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OSHA'S PROPOSED RULE WOULD ALLOW UNION WALKTHROUGHS OF ALL WORKSITES: YOUR 7-STEP SURVIVAL GUIDE

Insights
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Federal safety officials have just made good on one of their promises by issuing a proposed rule that would give a designated union representative the right to accompany an OSHA inspector during a facility walkaround — *regardless of whether the representative is your employee or the facility is a union shop*. What do you need to know about this proposed rule released today, what can you do in response, and what are the seven key steps you can take to prepare?

What is the Proposed Rule?

OSHA's new proposed rule alters the current regulation by removing the explicit regulatory requirement that an employee representative be an employee of the employer being inspected. Instead, the proposed rule now states that "the representative(s) authorized by employees may be an employee of the employer or a third party." The proposed rule also authorizes a third party who can be used to assist OSHA during an inspection based on their "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills."

As we discussed earlier this year, the proposed rule mirrors a similar rule in place during the Obama administration — implemented through a 2013 letter of interpretation known as the "Fairfax Memo" rather than going through the formal rulemaking process OSHA is using now — until it was rescinded by the Trump administration in 2017. In the Fairfax Memo, OSHA declared that "workers at a worksite without a collective bargaining agreement may designate a person

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affiliated with a union or a community organization to act on their behalf as a walkaround representative."

OSHA's proposed rule mirrors its position in 2013 that the OSH Act authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by [the employer's] employees," without any limit on whom the employees can choose for a representative. Similarly, the proposed rule's reasoning relies on the OSHA Act and its longstanding regulation that 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."

This proposed rule goes even further than OSHA's position in 2013, where OSHA contemplated only non-employees assisting in the inspection if they were an industrial hygienist or a safety engineer. The new proposed rule would allow employees to even designate third-party interpreters to accompany OSHA during the inspection of a workplace.

When Will the Proposed Rule Go Into Effect?

Most proposed rules go into effect no earlier than six months from when they were proposed. OSHA has opened up a comment period through October 30 for employers, employee advocates, unions, and other groups to submit public comments on the proposed rule. Then, the agency will finalize and publish its final rule in the Federal Register with an effective date noted in that final rule.

Even if the proposed rule becomes a final rule, remember that business groups challenged the Fairfax Memo and OSHA's use of non-employee representatives till the practice was abandoned by OSHA in 2017. This time around, the final rule will need to be formally challenged in the court system to have the rule's enforcement stayed, much like OSHA's vaccine ETS and the Federal Contractor Vaccine Mandate.

Remember also that if you do business in a state where a state agency rather than federal OSHA enforces the OSH Act (such as California, Kentucky, North Carolina, or elsewhere), those state agencies' employee representative regulations and timelines to adopt the eventual federal rule may differ.

Do Employers Have a Say in OSHA's Rulemaking Process?

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Yes. Starting August 30, employers may submit comments on the proposed rule. Comments, along with any submissions and attachments, should be submitted electronically at the Federal e-Rulemaking Portal. Follow the instructions online for making electronic submissions. After accessing "all documents and comments" in the docket (Docket No. OSHA-2023-0008), check the "proposed rule" box in the column headed "Document Type," find the document posted on the date of publication of this document, and click the "Comment Now" link.

What Can Employers Do? Here's Your 7-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 continue to increase significantly. Thus, it's important for employers to take action in light of this proposed rule. Here's a seven-step action plan:

1. Know Your Rights

Keep in mind that employers have Fourth Amendment and state property rights, and nothing in the proposed new rule changes that. Even under the new rule, OSHA can only inspect worksites with the employer's consent unless the agency has a warrant. Therefore, employers are still entitled to control how OSHA accesses company property and the areas covered during an inspection unless the agency has a warrant. Work with your counsel if you have questions and to understand the ramifications that might result if you push the agency representatives to demand a warrant.

2. Revisit Your Procedures 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

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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.

3. Know How to Survive an OSHA Inspection

Review our "Focus 4" Threshold Tips for Surviving an OSHA Inspection that every employer should know: (1) don't permit any manager or supervisor interviews by OSHA on the day the agency arrives; (2) don't give federal OSHA any documents other than your OSHA 300 logs, 300A summaries, 301 forms, and relevant safety data sheets (SDS) on the first day of the inspection; (3) take the OSHA inspector straight to and straight from the area of the referral, complaint, or even the pertinent area of an emphasis program inspection; and (4) ensure your employees are refraining from any high hazardous activities occurring while OSHA is present.

4. Protect Your 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, you should insist that no third party access these areas, and OSHA's photos should be marked "trade secret."

5. Establish or Recommit to a Safety Committee

If your worksite does not have a safety committee already in place, consider establishing one ASAP. 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, you 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.

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6. Decide if the penalties for refusal warrant a denial of a Third-Party Representatives Access to your worksite

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.

7. 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. For the most up to date information, make sure you review our Labor Relations Insights, since there has been much activity from the NLRB in the recent days and weeks. 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 authors 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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