November 16, 2018

Mr. Ron Bailey
Occupational Safety and Health Review Commission
Ninth Floor, One Lafayette Centre
1120 20th Street NW
Washington, DC 20036–3457

**VIA ELECTRONIC MAIL TO: rbailey@oshrc.gov**

Re: Advance notice of proposed rulemaking, 29 CFR Part 2200
83 Fed. Reg. 45366 (Sept. 7, 2018)

Dear Mr. Bailey:

On September 7, 2018, the Occupational Safety and Health Review Commission published an advance notice of proposed rulemaking (ANPR) inviting public comments on several subjects. The Chamber of Commerce of the United States and the Associated General Contractors of America respectfully comment on one of those subjects—whether the definition of "affected employee" should be broadened.

The U.S. Chamber of Commerce, the world's largest business organization, represents the interests of more than 3 million businesses of all sizes, sectors, and regions. The Associated General Contractors of America (AGC) is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 general contractors and over 9,000 specialty-contracting firms.

The Commission's rules currently define "affected employee" as "an employee of a cited employer who is exposed to or has access to the hazard arising out of the alleging violative circumstances, conditions, practices or operations." 29 C.F.R. § 2200.1(e). A definition to approximately the same effect goes back to the Commission's earliest days. 29 C.F.R. § 2200.1(e) (1972), adopted at 37 Fed. Reg. 20237, 20238 (1972). (The rule was amended in 1986 to reflect case law on "access." 51 Fed. Reg. 23184 col. 2 (1986) (proposal); 51 Fed. Reg. 32001 (1986).) The Commission's rule was evidently meant to implement the requirement of section 10(c) of the Act that, "The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection."

Neither the Chamber, the AGC nor its counsel are aware of practical problems that have arisen with the rule. They are, however, aware that a January 2015 petition for rulemaking filed by the Occupational Safety and Health Law Project on behalf of several labor unions and allied organizations requested that the definition of "affected employee" in Commission Rule 1(e) be broadened. The petition asked that the rule's restriction to employees "of a cited employer" be

eliminated and that the rule be amended to encompass "*any employee who performs work at the site and* who is exposed to or has access to the hazard arising out of the alleging violative circumstances, conditions, practices or operations." (Italics showing new proposed language.) The petition argues that these changes are needed to permit on-site workers to participate in contests of citations by controlling or creating employers on multi-employer sites and in contests by host employers to whom employment agencies refer temporary workers.

There are several problems with the petition. We identify five below:

1. The petition fails to show that the current definition has in fact posed a problem for on-site workers seeking to participate in Commission proceedings or even that it is likely to do so. The petition does not point to a single case in the then 44 years of the Commission's existence in which the current rules have prevented or discouraged an on-site worker from obtaining or seeking party status.

2. The petition ignores Commission Rule 21. That rule allows persons to intervene until ten days before the hearing and even thereafter if good cause is shown. The petition need only set forth the intervenor's "interest … in the proceeding" and "show that participation … will assist in the determination of the issues in question, and that the intervention will not unduly delay the proceeding."[1] These are not difficult standards to meet, especially if, as the unions argue in their petition, the same-site workers have "first-hand knowledge of the cited conditions [with which] they can contribute significantly to the Commission's proceedings" (petition at 1) or are "contract workers" who "can actively assist in the Commission's proceedings." *Id.* at 2. Nowhere does the petition argue that such workers have tried intervention and were denied, or that they would have difficulty intervening. Most important, the petition does not show why intervention under Rule 21 would not suffice to address their concerns.

3. The unions' argument with respect to temporary workers is especially questionable. The Secretary of Labor often considers such workers to be employees of the on-site entity—and usually of *both* the on-site entity and the referring entity. "In general, OSHA will consider the staffing agency and host employer to be 'joint employers' of the worker in this situation." Thomas Galassi (OSHA), "Policy Background on the Temporary Worker Initiative" (July 15, 2014). If, as is often the case, the on-site entity does not dispute that it is at least *an* employer of the on-site workers, then their appearance as affected employees under the current rules would

---

[1] Commission Rule 21 states:

