UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. INTEGRA HEALTH MANAGEMENT, INC. Respondent.	OSHRC Docket No. 13-1124

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT INTEGRA HEALTH MANAGEMENT, INC.

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Pursuant to the Commission's September 18, 2015 briefing notice, the Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief in support of Respondent Integra Health Management, Inc. ("Integra"). The Chamber's brief addresses the three principal issues identified in the Commission's briefing notice.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents three hundred thousand direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

The vast majority of the Chamber's members are subject to the Occupational Safety and Health Act ("Act"). As potential respondents to citations issued by the Secretary of Labor, these members have a vital interest in ensuring that the Secretary and the Commission correctly interpret and fairly enforce the Act. This interest is particularly important where, as here, the Secretary seeks to effectively announce—in the absence of notice-and-comment rulemaking—that an employer may be liable under the general duty clause for the criminal conduct of one of the customers its employees are hired to serve. This decision has the potential to reach far beyond Integra, or even the health care industry, and to impact employers in many industries where employees must interact with

customers, face-to-face, to perform their work. As a result, the Chamber has a significant interest in the Commission rejecting such a rule.

II. SUMMARY OF ARGUMENT

The Secretary's citation in this case seeks to significantly expand the traditional scope of Section 5(a)(1) of the Act, the general duty clause, while at the same time, undermining the deliberative approach that OSHA has historically applied to the announcement of new rules of general applicability. Against a tradition of express restraint in policing social behavior via the general duty clause, the Secretary seeks to hold an employer liable for failing to abate, not the materials or conditions of its workplace, but the deliberative, uncharacteristic, and entirely unpredictable actions of one of its member customers—a third party whose actions were both shocking and beyond the employer's control. That theory is not tenable.

In the first place, the Secretary has not established the existence of a recognized hazard. In a perhaps understandable but ultimately misguided attempt to eliminate inherent risk, the Secretary and the ALJ have defined the hazard as a task that is the very core of many employers' businesses: face to face meetings with clients. But the Commission has long held that activities central to an employer's business cannot be recognized hazards under the general duty clause, and has long avoided attempting to regulate criminal activity of third parties under the Act. Defining the hazard in this way also makes it impossible for the Secretary to establish that the employer may feasibly and effectively abate the alleged hazard. Finally, the Secretary should not be permitted to

rely upon voluntary guidelines that expressly disclaim any legal effect in establishing a violation of the general duty clause, in this case or any other.

For all of these reasons, and those stated by Integra in its Petition, the Commission should reverse the ALJ decision and vacate the Secretary's citation in its entirety.

III. ARGUMENT

To establish a violation of the general duty clause, 29 U.S.C. § 654(a)(1), the Secretary must prove that (1) an activity or condition in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate or materially reduce the hazard. *Empire-Detroit Steel Div. v. OSHRC*, 579 F.2d 378, 383-84 (6th Cir. 1978). As requested in the Commission's briefing notice, the Chamber addresses all but the third of these elements, as well as the impact of the Secretary's Guidelines for Preventing Workplace Violence for Health Care and Social Services Workers on the Secretary's citation.

A. THE INHERENT RISK OF CRIMINAL ACTS BY CUSTOMERS OR CLIENTS IS NOT A RECOGNIZED HAZARD WITHIN THE MEANING OF THE GENERAL DUTY CLAUSE.

The Secretary's and the ALJ's definition of the purported recognized hazard in this case is contrary to Commission precedent and congressional intent. The Commission has long recognized that hazards under the general duty clause must be "defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Sec'y of Labor v.*

Pelron Corp., No. 82-388, 1986 WL 53616, at *3 (Rev. Comm. June 2, 1986); *Sec'y of Labor v. Otis Elevator Co.*, No. 03-1344, 2007 WL 3088263, at *3 (Rev. Comm. Sept. 27, 2007) (same). In other words, the Secretary must identify "a preventable consequence of the work operation." *Sec'y of Labor v. Morrison-Knudsen Co.*, No. 88–572, 1993 WL 127946, at *19 (Rev. Comm. April 20, 1993). Precise and limited definitions of "hazards" under the general duty clause are necessary because "Congress intended to require elimination only of preventable hazards." *Nat'l Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Because the general duty clause focuses only on preventable hazards, the Secretary and the Commission have traditionally limited its application to conditions and materials of the employer's workplace, as opposed to the social behavior of third parties. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009).

