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Workplace Safety and Health Update

Week of ***March 31, 2014***

Union Reps on OSHA Inspections Seen as a Concern

On at least three occasions, organizers for the nation's second largest union have accompanied OSHA enforcement personnel on inspections at non-union worksites of a janitorial company that has resisted union affiliation. This is an old organizing tactic, repackaged for today's OSHA, with the agency's support.

Representatives from the Service Employees International Union (SEIU) participated in recent OSHA inspections at sites where employees of Professional Janitorial Service (PJS) were working, according to a report on watchdog.org. The union, however, had not been recognized as the employees' representative for collective bargaining at these locations. PJS is the largest non-union janitorial service in Houston and has been at odds with SEIU for the past seven years.

Unions seeking to go on OSHA inspections may want the opportunity to familiarize themselves with the employers' operations or to show employees they are identified with the federal government. This old union tactic from the 1980s or before was used in the mining industry with MSHA-regulated sites. While union representatives may add little or nothing in the way of expert technical insight to help OSHA, the theory used to support union entry requests, today's OSHA may not be focusing on this question in facilitating union entry at a union-free site.

The practice is unsettling to employers because it gives union representatives direct access to employer premises that otherwise they would not enjoy and opens employers up to harassment from unions trying to gain inroads with their workers. "Unions are very adept at using the apparatus of government to harass companies that don't do what they like," said James Sherk, a senior policy analyst in labor economics at the Heritage Foundation, as quoted by watchdog.org. "That's the concern."

A 2013 union letter to OSHA sought clarification on non-employee, union reps participating in inspections. OSHA responded that the OSH Act authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by [the employer's] employees." 29 U.S.C. § 657(e). Therefore, a person affiliated with a union or a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees. This right, however, is qualified by the Secretary's regulations, which allow OSHA compliance officers (CSHOs) to exercise discretion over who participates in workplace inspections "***for the purpose of aiding such inspection.***" 29 U.S.C. § 657(e) (emphasis added).

OSHA also responded that its regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, "but only … to allow OSHA to manage its inspections…. They allow the Secretary or her authorized representative (the compliance officer) conducting the inspection to determine who can participate in an inspection. See 29 C.F.R. §§ 1903.8(a)-(d)." Further, OSHA believes that union representatives may file complaints on behalf of an employee, request workplace inspections, participate in informal conferences to discuss citations, contest the abatement period in OSHA citations, and participate in contest proceedings. Critics complain that rather than making these pronouncements through a "back-door"

process, OSHA should have undertaken notice-and-comment rulemaking.

The OSHA visits to the janitorial company resulted in at least $14,000 in fines against PJS. Inspectors were summoned based on complaints that PJS had failed to provide personal protective equipment. The allegations proved meritless, but PJS was cited for minor infractions, including a lack of paperwork, onsite informational posters and a minor training violation, according to a PJS spokesperson. PJS said it had not had an OSHA citation in the previous 26 years.

There are strategic options for union-free employers faced with OSHA site entry demands for union representatives, but they should be closely coordinated by counsel, considering all of the facts and circumstances of the situation.

Supervisor Not an Agent under Mine Act

An hourly employee who supervised a four-person team, but had no control over hiring, selecting or disciplining team members, is not an agent under the Mine Act, a judge has ruled.

An "agent" is any person charged with responsibility for the operation of all or part of a mine or the supervision of miners there (Section 3(e) of the Act). In prior rulings, including a precedent setting case won by Jackson Lewis shareholder, Henry Chajet, Martin Marietta Aggregates, 22 FMSHRC 633 (May 2000), the Federal Mine Safety and Health Review Commission has focused on a miner's job functions, not his title, in determining questions of agent status.

Administrative Law Judge James Gilbert said a process manager working for Taft Production Co., a cat litter producer in California, was not an agent based on his job duties. While the employee gave his team members tasks to complete and supervised them, he neither hired nor selected them for his team. Personnel issues were handled by the manager's boss. In addition, Gilbert said, "No evidence was presented that [manager] was responsible for the safety of his team or for ensuring compliance with mandatory safety standards."

Finding that the manager's duties "weigh more heavily toward a rank and file miner," Gilbert determined he was not an agent.

In addition, during an inspection in August 2012, MSHA cited the employer for four housekeeping violations. Gilbert upheld all of them and concurred with MSHA's $3,321 assessment.

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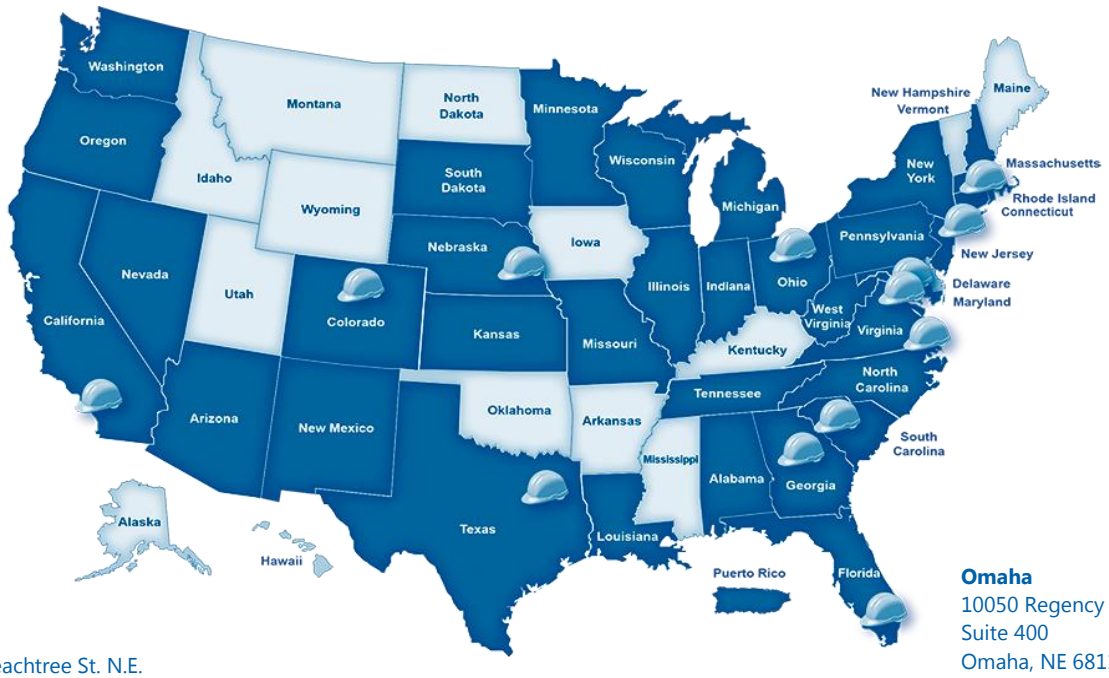

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