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Industry Groups and Congressional Leaders Attack OSHA's New "Worker Walkaround" Inspection Rule

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To advance the Biden Administration's promise to be "the most labor friendly administration in history," on April 1, 2024, OSHA published in the Federal Register its Final *Worker Walkaround Representative Designation Process* Rule (the "Worker Walkaround Rule"). The new Final Rule amends OSHA's regulation at 29 CFR 1903.8(c) – *Representatives of Employees and Employers* – to open the door to participation in OSHA inspections by third parties, including union representatives at non-union workplaces, disgruntled former employees, plaintiffs' attorneys or their experts, and scores of others.

OSHA's new final rule went into effect on May 31, 2024, but ten days before that, on May 21st, the US Chamber of Commerce, with various other industry and business groups, filed a lawsuit in the US District Court for the Western District of Texas challenging the legality of OSHA's new Worker Walkaround Rule. The lawsuit, *Chamber of Commerce v. OSHA*, seeks to postpone enforcement of OSHA's new Worker Walkaround Rule and ultimately to permanently vacate the new regulation.

Background of the Rule

The Worker Walkaround Rule permits OSHA to authorize worker representatives to accompany government inspectors during OSHA inspections, even if the selected representatives are not employees of the company being inspected, if the inspector believes the third party will aid in an effective inspection. OSHA has not masked at all its intention that this rule would facilitate union access to non-unionized workplaces, which, of course, would promote union organizing efforts.

Historical Context

As a reminder, this is not the first time such a policy has faced legal challenges. A similar policy was advanced by the Obama Administration in 2013. At that time, the policy was introduced through a Letter of Interpretation. Industry challenged the interpretation letter as a backdoor rulemaking; the interpretation so perverted the language of the regulation that it effective rewrote the rule without formal notice-and-comment rulemaking. As a result, in 2017, a federal judge in the Northern District of Texas questioned the policy's legitimacy due to the lack of formal rulemaking, ultimately leading to its revocation by the Trump Administration. That case was brought by the National Federation of Independent Business (NFIB), which has also joined the challengers in the current

litigation.

Legal Arguments Against the Rule

The plaintiffs in the present lawsuit contend that even though OSHA went through a rulemaking process this time, the rule still has four fatal legal deficiencies. They argue that the Worker Walkaround Rule:

1. *Exceeds OSHA's Statutory Authority:* By upending the entire scheme in 29 USC 657(e) and conflicting with the National Labor Relations Act (NLRA) by permitting union organizers to represent employees in non-union workplaces.
2. *Violates the Fifth Amendment* by effecting a "per se taking," despite Congress not giving OSHA the authority to appropriate employers' property.
3. *Violates the Regulatory Flexibility Act* by not preparing the required regulatory flexibility analyses. OSHA reached the preposterous conclusion that the rule would result in zero cost to employers and the economy, and therefore short-circuited some of the onerous economic analysis required of most new regulations. Specific impacts include the infringement on property rights and substantial costs for employers to manage visits from potentially unlimited non-expert third parties. The plaintiffs argue that OSHA's rush to politicize workplace inspections compromised essential rulemaking principles.
4. *Violates the APA* on several grounds because:
    - OSHA misrepresented the rule as merely clarifying existing policy, failing to acknowledge its significant expansion and conflict with existing regulations.
    - The cost-benefit analysis was flawed, based on an unsupported assumption that the rule would impose little to no costs on employers.
    - OSHA should have addressed important issues, such as protecting confidential business information and determining the maximum number of allowed employee representatives, but it did not respond to significant public comments on these matters.
    - OSHA ignored apparent alternative approaches.

Congressional Review Act Resolution

Several employer groups are also rallying behind House Republicans' Congressional Review Act (CRA) resolution (H.J.Res. 147) aimed at repealing OSHA's Worker Walkaround Rule. This legislative effort, announced by Rep. Mary Miller (R-IL), seeks to use the CRA, Congress's process to revoke major Agency actions, to overturn the rule. This effort is almost certain to be futile, as resolutions under the CRA require passage by both chambers of Congress and signature by the President within just a few months of when the regulation is issued. It only work when one president's executive agency promulgates a "midnight rule" close to an election, and following that election, both houses of Congress and the White House are controlled by a president of the other party. The threat of a CRA revocation is one of the reasons OSHA moved at lightning speed to get the Worker Walkaround Rule issued so far ahead of the election in November.

Tips and Strategies for Employers

In the meantime, OSHA is free to start implementing its new rule, and bringing along third parties to OSHA

inspections. Here are CMC's Top 10 tips and strategies for what employers should do to prepare for and manage an OSHA inspection in which OSHA brings along a third-party employee representative (e.g., a union representative at a non-union workplace, a plaintiffs' attorney or expert, a disgruntled former employee, etc.):

To ensure your organization is ready for an OSHA inspection, with or without a third party employee inspection representative, sign-up for Conn Maciel Carey's OSHA Inspection Masterclass. Learn more about this training here.