The Secretary defines the applicable hazard here as the risk of Integra employees "being physically assaulted by [Integra members] alleged to have a history of violent behavior." Cmn. Release at 1 (Sept. 18, 2015). The ALJ altered this definition slightly, characterizing the hazard as the risk of "being physically assaulted during a face-to-face meeting by a member with a history of violent behavior." *Sec'y of Labor v. Integra Health Management, Inc.*, 2015 WL 4474372 (ALJ June 22, 2015) ("ALJ Op.") at *35. These sweeping definitions are not cognizable recognized hazards under the general duty clause for three independent reasons: face-to-face interactions with Integra's members, and the risks that those interactions entail, are the core activity of Integra's business, and eliminating them eliminates the business; the general duty clause does not apply to the

actions of third parties that are outside the employer's control and whose potentially hazardous conduct is not readily recognizable by the employer; and the Secretary's definition makes no attempt to inform Integra, or any other employer, when necessary face-to-face interactions cross the line from benign to hazardous.

1. The General Duty Clause Does Not Apply To The Normal Activities Of Business.

The Commission has held that the normal activities of a business do not represent the types of "hazards" that the general duty clause was intended to regulate. This is because "an employer cannot reasonably be expected to free its workplace of inherent risks that are incident to its normal operation." *Sec'y of Labor v. Inland Steel Co.*, No. 79-3286, 1986 WL 53521, at *3 (Rev. Comm. July 30, 1986). Indeed, "[t]o permit the normal activities . . . [of] industry to be defined as a 'recognized hazard' within the meaning of section 5(a)(1) is to eliminate an element of the Secretary's burden of proof and, in fact, almost to prove the Secretary's case by definition, since under such a formula the employer can never free the workplace of inherent risks incident to the business." *Pelron*, 1986 WL 53616, at *3 (emphasis in original).

Human interaction, of course, is an essential component of numerous businesses. And human interaction carries a small but irreducible risk of human misbehavior. Here, the population Integra serves presents potentially elevated risks. By definition, Integra's clients are insufficiently resourced to maintain consistent medical care. ALJ Op. at *5. Their medical conditions are serious enough that regular care is required, and the consequences of failing to obtain that care severe. *Id.* at *6. In addition, as the ALJ

found, "most" Integra members have criminal records, significant mental illness, or both (*id.* at *7), and "many" have histories of violent behavior. *Id.* at *33. Many have neither consistent shelter nor adequate food and, unsurprisingly, many do not have working telephones. *Id.* at *6.

Eliminating human interaction will often undermine the core purpose of a business. Here, Integra's sole purpose is to connect its members to community and other social service resources that may help to improve their access to, and use of, medical care. *See* ALJ Op. at *34 (noting that members' "very behavior is the essence of Integra's business"). Consistent, reliable, face-to-face interactions are the only way for Integra to provide these services; if intermittent telephone communications were sufficient, Integra members would likely be adequately served by routine doctor's office reminder calls, but they are not. *Id.* at *9 (Integra CEO explaining "the only way you're going to engage some of these members is to really do it on a personal level and—talk face-to-face and get them engaged"). Refusing to meet with clients with a criminal history, or those with severe mental illness associated with a propensity for violence, would eliminate "most" of Integra's member customers, and most of its business. That is not consistent with the general duty clause.

2. Purported Hazards Attributable To Third-Party Conduct Are Not Covered By The General Duty Clause.

Hazards under the general duty clause have traditionally been limited to those conditions or practices "over which the employer can reasonably be expected to exercise control." *Sec'y of Labor v. Megawest Fin., Inc.*, No. 93-2879, 1995 WL 383233, at *8

(Rev. Comm. ALJ June 19, 1995). "The element of an employer's control is a crucial one when determining the employer's duty under the Act." *Id.* Indeed, the Commission has "consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent." *Sec'y of Labor v. Green Constr. Co.*, No. 5356, 1976 WL 6135, at *2 (Rev. Comm. Oct. 21, 1976).

