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Union Officials and Other Non-Employees Now Allowed in OSHA Inspections

Employers in certain industries may find themselves subject to workplace inspections by the Occupational Safety and Health Administration (OSHA). Those inspections may now be somewhat more concerning to employers because on March 29, the U.S. Department of Labor published its final rule, effective May 31, allowing non-employees to accompany OSHA officers during such inspections on behalf of employees. One result of this rule is that union officials may now be allowed to participate in OSHA inspections of non-union workplaces. Prior to the new "Walkaround" rule, both the employer and employees were entitled to have a representative participate in an OSHA onsite inspection, but while the employer was able to have someone outside the organization be its representative (such as an industrial hygienist or a safety engineer), the employee representative had to be an employee of the employer. Under the new rule, employees may have a non-employee serve as their representative as long as "good cause" has been shown why the individual is "reasonably necessary to aid in the inspection." This assessment may be based on factors including, but not limited to, the representative's "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills." Such representatives, however, are not limited to those who have formal credentials and can include union representatives, community activists and potential expert witnesses. Although concerns about whether a representative is reasonably necessary to aid in the inspection may be raised to the Compliance Safety and Health Officer (CSHO) conducting the inspection, the CSHO has the final authority to make a decision on the spot regarding the matter. OSHA has stated that the new rule will enable it to conduct more thorough investigations. In recently published FAQs, OSHA provided guidance on the new Walkaround rule:

- There is no limit to the number of employee representatives who may participate in an inspection.
- There are a number of ways a third-party representative may be authorized by employees to participate in inspections: 1) if employees are represented by a union, the highest-ranking union official or union employee representative onsite will designate the employee representative; 2) employees can designate an authorized employee representative when they authorize them to file a complaint on their behalf; 3) employee members of an established safety committee or employees at large can designate the authorized employee representative; 4) employees can inform the CSHO during the inspection or interviews; and 5) authorized employee representatives can inform the CSHO or OSHA Area Office that they represent employees.
- Third-party representatives may take their own photos and measurements if allowed by the employer or under the terms of a collective bargaining agreement, participate in opening and closing conferences, and participate in private formal interviews held by the CSHO if requested by employees.
- The employee and employer representatives shall be provided with a reasonable amount of time (one hour) to travel to the inspection site, unless an inspection cannot be delayed.
- The employee representative may wear clothing with a union name or logo, but may not speak with employees on topics unrelated to the inspection. An employee representative whose conduct interferes with a fair and orderly inspection may be denied from accompanying the inspection.
- Third-party representatives are required to abide by the employer's established lawful rules and policies, but they must be equally applied to all visitors and not interfere with a third-party representative's right to participate in an onsite inspection. Such policies include limiting entry to areas containing trade secrets or that have confidentiality requirements

(although any confidentiality requirement may not restrict the employee representative from discussing the inspection with employees or participating in future enforcement proceedings), and wearing necessary respirators.

Employers should stay abreast of the status of the Walkaround rule since it may be challenged in the coming days. Nevertheless, employers should prepare for the rule's May 31 effective date by ensuring that their management employees understand employers' rights and obligations during an OSHA onsite inspection including, but not limited to, what they may do to protect trade secrets and confidential information and ensure the proper conduct of third-party employee representatives.

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