



Will Adding Non-employees to OSHA Inspections Improve Safety?

Insights

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Non-employees accompanying OSHA on an inspection of a non-union work site?

Many employers are learning that third parties can use safety issues pressure employers by harming the company's reputation and driving a wedge between management and employees. The most recognized effort has been UNITE-HERE's years long campaign against Hyatt in which they have emphasized alleged safety problems associated with housekeeping employees; many of whom are also members of minority groups. However, one should not assume that unions are the only third parties using worker safety issues to bring pressure on businesses. Occupy Wall Street clones and a host of issue-specific organizations have used safety to attack highly visible companies. Unfortunately, because these groups are not composed of the affected workers and may have agendas unrelated to safety, they may distract OSHA, employers and unions from the business of assuring workplace safety.

OSHA has now startled employers by issuing an "Interpretation Letter," which departs from 40 years of practice, and expands the right of non-employees to join OSHA inspections.

The Contents of OSHA's February 2013 Letter

The recently released February 21, 2013 Interpretation Letter to a United Steelworker safety representative addressed:

whether workers at a workplace without a collective bargaining agreement may authorize a person who is affiliated with a union or a community organization to act as their representative under the Occupational Safety and Health Act (OSH Act). This would include "representing the employee(s) as a personal representative" and "accompanying the employee on an OSHA inspection" in a non-unionized workplace.

OSHA answered, in part:

The OSH Act authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by [the employer's] employees.".... Therefore, a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees to serve as their representative. 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.

The Letter disavowed and withdrew a March 7, 2003 Interpretation Letter suggesting that the OSHAct should impose more restrictions on non-employee involvement in inspections than OSHA's new interpretation...

OSHA recognizes that there has been some confusion about these issues arising from a March 7, 2003, OSHA letter to Milan Racic. Although this letter addressed an issue related to your inquiry, it is important to explain the distinction between the situation discussed in that letter and your letter.

The Racic letter merely states that a non-employee who files a complaint does not necessarily have a right to participate in an inspection arising out of that complaint. It does not address the right of workers at a facility without a collective bargaining agreement to have a representative of their own choosing participate in an inspection. To the extent it has been interpreted to prohibit such a right, it is inconsistent with the OSH Act and with OSHA's regulations. Because of the confusion it has engendered, OSHA is withdrawing the Racic letter.

The following language from the disavowed letter is interesting:

.... 1903.8(a) says in part:A representative of the employer and a representative authorized by his (sic) employees shall be given an opportunity to accompany the [CSHO] during the...inspection...for the purpose of aiding such inspection... [clarification added].

1903.8(b) says in part: [CSHOs] shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees.... If there is no authorized representative of employees, or if the [CSHO] is unable to determine with reasonable certainty who is such representative, he (sic) shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

Section 1903.8(c) says in part: The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the [CSHO], good cause has been shown why accompaniment by a third-party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough... inspection... such third-party may accompany the [CSHO] during the inspection [emphasis and clarification added].

Section 1903.8(d) says in part: [CSHOs] are authorized to deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection. The right of accompaniment in areas containing trade secrets shall be subject to the provisions of 1903.8(d) [clarification added].

*According to paragraph A.3.f.(3) of Chapter II of the OSHA Field Inspection Manual (FIRM) (copy of pages enclosed): **Where employees are not represented by an authorized representative, where there is no established safety committee, or where employees have not chosen or agreed to an employee representative for OSHA inspection purposes whether or not there is a safety committee, the CSHO shall determine if any other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, the CSHO shall consult with a reasonable number of employees during the walkaround.*** (my emphasis).

Paragraph A.3.h. says: The CSHO may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection.... If disruption or interference occurs, the CSHO shall use professional judgment as to whether to suspend the walkaround or take other action. The Assistant Area Director shall be consulted if the walkaround is suspended. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

As you can see, neither the OSHAct, the regulations in 29 CFR §1903.8, nor the FIRM make any provision for a walkaround representative who has filed a complaint on behalf of an employee of the workplace. Therefore, if a representative from your union obtains written authorization from a current employee of a workplace to file a work-place safety and health complaint with OSHA on his or her behalf, that representative does not have a right to accompany the CSHO on the inspection walkaround.

Section 1903 (b) describes what OSHA should do when no union represents employees, and that provision cited in the 2003 letter does not seem to easily fit the Secretary's new interpretation. One could suggest that instead of involving a third-party, the Compliance Officer is instead supposed to conduct a representative number of employee interviews...

If there is no authorized representative of employees, or if the [CSHO] is unable to determine with reasonable certainty who is such representative, he (sic) shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

Read the standard and the Radic letter, and then consider the new February 21, 2013 letter and OSHA's internal "*Talking Points*" for a better understanding of OSHA's reasoning.

Does This Interpretation Make Sense?

We'll outline a bit of the history associated with non-employee involvement in OSHA processes, and leave a more detailed legal analysis for another time.