The inherent risks that come with face-to-face interaction with a client or customer are fundamentally different from the hazards targeted by the Act. The Act focuses on hazards that arise from some condition inherent in the environment or the processes of the employer's workplace not dependent upon unpredictable human behavior, such as overexposure to lead or noise or the risk of electrocution. The general duty clause has served a modest purpose by filling "those interstices necessarily remaining after the promulgation of specific safety standards" under the Act. *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979). But the hazards covered by the Act—whether addressed by specific safety standards or the gap-filling function of the general duty clause—have one thing in common: they are aspects of the work environment that employers, through control of their workplaces, can both anticipate and reduce or eliminate.

The ALJ's decision ran afoul of these principles in two respects. First and most importantly, it tasked the employer with responsibility for the acts of third parties completely outside the employer's control. The danger from these individuals "arises not from the processes or materials of the workplace, but from the anger and frustration of

people." *Megawest Fin.*, 1995 WL 383233, at *9. It is this "human factor" (*id.*) that separates interactions with an employer's customers or clients from the traditional hazards regulated by the Act and places patient care—and the distinct individuals to whom it is provided—beyond the scope of an employer's general duties of hazard correction and control.

This rule reflects that "[e]mployers have less control over employees than they do over conditions[,] [as] employees have a will, an intention, and an intellect that drives their behavior, and they are not always amenable to control." *Megawest Fin.*, 1995 WL 383233, at *9. And, of course, employers have "even less control over the behavior of third parties [that are] not in [their] employ[,]" such as their customers. *Id.* Because the sole element of danger from face-to-face patient interaction arises, not from conditions of the workplace, but from the "wild card" of human behavior, face-to-face client interactions are "completely different from any other hazards addressed by the Act." *Id.* Indeed, while the threats associated with third-party patients may be "omnipresent, an employer may legitimately fail to recognize that the potential for a specific" violent act by an employer's customer exists. *Id.*

The ALJ compounded this problem by adopting a breathtakingly broad definition of what constitutes a "workplace": "member's homes, [employees'] personal vehicles, or [] public places such as hospitals, restaurants, and doctor's offices . . . are [all] considered an Integra workplace." ALJ Op. at *32. Under the ALJ's analysis, an employer cannot only be responsible for the activities of third parties, but for those activities at a customer's own home, in its employees' vehicles, and in an array of public places. But

there was no evidentiary showing—nor could there be—that these are areas over which an employer could "reasonably be expected to exercise control."

The ALJ held otherwise in this case for two reasons: one, that Integra does control the amount of training and information its employees have prior to interacting with its members, and the procedures they use to do so; and two, that *Sea World of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014), made actionable a similar hazard under the general duty clause. *See generally* ALJ Op. at *32-35. Neither of these arguments withstands scrutiny.

It is obviously true that an employer can control the amount and type of training its employees receive, and the information those employees receive about potential members. Indeed, Integra presented extensive evidence of its existing training programs and procedures. *See generally* ALJ Op. at *9-14. Yet the ALJ's analysis fails to require any showing that training could protect against the *cited hazard* at all. Thus, for example, while the ALJ faulted Integra for not consistently performing criminal background checks on its members (ALJ Op. at *34), he never explained how knowing that member (b)(6) had engaged in aggravated assault and battery nearly 15 years before her interactions with him (*see* ALJ Op. n.3 (describing criminal history related to offenses in the 1990s)) would have reduced the hazard presented by Ms. (b)(6) face-to-face meetings with him.[1] Similarly, although the ALJ faulted Integra for providing

[1] The ALJ's solution, instead, was that Integra should stop providing face-to-face services to any members with a history of violent criminal behavior, regardless of how temporally remote the behavior, and apparently also regardless of Integra's own experience with that member. ALJ Op. at *44. But his finding that "many" Integra

"inadequate" training and for assigning an "inexperienced" employee to Mr. (b)(6) case (*see* ALJ Op. at *34, *39-42), he never explains how better training or more experience would have helped Ms. (b)(6) fend off Mr. (b)(6) random knife attack. In other words, the ALJ never actually found that the employer had the ability to control the hazard he believed existed.

