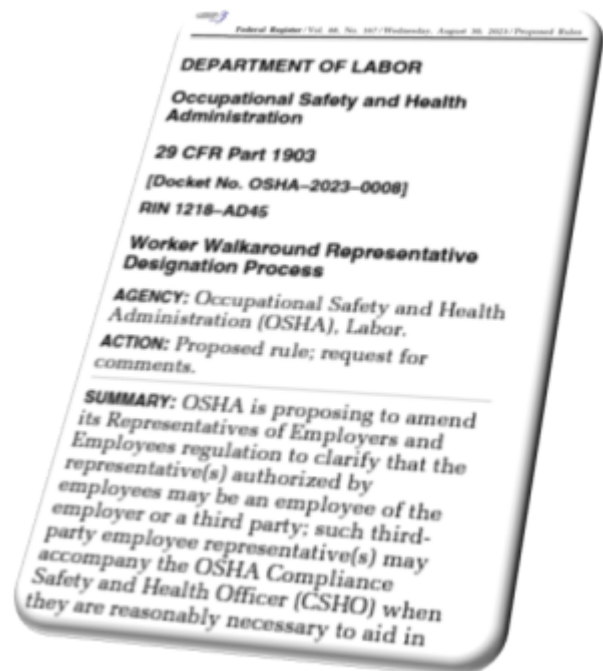


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Join CMC's Employer Coalition to Work on OSHA's Inspection Walkaround Rulemaking (Expanding Union Access to Non-Union Workplaces)

By [Eric J. Conn](#) and [Mark Trapp](#)

We wanted to reach out to notify you about OSHA's latest gift to organized labor. Consistent with the Biden Administration's promise to be "the most labor-friendly administration in history," last week, OSHA revealed its [Notice of Proposed Rulemaking](#) about the "**Worker Walkaround Representative Designation Process**." Specifically, OSHA proposes to amend 29 CFR 1903.8(c), which is **the regulation governing the rights of third parties to participate as employee representatives in OSHA inspections**. The NPRM for OSHA's Inspection Walkaround Rule would greatly expand when non-employees can accompany OSHA inspectors during physical inspections at your workplaces. Specifically, the proposed rule would open the door to third parties, including specifically union representatives even at non-union workplaces, if the OSHA compliance officer determines the third party would positively impact the inspection.



History of Union Access to Workplaces During OSHA Inspections

As a reminder, The Obama/Biden Administration tried to contort the meaning of the Inspection Walkaround regulation by granting union representatives the ability to participate in OSHA inspections at non-union

workplaces by way of a formal [letter of interpretation](#) in February 2013. The interpretation letter responded to this inquiry by a labor union: ***"May workers at a worksite without a collective bargaining agreement designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative?"***

OSHA has an existing regulation at [29 C.F.R. § 1903.8\(c\)](#) that speaks to this issue, and it sets a strong bias against third party participation in OSHA inspections, unless the third party has some special skill (such as industrial hygienist or a language translator) that OSHA is lacking. Here is the existing regulatory text:

"The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection."

Notwithstanding that pretty clear regulatory limitation to third party inspection participation, OSHA responded to the union's interpretation request in the affirmative, explaining that:

"Although the regulation acknowledges that most employee representatives will be employees of the employer being inspected ... it is OSHA's view that [non-employee] representatives are 'reasonably necessary' when they will make a positive contribution to a thorough and effective inspection."

While the regulatory text does grant OSHA some degree of latitude to include third parties in their inspections, it is pretty clear that the third party must have some type of technical area of specialization (e.g., engineer or industrial hygiene, or perhaps a language interpreter). But OSHA made the leap from the commonsense reading of the regulation that only allows participation by non-employees with technical expertise, to participation by anyone "reasonably necessary to the conduct of an effective and thorough physical inspection." This interpretation invites the involvement of non-technical union representatives, even from unions that had not been elected to represent the workforce at the subject workplace.

Industry representatives filed a legal challenge to the 2013 interpretation letter, asserting that it was so inconsistent with 29 C.F.R. 1903.8(c), that it effectively attempted to rewrite the regulation without formal APA notice-and-comment rulemaking. Ultimately, as the reigns at OSHA were handed over to the Trump Administration, [the controversial interpretation letter was rescinded](#). Now, as with so many policies and regulations, the Biden Administration's OSHA is attempting to roll back the Trump rollback. This time around, to avoid a challenge to an interpretation letter as being a backdoor rulemaking, OSHA is attempting to make the change by way of a proper APA notice-and-comment rulemaking.