> **§ 2200.21 Intervention; appearance by non-parties.**
>
> (a) *When allowed*. A petition for leave to intervene may be filed at any time prior to 10 days before commencement of the hearing. A petition filed less than 10 days prior to the commence-ment of the hearing will be denied unless good cause is shown for not timely filing the petition. A petition shall be served on all parties in accordance with §2200.7.
>
> (b*) Requirements of petition*. The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unduly delay the proceeding.
>
> (c) *Granting of petition*. The Commission or Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine.

not be disputed. But even if the on-site entity does dispute the assertion, and on-site workers seek party status, it is unlikely that a judge would find it prudent to resolve a key merits issue at the threshold of the litigation through the procedural device of resolving a workers' party status. A prudent judge would, until the issue's merit is explored through discovery and trial, more likely allow the workers provisional participation under Rule 1(e) or, in the alternative, permit intervention under Commission Rule 21.

4. The amendment sought by the union would create, especially with respect to multi-employer worksites (particularly construction worksites) difficult problems of administration and difficult questions about the lawfulness of expanding notification requirements on employers.

As Commission Rules 7(g) and (h) indicate, the most practical way to implement section 10(c)'s command that affected employees have an opportunity for party participation would be to impose the burden of notifying "affected employees" of the contest and of the hearing date on the cited employer. But expanding the definition in Rule 1(e) to non-employee exposed workers would create considerable notification difficulties for cited employers. They would have to first figure out who the non-employee affected workers are—a difficult task on a multi-employer construction site, where any one of many trades might have passed by an allegedly violative condition. The alternative would be to force cited employers to resort to overkill—to treat all site workers as affected whether they are in fact or not. Then the employer would have to figure out how to give the workers notice. Would their unions have to be served? If so, which ones? What about workers who are not in a union? Would posting on the job site suffice? Suppose by the time of posting the non-employee workers were no longer working at the site because their phase of the work had been completed? Suppose that several employers were cited (the controlling, creating, and several exposing employers); would all of them have to notify all affected workers? Serve all the unions? The unions' petition neither addresses these ramifications nor shows that any gain in worker participation caused by these amendments would justify the greater burdens of notification and uncertainty they would impose.

The appropriateness of imposing notifications burdens on employers with respect to workers who are not their employees may also be questioned, for the Act itself suggests that Congress meant to impose notification burdens on employers only with respect to their own employees. Section 8(c)(1) states that, "The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep *their* employees informed of their protections and obligations under this Act, including the provisions of applicable standards." (Emphasis added.)

A change to the rule may also have ripple effects on other aspects of the administration of the Act. Section 6(d) on variances states that, "Affected employees shall be given notice of each such [variance] application and an opportunity to participate in a hearing." The Secretary's

variance regulations state, however, that the applicant must inform "*his* employees of the application." 29 C.F.R. § 1905.11(b)(5) (emphasis added).[2]

5. The unions' petition implicitly raises broad legal questions that would be better be resolved in adjudication than in a rulemaking over a procedural rule. For example, there is at the moment considerable uncertainty and controversy about the contours and reach of the joint employer doctrine. *See, e.g.*, the discussion in *Froedtert Memorial Lutheran Hospital, Inc.*, 20 BNA OSHC 1500, 1512-15, 2002 CCH OSHD ¶ 32,703, pp. 51,739-41 (No. 97-1839, 2004) (Chairman Railton, concurring). The Commission is also likely aware that the doctrine has been controversial in other fields of law, such the National Labor Relations Act. *E.g., Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015), *pet. for rev. filed*, Nos. 16-1028 & 16-1064 (D.C. Cir.). Whatever the ultimate resolution of this question of substantive law may be, it should not be unnecessarily pretermitted by a procedural rule.

In sum, it would be better for the Commission to continue the modest approach in its current rules and resolve any legal questions in adjudication. Commission Rule 1(e) should for now remain as it is.

Respectfully,

Marc D. Freedman
Vice President, Workplace Policy
Employment Policy Division
Chamber of Commerce of the United States

Kevin Cannon
Director, Safety and Health
Associated General Contractors of America

*Of Counsel:*
Arthur G. Sapper, Esq.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Washington, D.C.

36061514.3

[2] 29 C.F.R. § 1905.11(b)(5) requires a "certification that the applicant has informed his employees of the [variance] application …."