The ALJ's reliance on the D.C. Circuit's divided *Sea World* opinion—with which the Chamber respectfully disagrees—fares no better. *SeaWorld* involved the hazard of direct interactions on Sea World property with a killer whale. *SeaWorld*, 748 F.3d at 1208. The Court held that Sea World had the ability to place barriers on its own property between the whale and trainer, and could eliminate personal interactions between trainer and whale without substantially impacting its product. *Id.* at 1213-14. In other words, the identified hazard was comprised of "conditions over which [Sea World] could reasonably exercise control." *Megawest Fin.*, 1995 WL 383233 at *8. That case, however, does not support the broad proposition that an employer can be held responsible for the acts of third-parties that it cannot control.

Numerous other authorities support this commonsense principle. For example, the Tenth Circuit refused to accept a definition of "recognized hazard" that included the risk of firearms in company parking lots because it was "too speculative and unsupported to [constitute] [ ] the clear and manifest purpose of Congress." *Ramsey Winch*, 555 F.3d at

(continued...)

members had a history of violent behavior (*id.* at *33) elucidates the fallacy in that position: Integra cannot eliminate services to "many" of its members and still remain a viable enterprise.

1205, 1207 (internal quotation omitted); *see also Oil, Chem. & Atomic Workers v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984) (refusing to apply a broad meaning of "hazard" under the general duty clause and instead "confin[ing] the term 'hazards' under the general duty clause to the types of hazards [the Court] kn[e]w Congress had in mind"). In reaching this conclusion, the Tenth Circuit observed that OSHA has historically exhibited an "express restraint in policing social behavior via the general duty clause." *Ramsey Winch*, 555 F.3d at 1206; *see also Pa. Power & Light Co. v. OHSRC*, 737 F.2d 350, 354 (3d Cir. 1984) (recognizing that an employer's "duty does not extend to the abatement of dangers created by unforeseeable or unpreventable employee misconduct"); *Pratt & Whitney Aircraft v. Sec'y of Labor,* 649 F.2d 96, 104 (2d Cir. 1981) (indicating the Act only requires employers to "guard against significant risks, not ephemeral possibilities").

The Commission should proceed with tremendous caution to the extent that it would extend the general duty clause to hold an employer liable for the social behavior of customers or clients that inheres in the nature of the employer's business. Although employers may have theoretical knowledge that third parties are capable of posing a hazard to their employees, human beings do not act with the same level of predictability as the processes and materials traditionally covered by the Act. Moreover, holding employers responsible for the independent acts of their customers or clients could result in perverse consequences, such as depriving disadvantaged and high risk individuals of important services. For all of these reasons, the ALJ's decision should be reversed and the Secretary's novel citation vacated.

3. The Secretary And The ALJ's Open-Ended Definition Of The Alleged Hazard Fails To Give Employers Notice Of The Conditions Or Practices They Must Prevent.

The purported goal of the Secretary's citation in this case is to protect Integra employees from the broad risks associated with face-to-face interactions with certain Integra members. ALJ Op. at *34. Because this alleged hazard is a social phenomenon rather than a "condition or practice" of the workplace over which employers exercise control, *Pelron*, 1986 WL 53616, at *3, this definition does not provide Integra—or other employers whose employees are required to interact face-to-face with customers—adequate notice regarding the precise risks against which it is supposed to protect its employees.

Presumably, neither the Secretary nor the ALJ could have intended to characterize all face-to-face customer/employee interactions as preventable hazards under the general duty clause, because most such interactions do not pose a "tangible and appreciable risk" to employees. *Sec'y of Labor v. Beverly Enters., Inc.*, Nos. 91-3144 et al., 2000 WL 34012177, at *13 (Rev. Comm. Oct. 27, 2000). But the ALJ's sole limitation of the hazard to customer members "with a history of violent behavior" (ALJ Op. at *35) similarly fails to provide the required notice.

As noted above, general-duty hazards must be "defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron*, 1986 WL 53616, at *3. Moreover, an employer is entitled to fair notice that he may be charged with a violation of the general duty clause: "Like other statutes and regulations which allow

monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d 97, 100 (5th Cir. 1980). Importantly, these notice concerns apply, not just to the Secretary's promulgation of specific standards, but also to her enforcement of the broadly-worded general duty clause. *Id.*

The notice concerns raised by the ALJ's amorphous definition of the alleged hazard are compounded by the sweeping nature of the citation at issue. There is no evident reason that the ALJ's analysis, if accepted, could not apply to *any* face-to-face customer interaction where the customer has a "history of violent behavior," whether known to the employer or not. The potential implications of that are staggering not just for the health care industry, but for other industries in which employees are required to interact with customers in their homes—cable companies, telecommunications companies, utility companies, appliance installation services, and the like. With little help from the decision or the Secretary, employers that wish to fulfill their general duty obligations will now have to decide:

- What constitutes sufficient evidence of violent behavior? A criminal conviction? For what offenses? Civil liability? In what circumstances? Mere accusations? Dismissal from employment for workplace violence?

