

OSHA's New Walkaround Rule Raises Unionization, Constitutional Concerns for Employers

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The U.S. Department of Labor has announced a final rule that will reshape the future dynamic of Occupational Safety and Health Administration (OSHA) inspections. The [rule](#) aims to clarify (but instead expands) the rights of employees to authorize third-party representatives to accompany an OSHA compliance safety and health officer (CSHO) during a workplace inspection. It is scheduled to take effect on May 31, 2024.

Background

Currently, under 29 C.F.R. Section 1903.8(c), employee-authorized third-party representatives are allowed to accompany OSHA workplace inspections. However, the regulation specifies that the employee-authorized representative “shall be” an employee of the employer. Section 1903.8(c) provides a caveat that the CSHO can allow a third-party representative “such as an industrial hygienist or a safety engineer” if they determine good cause is shown the third-party is reasonably necessary.

OSHA has long permitted employee representatives to be third parties under Section 1903.8(c). But in 2017, a district court ruled that Section 1903.8(c) only permitted employees of the employer to be authorized as representatives. The court rejected OSHA’s interpretation as “flatly contradict[ing]” the regulation because the first sentence of Section 1903.8(c) stated that employee representatives “shall be employees of the employer.” *Nat’l Fed’n of Indep. Bus. v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666, at *11 (N.D. Tex. Feb. 3, 2017). Even so, the court acknowledged that the Occupational Safety and Health Act does not limit who can serve as an employee representative and that OSHA’s historic practice was a “persuasive and valid construction” of the Act.

Expanded Representation Rights

The final rule modifies Section 1903.8(c). First, in response to the district court’s decision, the final rule clarifies that employee representatives may be an employee of the employer *or a third party*.

Second, it clarifies that a third-party representative authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO’s inspection. The third-party employee representative(s) may accompany the CSHO when, in the judgment of the CSHO, good cause has been shown why they are reasonably necessary to aid in the inspection. A third-party representative may be reasonably necessary to aid the inspection because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills. But the revisions note that the options for third-party representation during OSHA inspections are not limited to only individuals with skills and knowledge similar to that of the two examples (industrial hygienist or safety engineer) provided in the prior regulatory text. The regulations require no specific qualifications for employer representatives or for employee representatives who

are employed by the employer.

Impact on Workplace Safety

OSHA believes that these changes will enhance the effectiveness of workplace inspections. By allowing employees to select representative(s) of their choice, the agency hopes to ensure that it obtains the necessary information about worksite conditions and hazards. The agency believes this is a critical step toward creating safer workplaces, as employee representation during inspections plays a vital role in identifying and addressing potential safety issues.

Impact on Maintaining Property Rights, Excluding Outside Third Parties

Employers always have been permitted to control their property interests and prohibit outside third parties from trespassing on their property. They also have the right to be free from unlawful searches and seizures under the Fourth Amendment of the U.S. Constitution. OSHA allowing a third-party to enter an employer's property to participate in an inspection may be considered government action that violates the Fourth Amendment. The expansion of Section 1903.8(c) eliminates that right for any employer subject to an OSHA inspection. The impact is significant. Whether it be losing the right to maintain confidentiality of plant operations, trade secrets, or proprietary practices to allowing third party union organizers access to an employer's private workplace and to its employees. If the final rule ultimately goes into effect in May, it seemingly allows a third-party union representative during an organizing campaign with an election scheduled to report a safety concern to OSHA and then gain direct access to an employer's workplace during the inspection that follows. This would give union organizers unprecedented access. Further, while the general counsel of the National Labor Relations Board (NLRB) has already set out to ban employers from holding captive audience meetings with their employees, broadening unions' access rights to employer property remains a priority for the NLRB in 2024. This new OSHA rule may signify a collaborative effort between the agencies to accomplish a top priority for this administration: promoting unionization.

Potential Challenges

The final rule may face legal challenges. OSHA highlights some union comments about how helpful union representatives can be to the CSHOs during inspections where there are technical or complex issues, hazards with which the CSHO may be unfamiliar or the CSHO needs education on industry practices. However, this begs the question of why the employer cannot provide such information to OSHA? The reality is that the agency often views the employer and its management as self-interested and discounts what they have to say. But what criteria are CSHOs in the field going to use to determine, in their "judgment," if a third party would be helpful? Will they account for potential biases and non-safety agendas these third parties might have in making these determinations? CSHOs do have a challenging job. But perhaps the agency should spend its resources on training up its CSHOs to be able to handle more technical or complex inspections rather than creating this controversial rule which raises constitutional and due process concerns.

Organizations and individual employers are likely to file lawsuits seeking to enjoin this rule, given the potential adverse impact on businesses. It will be crucial to monitor these developments as they unfold because of their potential effect on the rule's implementation and enforcement. Even if the rule is not immediately enjoined and takes effect, some employers are likely to require OSHA to get a warrant to enter their property for an

inspection. Employers can move, for example, to quash the warrant as an unlawful intrusion, a violation of the employer's constitutional rights, and not necessary or narrowly tailored to worker safety.

Conclusion

This regulation opens the worksite door to experts in workplace safety and health, individuals with specific language skills, unions, plaintiff's attorneys, and more to take on an active role in inspections, and where they previously may not have had access.

Assistant Secretary for Occupational Safety and Health Doug Parker stated, "Worker involvement in the inspection process is essential for thorough and effective inspections and making workplaces safer." Parker added, "The Occupational Safety and Health Act gives employers and employees equal opportunity for choosing representation during the OSHA inspection process, and this rule returns us to the fair, balanced approach Congress intended."

If you have any questions, please reach out to a member of the Workplace Safety and Health practice group or the attorney with whom you usually work.

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