



5 Steps for Employers as OSHA Plans to Allow Union Walkthroughs of Non-Union Worksites

Insights

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Federal safety officials are gearing up for an aggressive enforcement agenda in 2023 – including a new proposal that would give workers and certified bargaining units the right to designate a worker or union representative to accompany an OSHA inspector during a facility walkaround — *regardless of whether the representative is your employee or the facility is a union shop*. The agency intends to issue its Notice of Proposed Rulemaking (NPRM) in May, but you can plan ahead. What do you need to know about this upcoming proposal, and what are the five key steps you can take to prepare?

We've Been Here Before

OSHA had a similar rule in place during the Obama administration — through a 2013 letter of interpretation known as the “Fairfax Memo” — until it was rescinded by the Trump administration. In the Fairfax Memo, OSHA declared (without going through the formal rulemaking process) that “workers at a worksite without a collective bargaining agreement [may] designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative.”

OSHA’s position in 2013 was that the OSH Act authorizes participation in the walkaround portion of an OSHA inspection by “a representative authorized by [the employer’s] employees.” Notably, however, limits are set by OSHA’s own regulations. In fact, an agency regulation indicates that the employee representative must be employed by the employer who controls the worksite being inspected.

Through the Fairfax Memo, however, OSHA took the position that even this regulation allows the agency’s compliance officer to decide to allow a non-employee to participate in an inspection of an employer’s worksite if it “is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.”

OSHA went even further to say that, in its view, these representatives are “reasonably necessary” whenever they will make a positive contribution to a thorough and effective inspection. Effectively, OSHA amended its regulation to shift the focus from requiring OSHA to find that such representatives are necessary to have “an effective and thorough” inspection to having such representatives whenever they “make a positive contribution” to OSHA’s inspection — which is a much lower bar.

Business groups challenged the Fairfax Memo and OSHA's use of non-employee representatives — and OSHA eventually rescinded the memo and abandoned the practice.

Now, OSHA is signaling that it will revive the rule announced in the Fairfax Memo, though the exact proposed rule will not be announced until May's NPRM.

What Can Employers Do? Here's Your 5-Step Action Plan

As we noted in 2013 when the Fairfax Memo was issued, there is an obvious concern that such a policy will encourage unions to get involved in OSHA inspections and complaints in non-organized facilities as a means of gaining access to the facility when they normally would not have such access. This change in policy could be a big boost to union organizing and has been widely applauded by most, if not all, labor unions.

It's now 10 years later, and as we recently discussed here, strike activity and union organizing is expected to increase significantly again in 2023. Thus, it's important for employers to take action in light of this upcoming NPRM.

Once OSHA issues its NPRM to revive the rule announced in the Fairfax Memo, it will almost certainly face legal challenge. In the meantime, however, you should take the following five steps:

1. Revisit the procedures you have in place for when OSHA shows up to conduct an inspection

Review these comprehensive OSHA Inspection FAQs, then put together a plan for when OSHA arrives at your worksite. For example, designate one supervisory employee to be the contact person when OSHA arrives and ensure OSHA's inspector stays within the inspection's scope. A designated manager or coordinator should stay with each OSHA compliance officer at all times during the inspection, except during interviews with non-supervisory employees who do not request a manager's presence. It is a strategy question whether to use the safety manager in this role. Be sure you are ready to take side by side photos, sampling, and tests when OSHA requests to do so.

2. Protect trade secrets

Even if your procedures during an OSHA inspection are not fully developed, a top priority is to ensure that site management knows what areas of the worksite contain trade secrets or other confidential commercial information that you would not want a third-party to see or access. For those areas, employers should insist that no third-party access these areas, and OSHA's photos should be marked "trade secret."

3. Establish or recommit to a safety committee

If your worksite does not have a safety committee already in place, consider establishing one because that committee arguably would hold the "representative" role in walkaround

inspections, and employees may designate a safety committee member as their representative instead of a union member. Note that when setting up safety committees, employers must be aware of the National Labor Relations Act and unfair labor practice concerns if the safety committee is not properly implemented. So, you'll want to seek legal counsel before implementation.

4. Decide if the third-party representatives will be allowed on site

After you have followed the steps above, you may decide as a matter of policy to refuse requests for third parties to accompany OSHA. One option is to advise the OSHA compliance officer that they may conduct their inspection, but you are choosing to deny entry to any third party. You have the Fourth Amendment right to refuse a walkaround inspection on any basis and require OSHA to get a warrant to conduct its inspection. But you should note that OSHA may treat this refusal to allow a third-party on-site as a "refusal of entry" and seek a warrant. Seek legal counsel to decide if refusing entry is the right option for you.

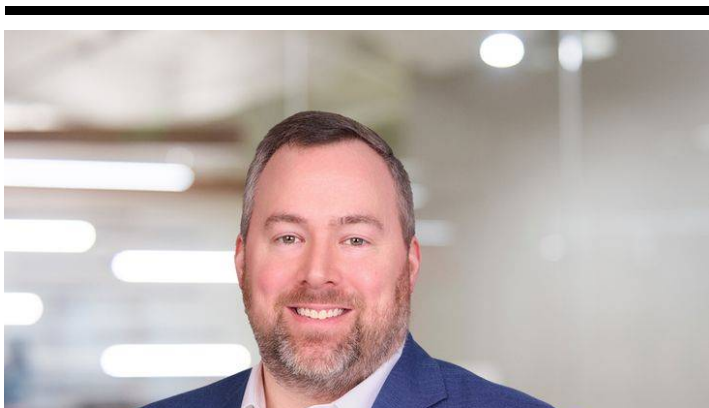
5. Prepare for an increase in labor actions and union organizing

See our [prior Insight](#) for a thorough discussion of what is happening across the country on the labor front and things you can do to immediately and efficiently respond to union organizing and work stoppages. On the front end, your action plan may include maintaining effective lines of communication with employees, consistently applying work-related policies and procedures, having an effective complaint resolution process in place, and proactively reviewing compensation packages to ensure you remain competitive.

Conclusion

You should understand your rights if OSHA arrives at your worksite and have a plan before you are asked to allow a non-employee to accompany an inspector at your worksite. If you have any questions, contact the author of this Insight, your Fisher Phillips attorney, or any member of our [Workplace Safety Practice Group](#) or [Labor Relations Practice Group](#). Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information on OSHA issues.

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