- Is *any* history sufficient, or is there some temporal limitation? Is a 50-year-old's college bar fight a sufficient history of violent behavior?

- What constitutes violent behavior? Is the employer required to consider mitigating circumstances, such as self-defense?

- How thorough must the employer's investigation be into the facts and circumstances of a potential customer's behavior? Is a criminal background check enough, or must the employer review civil records, employment records, and other materials as well?

These are merely a small sampling of the questions that remain unanswered under the ALJ's novel and overly inclusive definition of the alleged hazard. Indeed, both the Secretary and the ALJ fail to separate in any meaningful way the alleged hazards from Integra's normal, everyday activities, and thus fail to give Integra and other similarly situated employers notice regarding the conditions they must abate. Because Integra "could not have been sufficiently apprised of [its] potential liability under the general duty clause" for failing to prevent face-to-face interactions with its members, the citation must be vacated. *Sanders*, 620 F.2d at 100.

B. THE SECRETARY FAILED TO PROVE THAT THERE WERE FEASIBLE AND EFFECTIVE MEANS OF ABATING THE ALLEGED RECOGNIZED HAZARD.

Under the general duty clause, the Secretary had the burden to demonstrate and describe the feasibility, practicality, and economic viability of additional safety measures that Integra could have employed to "eliminate[ ]" or "materially reduce[ ]" the alleged recognized hazard. *Nat'l Realty*, 489 F.2d at 1266-67; *Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981). Although the Secretary does not have to propose safety standards that have gained wide-spread industry acceptance, prevailing industry standards are relevant to deciding the central question of whether a reasonable person would have utilized the precautions if faced with the alleged hazard. *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1080 (3d Cir. 1980).

The Secretary's evidence was inadequate in this case in two principal respects. *First*, for the same reason that the Secretary has not established the existence of a hazard, he failed to prove that his proposed means of abatement would *effectively* abate the defined hazard. That is because there is no connection between most of the Secretary's proposed means of abatement—background checks, additional employee training, and the like—and actually reducing the defined hazard. There is no evidence establishing that these abatement measures would reduce or eliminate the identified hazard; the Secretary's expert was unable to testify that they would (*see generally* Integra Pet. at 7-8), and there is no reason to think that an unarmed employee, no matter how well trained, could successfully fend off a random knife attack such as the one Ms. (b)(6) faced.

Second, the one proposed abatement that *could* reduce or eliminate the hazard—refusing to provide services to individuals with a "history of violent behavior"—is infeasible on its face. As the ALJ found, "many" Integra members fall into this category (ALJ Op. at *33); refusing to provide services to these individuals would have a substantial negative impact on Integra's business model. Thus, while Integra "could" do it, the Secretary did not establish that it "could" do so and remain a viable enterprise.[2]

Where, as here, the only effective means of abating an alleged hazard would be for an employer to refuse to serve a large portion of its clients or customers, a citation under the general duty clause is unsupported.

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[2] The fact that Integra has permitted a handful of individuals with criminal backgrounds to "roll off" its member lists since Ms. (b)(6) death does not establish that it could do so with *all* such individuals and continue to operate a viable business.

C. THE SECRETARY SHOULD NOT BE PERMITTED TO UTILIZE VOLUNTARY GUIDANCE TO EFFECTUATE SWEEPING POLICY CHANGE WHERE HE HAS FAILED TO ENGAGE IN RULEMAKING.

The Commission has also requested input regarding what effect, if any, should be given in this proceeding to the Secretary's Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers. The short answer, for several reasons, is none.

