

The Department of Labor Announces New Final Rule Clarifying Employee Representative Rights During Workplace Inspections

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On March 29, 2024, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a final rule (Final Rule) amending regulations for workplace investigations. It clarifies that employees may authorize both employees and a non-exhaustive list of third-party non-employees to act as their representative and accompany OSHA Compliance Safety and Health Officers (CSHO) during physical workplace inspections.

What is the Occupational Safety and Health Act of 1970 (the OSH Act)?

The OSH Act, which was enacted to ensure healthy and safe working conditions, sets and enforces standards by providing research, information, education, and training in the field of occupational health and safety.

Under the OSH Act, OSHA is authorized to inspect and investigate places of employment. During such an inspection, employers and employees have the right to allow a representative to accompany OSHA during a walkaround.

What Does the Final Rule Entail?

OSHA [first proposed](#) to allow union officials and other non-employees to participate in workplace inspections in August 2023. The Final Rule adopted in March 2024 expressly states that participation by third parties in workplace inspections is not limited to individuals of a particular professional discipline (*i.e.*, industrial hygienists and safety engineers). Rather, appropriate third-party representatives may now include but are not limited to:

- interpreters,
- officials with advocacy groups or local safety counsels,
- individuals with industry-specific expertise, and
- union agents or representatives, *regardless* of whether the authorizing employee is represented by a union.

While there is no requirement under the Final Rule for other employees selected for representation to have certain qualifications, third-party non-employees are unqualified to serve as inspection representatives unless the assigned CSHO is satisfied that “good cause” has been shown as to why a third party’s participation in the investigation is “reasonably necessary” to ensure that OSHA may effectively inspect worksite conditions and hazards.

The Final Rule clarifies that a third-party non-employee’s representation may be reasonably necessary to ensure that an effective and thorough investigation is conducted if the individual possesses relevant experience with particular hazards or conditions or relevant language skills.

OSHA concluded that allowing third parties to accompany CSHOs during inspections better comports with the purpose of the OSH Act.

Eliminating the “Good Cause” and “Reasonably Necessary” Requirements

Additionally, OSHA expressed its disagreement with public comments in favor of eliminating the “good cause” and “reasonably necessary” requirements in the Final Rule. They determined that these requirements are supported by the broad authority of the Secretary of Labor.

Concerns Over Circumventing the National Labor Relations Act

Finally, with respect to public commenters who argued that the NPRM sought to circumvent the National Labor Relations Act (NLRA) by, in part, allowing union officials to be employee representatives in non-union workplaces, OSHA dismissed these labor concerns.

They concluded that the Final Rule does not conflict with the NLRA “because the NLRA and the OSH Act serve distinctly different purposes and govern different issues, even if they overlap in some ways,” and because the OSH Act “does not place limitations on who can serve as the employee representative.”

In support, OSHA explained that, unlike the NLRA, which generally does not require employers to admit non-employee organizers onto their property, the OSH Act “explicitly afford[s] employees the right to have a representative accompany OSHA” to aid in an inspection notwithstanding the representative’s employment status.

Further addressing this concern, OSHA noted that even if a representative deviates from the designated role of aiding in an OSHA inspection, 29 CFR 1903.8(d) gives CSHOs authority to terminate the representative's participation.

Of course, this raises the question of whether CSHOs are qualified to determine whether a third-party representative is using the opportunity to access a non-unionized workplace for ulterior motives. Employers would be wise to consult legal counsel in the event that an employee selects a union-affiliated third party to act as a representative during an upcoming workplace inspection.

What is Next for Employers?

The Final Rule becomes effective on **May 31, 2024**. Employers should review [OSHA's announcement](#) and the full details of the Final Rule [here](#).

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