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Open Doors: Navigating the Occupational Safety and Health Administration's New Walkaround Rule

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In this article, the authors review a new Occupational Safety and Health Administration (OSHA) rule that allows non-employee representatives to accompany OSHA inspectors during on-site inspections of private workplaces.

In a move aligned with President Biden's promise to be "the most pro-union president in American history," the Occupational Safety and Health Administration (OSHA) has published its updated Worker Walkaround Representative Designation Process Rule.¹ The new updates broadly allow non-employee representatives to accompany OSHA inspectors during on-site inspections of private workplaces.

BACKGROUND

Since its implementation in 1970, the Occupational Safety and Health Act (the Act) has permitted OSHA inspectors to conduct unannounced physical inspections of workplaces to assess compliance with safety and health regulations, called "walkarounds." Walkarounds may be triggered by employee or third-party complaints or at OSHA's discretion, and OSHA inspectors have no obligation to provide notice before showing up to conduct a walkaround.

Longstanding OSHA regulations authorize employers and employees to each appoint a representative to accompany and aid OSHA inspectors

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during walkarounds. The representative authorized by employees must “be an employee(s) of the employer,” unless, in the judgment of the inspector, “good cause” is shown as to why a third-party is “reasonably necessary to the conduct of an effective and thorough inspection of the workplace.” Employees may demonstrate “good cause” and “reasonable necessity” by demonstrating the third-party has skills and knowledge pertinent to OSHA’s investigation; for example, the rule provides that safety engineers and industrial hygienists likely have such skills and knowledge.

In 2013, in a memorandum that would later become known as the “Fairfax Memo,” OSHA opined that the OSH Act permitted employees to appoint a non-employee union or community member as their walkaround representative with the OSHA inspector’s approval. On the heels of several lawsuits challenging that policy, the Trump administration withdrew the Fairfax Memo in 2017.

NEW RULE

In the fall of 2023, OSHA proposed to incorporate the Fairfax Memo into the OSHA regulations. On March 29, 2024, despite vehement opposition from businesses and industry groups, OSHA announced² its plan to publish the final rule, which it published on April 1, 2024.

The final rule essentially incorporates the previously defunct Fairfax Memo, opening the workplace doors wide to any third-party appointed by employees as representative. In particular, the new rule specifies that “representative(s) authorized by employees may be an employee of the employer or a third party.” An employee representative may be appointed on an OSHA complaint form (on which the complaining party may indicate they are an authorized representative of employees) or by at least two employees during the investigation. In unionized workforces, the OSHA investigator will generally appoint a union representative as the employee representative.

No set number of employees are required to authorize an employee representative.

However, OSHA’s FAQs³ state that in workplaces with more than one employee, more than one employee is needed to authorize the representative. Employees and employers may object to a proposed representative, and inspectors have the ultimate authority to resolve these disputes. However, the rule does not provide any guidance for how inspectors should do so.

In addition, the new rule broadens the scope of individuals considered “reasonably necessary to aid in the inspection.” The two examples of “reasonably necessary” individuals (industrial hygienists and safety engineers) were deleted from the prior walkaround rule, and instead the rule broadly states that non-employees may be reasonably necessary

because of “relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills.” Under this revision, a third-party employee representative may be deemed necessary if they, for example, possess “language and communication skills that facilitate the gathering of information from employees.”⁴ Unsurprisingly, several unions have voiced their support for this new rule.⁵

The new rule includes some limits to the employee representative’s behavior during walkarounds. OSHA inspectors may prevent individuals from participating in the walkaround inspection if their conduct interferes with the inspection or unreasonably disrupts operations.

Specifically, OSHA’s new rule and accompanying FAQs specify that employee representatives may not:

- Enter areas of the workplace that contain or could reveal trade secrets.
- Take photographs and measurements (unless permitted by a collective bargaining agreement).
- Prevent the OSHA inspector from carrying out responsibilities, including taking photos, video recordings, monitoring, and interviewing.
- Discuss matters unrelated to the inspection with employees.
- Wander away from the inspection.
- Engage in solicitation or distribution of materials.
- Observe the inspector’s interviews of employees unless the employee being interviewed specifically requests the employee representative attend.

However, the third-party representative may wear clothing promoting a union as long as such clothing does not interfere with the inspection.

PRACTICAL IMPLICATIONS

Labor Law

The new rule’s broad definition of “reasonably necessary” provides unions with a new foothold into both unionized and non-unionized workforces. Indeed, the preamble of the new rule explicitly states that OSHA will allow a wide variety of third parties to represent employees,

including “those from unions or worker advocacy groups” – without majority employee approval.

While federal labor law requires a majority of employees in an appropriate unit to approve employee representatives, the new OSHA rule contains no minimum employee threshold. Instead, OSHA inspectors have sole discretion to allow a union representative to accompany them on a walkaround. And, the final rule contains no guidance on how OSHA inspectors should manage multiple or competing requests relating to employee representatives.

Accordingly, employers should be prepared for union organizers’ use of the OSHA Walkaround as an opportunity to infiltrate workplaces they would not normally be permitted to enter. Employers should also anticipate more complaints by labor organizers through OSHA’s complaint process, in addition to unfair labor charges.

Privacy Law

Allowing a non-employee access to employers’ private property during a walkaround might also raise privacy and trade secret concerns. Existing OSHA regulations permit employers to identify areas in the workplace that contain or might reveal a trade secret and request that a non-employee representative be prohibited from entering. However, the rules do not contain any mechanisms for resolving disagreements between employers and representatives, and employers should anticipate pushback.

OSHA’s FAQs further specify that employers may require third-party representatives to sign a reasonable confidentiality agreement, with coverage limited to the use of confidential information learned in the inspection, but only if the employer requires all visitors to sign the same agreement. Employers should review their policies relating to visitors and consider requiring all visitors to sign a confidentiality agreement.

STEPS TO TAKE NOW

The new OSHA walkaround rule, which took effect on May 31, 2024, raises more questions than answers, and we anticipate legal challenges to the regulation in the coming months. In the meantime, employers should consider implementing the following precautions:

- Review OSHA’s FAQs on the new rule.⁶
- If an OSHA inspector comes knocking, contact counsel immediately. Employers have the right to representation during an OSHA investigation, including third-party representation.

- Designate and train employer representatives to handle OSHA inspections, and ensure these individuals have a solid grasp of the rights and limitations of employee representatives.
- Identify and regularly update a list of areas that contain trade secret information or could reveal trade secret information and advocate for confidentiality by excluding non-employees from that area.
- Consider requiring all visitors (including third-party employee representatives) to execute nondisclosure and/or confidentiality agreements.

NOTES

1. <https://www.federalregister.gov/documents/2024/04/01/2024-06572/worker-walkaround-representative-designation-process>.
2. <https://www.osha.gov/news/newsreleases/national/03292024>.
3. <https://www.osha.gov/worker-walkaround/final-rule/faq>.
4. See OSHA's FAQs, <https://www.osha.gov/worker-walkaround/final-rule/faq>.
5. <https://nationalcosh.org/Worker-Walkaround-Comments>.
6. <https://www.osha.gov/worker-walkaround/final-rule/faq#:~:text=What%20is%20the%20%22Walkaround%22%20final,purpose%20of%20aiding%20such%20inspections>.

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