principle was the result of ten years of Congressional debate before the APA was finally enacted in 1946. Providing stakeholders with an opportunity to comment on a proposed rule has, since then, stood as a universal principle of due process for the last 72 years.

And it is difficult to ignore the irony: this Bill requires employers to seek input from union representatives, employees, and co-located employers, no less than six different times[13] throughout the proposed standard. And while its sponsors should be applauded for recognizing the value gained by stakeholder involvement in the development of an *employer's* safety program, this highlights that stakeholder participation serves a valuable purpose in crafting the standard that they will later be required to implement.

OSHA has relatively limited knowledge and experience in the health care industry and does not profess more. OSHA has not fully assessed the efficacy of its own efforts to address workplace violence in health care facilities and the GAO advised OSHA of this. Stakeholder involvement should therefore be welcomed rather than shunned.

Moreover, depriving stakeholders of the chance to participate in developing a workable standard does not silence only healthcare employers, who have acquired expertise through years of trial and error. It also disenfranchises employees, through their unions and professional associations; security and technology firms, who have developed techniques and solutions that have led to improvements; insurance carriers, who have amassed troves of valuable data; and the scientific and medical communities, who perhaps have insight into the causes of workplace violence and effective intervention modalities.

Under the proposed Bill, none of these constituents will have a chance to lend their acquired wisdom and expertise.

5. Congress has not Established Good Cause to Skip the Rulemaking Step of Seeking Stakeholder Participation

Unless there is good cause to skip the important procedural step of incorporating stakeholder participation in the development of a rule, Congress should permit the Agency to follow this time-honored process.

In the State of California, a similar rule was developed and issued through traditional comment-driven rulemaking. The entire process, from the first notice of a proposed rule to its final implementation, only took fourteen months.[14] This is not an unduly burdensome length of time to make sure that government can gather valuable knowledge from stakeholders.

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[13] See, e.g., H.R. 1309 at §103(1)(A) ("Each Plan shall be developed…with meaningful participation of direct care employees (and) employee representatives"); §103)(1)(B)(ii)((II) (Risk assessment shall be conducted with direct care employees and employee representatives); §103(1)(B)(iv) (post-incident investigation with the participation of employees and their representatives); §103(2)(A)(ii) (solicit input from involved employees and their representatives following a workplace violence incident about the cause); §103(6) (Annual evaluations conducted with full, active participation of covered employees and representatives).

[14] California's Workplace Violence in Healthcare regulation was published as a proposed rule on October 30, 2015. Comments were due Dec. 17, 2015. The public hearing was Dec. 17, 2015. The rule was filed with the secretary

At this moment, OSHA has already stated, in its current Regulatory Agenda, its intention to develop a rule on "prevention of workplace violence in health care and social assistance." Indeed, OSHA has stated that it will initiate a SBREFA[15] panel in March, 2019, so there is no evidence to suggest that the Agency is taking too long.[16]

OSHA's regulatory agenda includes other proposed standards intended to address significant risks in the workplace – including mechanical power presses, lead exposure, communication towers, tree care, cranes and derricks, and powered industrial trucks. This Bill proposes to insert workplace violence in the healthcare industry above others in the absence of evidence to justify that prioritization.

Further, given OSHA's existing history of enforcement against health care employers in instances of workplace violence, together with the Agency's stated intent to promptly implement a rule, the assertion that the Agency's efforts have been "slow" are unfounded.

The Bill's assertion that employer organizations have challenged OSHA's authority to enforce against workplace violence hazards[17] is misleading. The Occupational Safety and Health Review Commission upheld OSHA's use of the General Duty Clause[18] in a number of recent decisions, including just last week.[19] This negates the case for skipping proper rulemaking procedures or that a crisis can be met in no other way than by suspending administrative due process.

6. Conclusion

Any effort to regulate the issue of workplace violence in healthcare should be thoughtful rather than rushed. The process should be inclusive of employers, employees, the security industry, the insurance industry, and the scientific and medical professions.

This subcommittee can and should have faith that the collaborative input of those with experience, training, and learning in this field will yield a better approach than the Bill before us today. Thank you for the opportunity to appear before you, I look forward to addressing any questions you may have.

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of state (finalized) on Dec. 8, 2016. While 48 days is insufficient for meaningful stakeholder participation, the overall time of fourteen months negates this Bill's assertions that "legislation is necessary to ensure the timely development of a standard…"

[15] Small Business Regulatory Enforcement Act of 1996, P.L. 104-121 (Mar. 1996). A SBREFA panel, or SBAR panel, is a preliminary step prior to publishing a proposed rule that meets with representatives of small entities – another critical stakeholder.

[16] RIN 1218-AD08 (Fall 2018), see, e.g. https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1218-AD08

[17] HR 1309 at Section 2(11).

[18] 29 U.S.C. 654(a)(1)

[19] See, e.g. *Secretary of Labor v. Integra Health Management, Inc.*, OSHRC No. 13-1124; *Secretary v. BHC Northwest Psychiatric Hospital, LLC et al*, OSHRC Docket No. 17-0063.