

OSHA to Issue Rule Expanding Employees' Discretion During Walkaround Inspections

Peter Gillespie and Edward Shivers
10.19.2023

Summary of the Proposed Regulation

On August 29, 2023, the Occupational Safety and Health Administration (OSHA) issued a press release announcing proposed changes to the *Representatives of Employers and Employees* standard. In the past, although not explicitly allowed by OSHA regulations, the agency permitted third-party representatives, authorized by employees, to accompany OSHA during physical inspections, when deemed “reasonably necessary” by an OSHA compliance safety and health officer (CSHO). However, in 2016, a federal court found the practice inconsistent with OSHA regulations. Through its rulemaking powers, OSHA is attempting to reinstate the practice.

OSHA's proposed amendment will allow employees to authorize other employees (or third parties) to represent them during physical inspections conducted by CSHOs. These third-party representatives are not required to be employees of the employer. Rather, OSHA would allow a representative to participate based on the representative's experience, skills, or knowledge.

OSHA contends that these proposed changes are necessary to allow employees to select representatives they feel are best equipped to represent their safety concerns during inspections. In the proposed regulation, OSHA is requesting feedback on three issues:

Attorneys

Peter J. Gillespie

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- whether OSHA should defer to employees when they select a representative to aid CSHOs during physical inspections (i.e., remove CSHOs' "reasonably necessary" discretionary power);
- whether OSHA should add a presumption to the proposal that third party representatives, selected by employees, be "reasonably necessary to the conduct of an effective and thorough physical inspection [;]" and
- whether expanding the third-party representative definition should include additional circumstances when CSHOs might invite a third-party representative.

Possible Consequences

The issue with the proposed rule lies in its ambiguity. For instance, employees could invite local politicians, community activists, aggrieved former employees, or a potential business competitor to accompany a CSHO during an inspection. The proposed rule also would allow union representatives, other labor or community activist groups, and even plaintiffs' attorneys (or their expert witnesses) access to non-union workplaces and employees -- potentially as a front for organizing campaigns or to obtain free discovery to support a personal injury or other lawsuit.

The lack of requirements or specific qualifications for potential third-party representatives are cause for further concern. The proposed language only requires that representatives be "reasonably necessary." In addition, there is no meaningful mechanism proposed to confirm the credentials or qualifications of someone OSHA brings as an outside representative.

OSHA's proposed regulation is likely to be finalized after the comment period, which runs through October 30, 2023. Employers should begin to evaluate strategies to respond to situations where OSHA is inspecting a worksite and proposing to bring a third party. If you or your company have any questions regarding your company's OSHA compliance, please contact your Laner Muchin attorney.