

Who Invited You? OSHA Reverses Itself on Fairfax Memo

2 min read

May 4, 2017

By: Tom H. Luetkemeyer

OSHA recently announced it will no longer bring union representatives to inspections of non-unionized workplaces. As a result, barring a designation by an employee (which I'll discuss further below), non-unionized employers no longer have reason to fear that an OSHA compliance officer will appear at the door accompanied by a union representative on an inspection or walk-around.

To provide some background, back in February 2013, OSHA announced in what has come to be known as the infamous "Fairfax Memo," that it had the right to invite union advocates to inspections of non-union work sites. That right flowed from its tenuous interpretation of language in the Occupational Safety and Health Act permitting OSHA to invite a union representative as a "representative authorized by the employer's employees." 29 U.S.C. § 657 (e).

That interpretation by OSHA has always been interpreted by employers and employer associations to be a "stretch," especially when one considers that in a non-unionized work setting, the employees have not selected any union as its exclusive bargaining representative. The National Federation of Independent Businesses challenged OSHA on the Fairfax Memo and filed suit in the United States District Court for the Northern District of Texas. In response to the lawsuit, and perhaps also in response to change in control of the executive branch of government, OSHA recently notified the Federation that the Fairfax Memo had been rescinded, meaning OSHA is no longer allowed to bring union representatives on inspections and walk-arounds of non-unionized work settings. As a result of that action by OSHA, the Federation filed a motion to voluntarily dismiss its case.

Employers should be aware, however, that there are avenues for employees to select a representative to assist them in a walk-around or to act as their advocate in an inspection. In some cases, such an action might be very appropriate. For example, in a workplace populated by individuals who speak a variety of languages and not necessarily English, the presence of an experienced advocate might be something *the employees* would want. Another example would be a workplace where the employees are relatively unsophisticated in safety techniques. In those instances, the employees can exercise their prerogative to name an advocate or a designee to assist them and OSHA in the walk-around. However, that decision should be left to the employees, and OSHA compliance

officers should not be unilaterally deciding to invite union members on walk-arounds or safety inspections. The good news for employers is that OSHA is no longer assuming it has that independent right.

If you would like more information about OSHA inspections or OSHA generally, please contact [Tom Luetkemeyer](#) or your regular Hinshaw lawyer.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

OSHA, Unions, Occupational Safety And Health Administration