The New Rulemaking Initiated by Biden's OSHA

The NPRM issued by OSHA last week includes this specific proposed new regulatory text for **29 C.F.R. §**

1903.8(c):

The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (e.g., because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills).

PART 1903—INSPECTIONS, CITATIONS AND PROPOSED PENALTIES [AMENDED]

1. The authority citation for part 1903 is revised to read as follows:

Authority: 29 U.S.C. 657; Secretary of Labor's Order No. 8–2020 (85 FR 58393); and 5 U.S.C. 553.

2. In § 1903.8 revise paragraph (c) to read as follows:

§ 1903.8 Representatives of employers and employees.

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(c) The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by ☐ employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why their participation is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (e.g., because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills).

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It is easy to see OSHA's intention here. Broadening the scope of individuals who can participate in these inspections provides an easy entry point for union representatives to access non-union workplaces. With that goal, this rulemaking looks more like a labor organizing rule masquerading as an OSHA regulation, than it is a bona fide safety regulation. That is not just the paranoid view of a jaded defense lawyer. OSHA expressed this very intention in the Administration's Fall Regulatory Agenda:

"This rulemaking will clarify the right of workers and certified bargaining units to specify a worker or union representative to accompany an OSHA inspector during the inspection process/facility walkaround, regardless of whether the representative is an employee of the employer, if in the judgment of the Compliance Safety and Health Officer such person is reasonably necessary to an effective and thorough physical inspection."

The potential consequences of such a rule extend further than just allowing union representatives entry into the workplace. Unions could use the OSHA inspection process as a front for organizing workplaces they might otherwise never be able to access. Further, nefarious third parties could uncover and expose trade secrets. The areas where OSHA is explicitly seeking feedback from interested stakeholders suggest that OSHA is in search of feedback that would justify OSHA's decision to lower the bar that union representatives must overcome to enter workplaces where they have not been elected as official employee representatives:

1. "Should OSHA defer to the employees' selection of a representative to aid the inspection when the representative is a third party (i.e., remove the requirement for third-party representatives to be

reasonably necessary to the inspection)? Why or why not?"

2. *"Should OSHA retain the language as proposed, but add a presumption that a third-party representative authorized by employees is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace? Why or why not?"*
3. *"Should OSHA expand the criteria for an employees' representative who is a third party to participate in the inspection to include circumstances when the CSHO determines that such participation would aid employees in effectively exercising their rights under the OSH Act? Why or why not? If so, should OSHA defer to employees' selection of a representative who would aid them in effectively exercising their rights?"*

Employers OSHA Inspection Walkaround Rulemaking Coalition

With that backdrop, we understand that employers have a strong interest in having a seat at the table for this rulemaking. Indeed, we have been contacted by several of our clients already inquiring whether Conn Maciel Carey's [OSHA Practice](#) and [Labor Law Practice](#) would be forming a coalition of employers and trade groups to work on this rulemaking. That is precisely what we intend to do. We are **organizing a fee-based company-anonymous coalition of employers and trade groups to advocate for the most reasonable possible fed OSHA regulation about third party participation in OSHA inspections.**

Those of you who have participated in any of our recent OSHA rulemaking coalitions know that together we have had a very positive impact on OSHA rulemakings over the last several years. We have submitted comprehensive written comments to the rulemaking record, testified at rulemaking hearings, advocated directly to OSHA and OMB in informal and formal stakeholder meetings. Through those prior rulemaking coalition initiatives, our input has resulted in direct changes to regulatory language and decisions by OSHA about the substance and policy direction of its regulations and standards. We intend to follow a similar approach with this rulemaking. We will be coordinating with our coalition members to:

- Keep coalition members informed about developments with the rulemaking on a regular and frequent basis;
- Solicit your input about the direct and indirect harm and costs associated with OSHA's proposed rule;
- Advocate for your interests through written comments, stakeholder meetings, and any other informal and formal opportunities to engage with decisionmakers at OSHA and OMB;
- Engage with OSHA as necessary post-issuance to steer guidance or further rulemaking in the right direction; and
- Educate coalition members about the rulemaking and the final regulation through regular email updates and/or calls and webinars.

This rulemaking will move quickly, with written **comments due by October 30, 2023**. **If your organization is interested in participating in this rulemaking coalition** or if a call would be helpful to talk through the rulemaking process, our advocacy plans, or anything else, please **contact OSHA Practice Chair [Eric J. Conn](#), or Labor Law Partner [Mark Trapp](#) as soon as possible**. We want to ensure as much time as possible to hear your input and get your feedback about written comments and talking points we are already starting to develop.

