February 4, 2014

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Joe Courtney
Ranking Member
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Courtney:

Thank you for holding today’s Subcommittee on Workforce Protections hearing, “OSHA’s Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process.” The Independent Electrical Contractors (IEC) appreciates this Subcommittee’s attention to this issue and respectfully submits comments on our experiences with Occupational Safety and Health Administration’s (OSHA) recent attempts to circumvent the regulatory process.

Founded in 1957, the Independent Electrical Contractors is a national trade association representing 3,000 merit shop electrical and systems contractors in 55 chapters across the United States. IEC believes in developing and fostering a stronger economy through the level of quality and services its members provide to the industry. Drawing from the dedication and desire of contractors in the independent sector, our country is able to benefit from a flexible array of services and competitive pricing which helps maintain an affordable level of costs on energy and utilities.

For more than five decades, IEC has faced the challenges imposed by the ever-changing world of the electrical industry. IEC has built a reputation as the premier trade association for America’s independent electrical and systems contractors, aggressively working with the industry to establish a free environment for electricians.

Providing a safe and healthy workplace for all employees is of the utmost importance to IEC members and is critical to business success. Our members support standards and regulations that are rooted in science and appropriately address the hazards of the work environment.

The construction industry – and the electrical sector in particular – is highly regulated by OSHA and relies on the regulatory process to ensure agency proposals impacting the health and safety of workers are properly vetted, needs-based, and supported by sound data. OSHA’s standard-setting process begins with a publication in the Federal Register of a request for information (RFI), an advance notice of proposed rulemaking (ANPRM), or a notice of proposed rulemaking (NPRM) that allows for a public comment period during which stakeholders provide input on the effects of a specific regulatory action, the scope of the proposal, economic impact, and other feedback. Typically, OSHA will also hold public hearings in addition to soliciting comments, and if required will initiate review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA) process to address the compliance burdens that would fall on small businesses. Only then would the agency proceed to a final
rule, which would be further vetted by the Office of Management and Budget (OMB) before being issued for promulgation.

Alarmingly, recent actions taken by OSHA to revise or reverse longstanding policies without public input, SBREFA review, or OMB vetting threaten the integrity of the rulemaking process and undeniably put both the safety of IEC members’ employees and our contractors’ proprietary information at great risk.

The most glaring example of this failure to properly scrutinize sweeping new policy is OSHA’s recent letter of interpretation regarding union participation in worksite inspections, dated February 22, 2013. In that letter, the agency issued a blanket endorsement for the participation of union representatives and other third parties in site inspections conducted by OSHA at a non-unionized workplace. Despite claiming that the letter merely confirms and clarifies existing policy, 29 CFR 1903.8(c) explicitly states that:

The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.

It is clear the intent of this title under the Code of Federal Regulations is to allow for the participation of qualified subject matter experts in the inspection process rather than the broad application OSHA has since granted to union representatives and community organizations. Through this letter of interpretation, OSHA overstepped its own rules and longstanding practices regarding inspections to allow unaffiliated and potentially unqualified individuals to access potentially hazardous worksites, putting trained workers at risk and creating liability for employers. As the Coalition for Workplace Safety, of which IEC is a member, pointed out in a letter to OSHA dated June 12, 2013:

“Another complication of this policy is making sure the union representative, community organizer, or third party has adequate workplace safety protection, does not present a risk to the safety or security of the facility, and does not have access to confidential business information. Many workplaces have explicit policies preventing anyone not specifically authorized from entering the workplace.”

IEC members are proud of their safety records and embrace OSHA visits to address and improve upon the safety and health measures and practices they implement in the workplace. It is important that OSHA provide an unbiased opinion during inspections, which would not be afforded to merit shop contractors should a union representative be present during a walk-through. According to OSHA’s Field Operations Manual (Field Operations Manual, Chapter 3, (IV)(H)(2)(c), during an inspection inspectors must make every effort to “ensure that their actions are not interpreted as supporting either party to the labor dispute.”

The blatant, dangerous shift in OSHA policy from health and safety to the realm of labor relations has serious implications for businesses. What is to stop an employee from selecting a competitor’s representative to accompany them on an inspection? What safeguards are in place to prevent a third party from generating misinformation or publicly disseminating inaccurate reports from a walk-
through that can be damaging to an employer? These are important questions that need to be addressed but are absent in the letter of interpretation.

While IEC supports the free determination of representation in the workplace, our members are concerned that by granting access to union representatives for inspections at merit shop worksites, OSHA is overlapping the responsibilities of the agency that rightly governs labor relations matters, the National Labor Relations Board.

By issuing a letter of interpretation rather than initiating a rulemaking, OSHA has failed to grant due consideration to the aforementioned health, safety, and proprietary consequences of its policy change. IEC urges this Subcommittee and the Committee on Education and the Workforce to continue to press OSHA to rescind its letter of interpretation and instead formally issue a proposal regarding third party participation in inspections for consideration through the federal rulemaking process.

OSHA has also failed to initiate the regulatory process before conducting enforcement actions specific to the electrical industry, as evident by its ongoing citation of employers on the basis of the American National Standards Institute (ANSI) and voluntary consensus standard National Fire Protection Association (NFPA) 70E for Electrical Safety in the Workplace.

To be clear: IEC does not object to NFPA 70E. Most of our members have adopted the voluntary standard and are training their employees to comply. However, for years OSHA has been citing employers for failure to meet requirements under NFPA 70E that are not specifically outlined in existing OSHA regulations, even though the agency has not specifically adopted the NFPA 70E standard itself. Most commonly, citations are issued for perceived safety training and personal protective equipment (PPE) violations under both the OSHA general industry and construction industry standards under 29 CFR 1910 and 29 CFR 1926, respectively.

Through this stretch of interpretation, OSHA is able to cite for a voluntary standard that has not gone through the public comment process or SBREFA review to fully assess the impact of 70E-based citations on smaller businesses. The ANSI panels that create these voluntary consensus standards often do not adequately represent small businesses during the development process, which makes the feedback of a SBREFA panel all the more important before OSHA continues to rely on 70E for citations. While IEC supports voluntary compliance with NFPA 70E, we take issue with OSHA’s adoption by default of the consensus standard without proper regulatory review.

The regulatory process needs more – not less scrutiny. That is why OSHA’s circumvention of its longstanding rulemaking procedures is alarming in its omission of the necessary steps to ensure the safety and protection of employees, their worksites, and the businesses that employ them. IEC commends the Subcommittee for today’s hearing and encourages ongoing examination of OSHA’s use of citations and letters of interpretation to regulate without due process.

Sincerely,

Alexis Moch
Vice President, Government Affairs
Independent Electrical Contractors