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BREAKING: OSHA Issues Final Worker Walkaround Representative Designation Process Rule

By Eric Conn, Mark Trapp, and Darius Rohani-Shukla

After an unusually short time at OMB, earlier today, OSHA revealed a pre-publication version of its Final Worker Walkaround Representative Designation Process Rule. The Official Final Rule will issue when it is published in the Federal Register next week, on April 1, 2024, and it will go into effect on May 31, 2024.

As expected, OSHA pushed this rule out ahead of the Congressional Review Act window – 60 legislative days before a possible transition to a new Administration and new Congress. By issuing the rule this far ahead of the next election, OSHA has avoided the risk that a possible new Republican Congress and President could repeal this rule under the CRA, preventing OSHA from ever promulgating a substantially similar rule in the future.

As a reminder, OSHA initially sought to amend its existing regulation at 29 CFR § 1903.8(c) in three ways:

1. Changing the extreme bias against third party employee representative participation in OSHA inspections by changing existing language to *allow non-employee third parties* to act as employee representatives during OSHA inspections;
2. Expanding the types of third parties permitted to represent employees during OSHA inspections by changing existing language limiting such representatives to credentialed certified industrial hygienists or professional safety engineers, to now permitting any third-party representative who has "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills"; and
3. Expanding the role these third-party representatives play during an OSHA inspection from simply "accompanying" OSHA during the physical walkaround phase of the inspection, to "participating" in the inspection, which presumably would include attending and asking questions during private employee interviews, reviewing the employer's records produced to OSHA pursuant to OSHA's broad subpoena authority, etc.

Conn Maciel Carey's OSHA Rulemaking Coalition pushed back on all of these changes, and it appears we achieved a little success. Here is the new final regulatory text:

1903.8 Representatives of employers and employees.

(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 accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

The Final Rule differs from the proposed rule in one important way. Although OSHA maintained its first two proposed changes to 1903.8(c) in the final rule, as a direct result of our advocacy, OSHA abandoned the third change it had proposed – that is, OSHA has dropped the broader "participation" right of third parties, and restored the narrower "accompany" and "accompaniment" language with a focus just on the physical inspection.

Our comments put considerable emphasis on the practical concerns of expanding the role of third parties during OSHA inspections, as well as the manifest concerns with the constitutionality of all of these changes, and that seems to have paid off. In the Preamble to the Final Rule, OSHA referenced our written comments sixty-one times, including this excerpt about the "participation" vs. "accompaniment" issue:

In response to comments received, OSHA has slightly revised the regulatory text in the final rule. OSHA's proposed revision to section 1903.8(c) stated that a third party representative could accompany the CSHO 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)." 88 FR 59833-34....

Some commenters expressed concern that the revision could permit representatives to participate in private employee or management interviews, independently interview employees, or gain unauthorized access to employers' private records.... While the terms "participate" and "accompany" are often used interchangeably in discussing employee walkaround rights (see, e.g., OSHA Field Operations Manual, CPL 02-00- 164, Chapter 3, Sections IV.D; VII.A), OSHA does not intend to change the role of the walkaround representative. Based on stakeholder comments, OSHA has determined that using the term "accompaniment" rather than "participation" maintains consistency with the OSH Act and other related OSHA regulations...

Accordingly, OSHA has removed the term "participation" in the final rule to clarify that the employee representative may accompany the CSHO when good cause has been shown why "accompaniment" is reasonably necessary to an effective and thorough workplace inspection.

The final rule makes clear that the involvement of the third party is limited to accompaniment during the "physical inspection," so employers will be on firm ground excluding these unwelcome third parties from other aspects of the OSHA inspection, like interviews or barring

their access to records produced to OSHA. While we would have liked this rule to receive considerably more revision, we are happy to see that our efforts to affect the rule were not in vain. Pushing OSHA to clarify exactly what role these new third parties can play during inspections will definitely prevent some of the chaos that could have occurred without the limitation.

Unfortunately though, OSHA punted on the opportunity to actually clarify what the designation process would look like in this rule that is purportedly sets the designation process. It does no such thing. In response to our comments about the lack of any process, and in particular, the problem with allowing a third party to participate with anything short of a majority vote of employees, OSHA had this to say:

Neither the OSH Act nor any OSHA regulations specify when or how employees should authorize their walkaround representative(s). As such, there is no single or required process by which employees can designate a walkaround representative. OSHA has never had a rigid designation process or required documentation to show that a representative is authorized.

Throughout this rulemaking, our rulemaking coalition highlighted many potential bases for legal challenges to the proposed rule. For example, our comments highlighted:

1. The concerning ways the proposed rule would impact employers;
2. How the proposed rule conflicts with the OSH Act, the National Labor Relations Act, and the US Constitution; and
3. How the rulemaking process has violated the Administrative Procedure Act and Executive Order 12866

We believe it is a certainty that this rule will face legal challenges from Industry. We will be sure to keep you apprised of further updates on that and any other developments related to the roll out of the rule.

Before the Final Rule was revealed today, Eric Conn, Chair of CMC's national OSHA Practice, was quoted extensively by Inside OSHA about this rulemaking, employers concerns with the proposed rule, and legal challenges that await this rule moving forward. He predicted there that we were on "any day now" watch for this final rule, and that we expect to see it issued one of the upcoming Fridays in March or April. Unfortunately, we were right about that.

Let us know if you have any questions about the now-final Worker Walkaround Rule or what to do if OSHA shows up with an unwelcome third party at the start of an OSHA inspection. One recommendation we have is to contact us about our **OSHA Inspection Masterclass**, which we have designed to assist employers in preparing for and then managing OSHA inspections so as to put the workplace and your safety program in the best possible light, mitigate the potential disruptions from an OSHA inspection, and avoid costly enforcement actions.