OSHA: Union Representatives May Participate In Walkaround Inspections In Non-Union Companies

Insights
5.28.13

In a new letter of interpretation publically released on April 5, 2013 the Occupational Safety and Health Administration (OSHA) announced for the first time that during an OSHA inspection of non-union worksites, employees can be represented by anyone selected by the employees including outside union agents.

Background
Until now, OSHA's policy has been to allow union representatives to be the "employee representative," but only when the inspection involves a unionized workplace. Section 8(e) of the Occupational Safety and Health Act of 1970 specifically stated the following regarding worksite inspections and third-party representatives:

> [A] representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the ... [OSHA] representative during the physical inspection of the workplace ... for the purpose of aiding the inspection. Where there is no authorized employee representative, the... [OSHA] representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

In other words, historically under the Act, the union had to be a recognized representative – in other words a union "certified" by the National Labor Relations Board to act as the employee representative in an OSHA inspection.

OSHA's New Union-Supported Policy
According to OSHA's new interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. The interpretation letter goes on to state that "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."

OSHA is utilizing a novel analysis in justifying its new determination that the Act and OSHA inspection regulations explicitly allows walkaround participation by an employee representative who

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

is not an employee of the employer when, in the judgment of the OSHA compliance officer, such representation is "reasonably necessary to the conduct of an effective and thorough physical inspection."

Under this expansive interpretation (which fails to specifically define who is "a person" affiliated with a union or community representative), not only can union organizers be designated as the "employee representative" but also individuals such as community activists or perhaps even plaintiff lawyers could participate in an OSHA inspection on behalf of some of the employees.

Obviously, there is concern that OSHA's new policy may encourage unions to get involved in OSHA inspections and complaints in non-organized facilities as a means of gaining access to the facility, where they normally would not have 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.

OSHA's new interpretation actually goes directly against its own inspection regulation. Section 1903.8 of the OSHA inspection regulations states in part that:

> (b) If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.
> (c) The representative(s) authorized by employees shall be an employee(s) of the employer...

In addition, OSHA's current Field Operations Manual (FOM) does not support its new interpretation. With respect to walkaround rights, the FOM states:

VII. Walkaround Inspection.

> A. Walkaround Representatives.
> Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee.
> 1. Employees Represented by a Certified or Recognized Bargaining Agent.
> During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in a walkaround.
> 2. No Certified or Recognized Bargaining Agent.
> Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on a walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

3. Safety Committee.

> Employee members of an established plant safety committee or employees at large may designate an employee representative for OSHA inspection purposes."

The new interpretation letter also raises many questions that have not yet been addressed and may lead to legal issues including:

- who is an appropriate employee representative;
- who makes the determination that the selected individual(s) is an appropriate employee representative;
- do the employees get to vote for the employee representative and does the selected individual have to receive a majority of the employee votes at the facility;
- if one or more employees object to the selected representative, does it void the selection;
- do different groups of employees get to select their own representative;
- how many employee representatives can be present during an investigation;and
- what rights do the non-employee representatives have during the inspection? (i.e. being present during managers and supervisor's interviews).

Possible Responses To OSHA's New Interpretation

It's important to note that worksites that have formal safety committees in place may be less susceptible to the application of this new interpretation in its OSHA walkaround inspection process. Under the FOM, the safety committees can designate the employee representatives for the facility, which would make it more difficult for the OSHA inspector to choose an outside union organization. If your company does not have a safety committee already in place, you may want to consider establishing one as that committee arguably would hold the "representative" role in walkaround inspections. But when setting up safety committees employers should be aware of the National Labor Relations Act and unfair labor practice pitfalls if the safety committee is not properly implemented.

You should also consider what trade secret, confidentiality, and safety and health measures should be in place before allowing any third party to have access to the worksite. If the OSHA inspector does attempt to bring in a third-party as a part of the inspection, you should attempt to ascertain the reasons for that third-party selection and why the person's presence is "reasonably necessary" in conducting the OSHA inspection.

What many employers do not know, is that they have the right to refuse a walkaround inspection on any basis and require OSHA to get a warrant. One option for employers is to advise the OSHA compliance officer that it will permit OSHA to conduct its inspection but it is refusing entry of any third party. OSHA may treat this as a "refusal of entry" and seek a warrant. Since OSHA's request

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

directly contradicts the Act and OSHA regulations, the federal district court judge reviewing the request for the warrant may not issue it.

Remember that you will not be allowed to participate in or argue on their behalf in the "ex parte" warrant application proceedings. If the warrant is issued you would have to decide whether to move to quash the warrant or otherwise oppose it if OSHA attempts to enforce the warrant in federal court. While requiring a warrant might not be the most favorable approach for some employers, it may prevent the excess use of walkaround inspections for organizing non-union workforces if the warrant is ultimately quashed.

The facts are clear that the new interpretation letter directly contradicts the express language of the Act and OSHA's regulation, and adds little, if anything, to improving safety and health in the workplace. What it does is open the door for potentially allowing an OSHA inspection to be improperly utilized as a union organizing tactic. This is one more reason why all employers must know all of their legal rights during an OSHA worksite inspection.

Fisher Phillips can work with you to develop a detailed strategy and protocol to respond to either OSHA or an employee's request for participation of non-employee representations during an OSHA inspection. For help with ensuring that your business or company are in compliance or for advice concerning any of OSHA's safety and health standards, contact your regular Fisher Phillips attorney or any of the lawyers in our Workplace Safety and Catastrophe Management Group.

This Legal Alert provides highlights of certain specific federal regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.