

FEBRUARY 20, 2024 | OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

OSHA Sends Proposed Final “Worker Walkaround Representative Designation Process” Rule to OMB

By [Eric Conn](#), [Mark Trapp](#), and [Darius Rohani-Shukla](#)

In early 2023, OSHA revealed plans for a rulemaking for a Worker Walkaround Representative Designation Process Rule that would amend existing regulation [29 CFR § 1903.8\(c\)](#), which governs participation by third parties in OSHA inspections as employee representatives. The proposed rule changes three key components of that regulation:

1. Changing the existing language that historically has generally limited employee representation during an OSHA inspection to individuals who are employees of the employer that is being inspected, to now *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. The existing regulation focuses on non-employees with a technical credential, “such as an industrial hygienist or a safety engineer” to accompany OSHA on an inspection when it “is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace[.]” The new Proposal eliminates the limitation to these technical experts,  and indicates that a third party representative may be “reasonably necessary” because of “relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills.”
3. The proposed rule may also expand the role these third party representatives play during an OSHA inspection. The OSH Act and the existing regulation speak in terms of the representative “accompanying” OSHA during the walkaround phase of the inspection, but the proposed amended rule introduces the term “participate,” which could mean OSHA intends for these third parties to have a more active role; e.g., attending and asking questions during private employee interviews, reviewing the employer’s records produced to OSHA pursuant to OSHA’s broad subpoena authority, etc.

There have been several major concerns with this proposed rule. The biggest ones are who OSHA would be welcoming into private workplaces over the objections of employers. Although masquerading as an OSHA regulation, the real reason OSHA is promulgating this rule is to make it easier for unions to get access to non-union workplaces. But that is not the most concerning set of interlopers for whom OSHA could be opening your doors. Plaintiffs’ attorneys and their “experts,” have been trying for decades to get early, unfettered access to workplaces after injuries. Disgruntled former employees are often the instigator of OSHA inspections, and would

surely love to come in and wreak havoc with an OSHA compliance officer. Family members or injured workers, media, competitors, and community and activist groups could also take advantage of OSHA's new regulation.

Conn Maciel Carey's national [OSHA Practice](#) and [Labor & Employment Practice](#) formed the *Employers Walkaround Representative Rulemaking Coalition*, composed of a diverse group of employers and trade associations representing many industries with millions of employees across thousands of workplaces in every state in the US, to advocate to OSHA to set aside this proposal or to at least set it up to operate reasonably. On behalf of that rulemaking coalition, we submitted a [comprehensive set of written comments](#) to OSHA's rulemaking docket.

One theme of our comments was that by misstating (grossly underestimating) the likely huge economic impact of OSHA's proposed rule and by ignoring the complex, novel questions of law implicated by the proposal, OSHA was circumventing some important aspects of rulemaking under the Administrative Procedure Act. It looked like OSHA was not even planning to run the proposed rule through the White House's Office of Management and Budget. We recommended that OSHA reconsider that approach, and seek review by OMB. OSHA has apparently heeded our recommendation, and done just that.



OSHA officially delivered the final rule to OMB for review pursuant to Executive Order 12866 on Friday, February 9th. Typically, the OMB final review process includes stakeholder meetings and a proper analysis of the impacts of its rulemaking by the Administration's economics and policy experts in OMB's Office of Information and Regulatory Affairs (OIRA). On behalf of our rulemaking coalition, we requested and have been granted a stakeholder meeting with OMB later this month.

If you are not part of our rulemaking coalition, but think your organization would be interested in setting up your own EO 12866 stakeholder meeting with OMB to have a seat at the table and a voice in this process, please contact any of us. We are happy to help with coordinating and preparing talking points for such a meeting.

Another update about this rulemaking you may find interesting. The House of Representatives Committee with oversight over OSHA (the Education and Workforce Committee) has joined Industry in pressing OSHA to withdraw the Worker Walkaround Rulemaking. In September, Assistant Secretary Doug Parker was grilled about

the lawfulness and wisdom of this proposed rule at a public hearing, and then sent OSHA a series of written questions. Here is a [link to those written questions and OSHA's answers](#). One notable Q&A relates to one of the other major issues we flagged in our written comments – *what is the problem for which this rule is intended as a solution?* Specifically, what evidence has OSHA seen of employees requesting and being denied an appropriate third-party inspection representative? OSHA responded to that question by noting that it does not track that and is not aware of any such instances. Administrative Law generally requires there to be a problem to be solved for a regulation to be lawful. 

On that issue, last week, the majority on the House Education and Workforce Committee sent [a letter to Labor Secretary Julie Su](#) requesting that DOL abandon the proposed Worker Walkaround rule in its entirety. Chairwoman Foxx expressed concerns about the Department's inability thus far to support the proposed rule with any sound data or qualitative analysis:

"OSHA's QFR responses make clear that it proceeded to undertake fundamental changes to its current walkaround regulation⁴ without any substantive data or an understanding of whether changes to its regulation are needed. After the hearing, Committee QFRs requested data detailing how many times a third-party representative accompanied inspectors as the representative of an employee during a worksite inspection for Fiscal Years 2019-2023. In response, OSHA wrote that it does not track this data."