The Secretary should not, in effect, use the Guidelines as a substitute for his obligation to enforce the Act principally by promulgating specific standards under the Act's rulemaking provisions. Courts have long admonished the Secretary that "specific standards are intended to be the primary method of achieving the policies of the Act" and that "they should be used instead of the general duty clause whenever possible." *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 905 n.5 (2d Cir. 1977). Indeed, the limited purpose of the general duty clause is to address "those interstices necessarily remaining after the promulgation of specific safety standards." *Bristol Steel*, 601 F.2d at 721. Thus, the general duty clause—properly applied with judicious discretion—serves the limited purpose of insuring "the protection of employees who are working under *special circumstances*" that are inappropriate for specific standards. *Ramsey Winch*, 555 F.3d at 1205 (quoting S. Rep. No. 91-1282, at 5186 (1970) (emphasis added)).

The Secretary has never made any showing that workplace violence issues are "inappropriate for specific standards," though of course he has declined for years to promulgate any such standard. *Ramsey Winch*, 555 F.3d at 1205 (noting that OSHA has, at least since the mid-2000s, "recognized workplace violence as a serious safety and

health issue" but "has not, however, promulgated any mandatory standards regarding workplace violence"). Instead, the Secretary has repeatedly promulgated "voluntary guidelines" addressing workplace violence in various contexts. *See, e.g.*, Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-01R (2004)[3]; Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, OSHA 3153-12R (2009).

These Guidelines, of course, have no legal effect. Yet the Secretary has sometimes attempted to point to similar Guidelines to establish key elements of a general duty clause violation—typically recognition and feasibility and effectiveness of abatement. It is not appropriate to do so.

The OSH Act's rulemaking procedures set forth strict substantive and procedural standards—including notice to the regulated community and comment—with which the Secretary must comply in order to promulgate an enforceable regulation. *See* 29 U.S.C. § 655. These procedures protect the regulated public by requiring the Secretary to substantiate the need for a standard to reduce a significant risk of harm, and the feasibility of the measures the Secretary wishes to implement. *Id.*; *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 653 (1980) (requiring showing of "significant risk of harm" that the standard will alleviate); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 n.31 (1981) (requiring showing of technological and economic feasibility). Voluntary guidelines, on the other hand, are not subject to any

[3] This 2004 version of the Secretary's Guidelines is no longer available on OSHA's website, having been replaced by a 2015 version. The 2004 version is the only one that could possibly apply here, however.

such strictures; the agency is free to promulgate them pursuant to whatever standards he wishes to apply. The Secretary should not, however, be permitted to use those guidelines as evidence of a recognized hazard, or abatement feasibility, when no such showing was made when the Guidelines were promulgated.

Leaving those issues aside, the Guidelines cannot be used as evidence of a general duty clause violation here for additional, independent reasons. *First*, the Guidelines themselves explain that they "do[] not alter or determine compliance responsibilities" under the OSH Act, and "are not a new standard or regulation." Guidelines, Introduction; Guidelines at 3. The Commission should not use the Guidelines for a purpose that the Secretary has disavowed. *Second*, and as importantly, the 2004 Guidelines clearly focus on risks in hospitals, clinics, and the like—not on the risk of injury from job duties outside those contexts. *See* Guidelines at 6-7 (highlighting various issues, including use of hospitals for criminal holds, the availability of drugs or money at hospitals, poorly lit parking areas, and the like).[4]

The Secretary's efforts to hold an employer accountable for a general duty clause violation cannot be bolstered by relying on the Guidelines. And, in light of the lack of guidance that comes from case-by-case adjudication, the Commission should likewise be careful not to use this case to "establish [new] rules of widespread application" dealing

[4] Earlier this year, the Secretary revised the Guidelines to explicitly include "field work" and "social workers who make home visits" within their ambit. *See* Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA Publication 3148-04R (2015). But those Guidelines cannot have applied to Integra's conduct in 2012 and 2013—the time period that is the subject of the Secretary's citation.

with face-to-face customer interactions. *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981).

IV. CONCLUSION

The Secretary's attempt to hold an employer responsible for the inherent risk of criminal behavior by third parties would vastly and improperly expand the traditional scope of the general duty clause. Such "adventurous enforcement of the general duty clause" is not the answer to alleviating hazards associated with face-to-face customer interactions. *Nat'l Realty*, 489 F.2d at 1267 n.37. The Commission should reverse the ALJ's decision and vacate the Secretary's citation.

Date: October 28, 2015

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CERTIFICATE OF SERVICE

This is to certify that on this 28th day of October 2015, a true and correct copy of the foregoing Brief was filed by hand with the following:

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