The OSHAct and standards provide specific rights to employee "representatives" in a number of circumstances. The most commonly invoked provisions involve employee access to medical information, including medical records under 1910.120(b), and to OSHA 300 Logs under 1904.35. Current and former employees, their recognized union, and their personal representatives do have

certain rights. In these standards, OSHA makes distinctions between an employee's "*personal representative*" and their "*authorized bargaining representative*." As examples...

1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records? Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

1904.35(b)(2)(i) Who is an authorized employee representative? An authorized employee representative is an authorized collective bargaining agent of employees.

1904.35(b)(2)(ii) Who is a "personal representative" of an employee or former employee? A personal representative is:

1904.35(b)(2)(iii)(A) Any person that the employee or former employee designates as such, in writing; or

1904.35(b)(2)(iii)(B) The legal representative of a deceased or legally incapacitated employee or former "employee."

Section 1903.35 broadly defines "*employee representative*," but this application seems intended for employees seeking medical records ostensibly involving the current or former employee.

Section, 1903.8(b), which deals with OSHA inspections, restricts the occasions when it is appropriate to involve a non-employee in an OSHA inspection. One can read 1903.8(a) as treating involvement of non-employees as an exception rather than the rule:

- Compliance Safety and Health Officers shall be in charge of inspections and questioning of persons.*
- A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection.*
- A Compliance Safety and Health Officer may permit additional employer representatives and additional representatives authorized by employees to accompany him where he determines that such additional representatives will further aid the inspection. A different employer and employee representative may accompany the Compliance Safety and Health Officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.*

OSHA's new interpretation may run counter to the intent of the OSHAct and the standards. In other words, will including individuals who are not employees or representatives of a duly selected union, and who may have agendas other than the workers safety, genuinely "further aid the inspection?" Or will this process impede inspections and distract Compliance Officers, workers, and the employer from fulfilling their duties under the OSHAct?

Another concern is how does the unfortunate OSHA Compliance Officer determine that the proffered person “represents the employees?” Does this mean that a third-party need only represent one employee, as in the case of medical record requests? Or does this mean that the Compliance Officer must use some procedure to determine if the third-party represents all or a majority of the employees? Finally, doesn't the National Labor Relations Act assign the NLRB the responsibility to determine whether a union represents the appropriate bargaining unit? Maybe this is why the Radic letter proposed the use of employee interviews where no representative was present? These are not idle musings....

Section 1903.8 (c) defines possible “*representatives authorized by employees.*”

The representative(s) authorized by employees shall be employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third-party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third-party may accompany the Compliance Safety and Health Office during the inspection.

Employers will probably debate the intent of 1903.8 before fact finders, but a simple reading of this section suggests that the drafters were thinking in terms of professionals employed by a recognized bargaining agent. Certainly, one is hard-pressed to find instances over OSHA's years of existence where OSHA or employers treated the standard as allowing a non-employee to accompany the inspection who was not affiliated with a bargaining agent.

OSHA's internal “*Talking Points*,” which have been freely shared by some Regions attempts to reassure Compliance Officers that it is actually common or at least, not uncommon, for third parties to so participate, but the explanation seems a bit half-hearted. After first stating the recognized practice that “*workers with collective bargaining agreements have selected experts from within their union (such as an industrial hygienist from the national headquarters) to act as the walkaround representative,*” the *Talking Points* say...

Workers without collective bargaining agreements have selected individuals from unions or other organizations to act as walkaround representatives. OSHA has generally agreed, and in a number of cases has convinced employers to withdraw their objections to allowing this. For example, during the 2012 Hershey/Exel inspection, members of the National Guestworkers' Alliance served as walkaround representatives. (my note: the National Guestworkers' are well known for their efforts against MacDonald's).

So, Will This Interpretation Improve Worker Safety?

We all have our philosophical biases, but putting preconceptions aside, one worries that widespread application of this Interpretation will overwhelm an Agency which is already understaffed and does not need more distractions from its core mission.

The Interpretation imposes an unreasonable burden on Compliance Officers and their supervisors to make a complicated legal determination where the response may turn a cooperative inspection into a dispute requiring warrants and court appearances, or trigger public attacks by enraged third parties. And let's be clear, unions seeking to organize a work site are not the only possible interveners. The *"Occupy Wall Street"* movement has generated spin-off groups, many of whom do not have an ounce of the understanding of the inspection process enjoyed by a union. No one is naïve enough to believe that a group will not hijack the workplace safety process for reasons wholly unrelated to protecting workers.

OSHA is a professional organization and the public might be surprised at how smoothly most inspections progress, even when the work site is unionized. That efficiency allows OSHA to conduct more inspections because they do not have to deal with warrants, public attacks, and constant interruptions by third parties who do not understand or care about the effectiveness of the OSHA system. One suspects that there are many people inside OSHA who are worried about this new interpretation.

Next Steps?

We'll leave strategy discussions for later after all sides have chewed through the OSHAct and legislative history, and thoroughly considered the legal issues.

However, one point is already clear. OSHA admits that each third-party request should be dealt with on a case-by-case basis. Employers need to prepare now by developing a procedure, and by communicating this new wrinkle to each work site, just as they should already have briefed site management on how to respond to an inspection by OSHA or any other governmental organization.

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