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Update About OSHA's Worker Walkaround Designation Process Rulemaking

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

Back in Q1 of 2023, OSHA revealed plans for a rulemaking for a Worker Walkaround Representative Designation Process Rule, and we have been tracking the rulemaking on the OSHA Defense Report blog since that time. Specifically, the Worker Walkaround Representative Designation Process rulemaking proposes to amend the existing regulation at 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 the existing 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 being inspected, to now *allow non-employee third parties* to act as representatives; and
2. Expanding the types of third parties permitted to represent employees during OSHA inspections. The existing regulation allows a non-employee "such as an industrial hygienist or a safety engineer" to accompany an OSHA compliance officer during an inspection when it "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace[.]" The specific reference in the regulation to these technical credential has meant that only representatives with relevant technical expertise, credentials, or unique language skills have been permitted to accompany OSHA. 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 can play during the inspection. The OSH Act and the existing regulation speak in terms of the employee 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, etc.

Conn Maciel Carey's national OSHA and Labor & Employment Practice Groups formed the *Employers Walkaround Representative Rulemaking Coalition*, composed of a broad and diverse group of employers and trade associations representing many industries, including retail, manufacturing, petroleum refining, construction, food manufacturing and distribution, agricultural, and more, with millions of employees across thousands of

workplaces in every state in the US. On behalf of that rulemaking coalition, we recently submitted a comprehensive set of written comments to OSHA's rulemaking docket. In this post, we provide you with a summary of our comments that detailed:

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

The written comments submitted on behalf of the *Employers Walkaround Representative Rulemaking Coalition*, available here (https://www.regulations.gov/comment/OSHA-2023-0008-1976), present our concerns that the Proposal would open a flood gate to a multitude of workplace disruptions. Specifically, we explained how:

1. The Proposal does not establish the existence of a problem with workplace safety, support it with evidence, or show that its proposed solution will address the identified problem. Our perspective is that since the Proposal failed to point to a single instance where the current rule prevented employee engagement or denied employees an inspection representative that would have changed the outcome of any OSHA inspection, the Agency still needs to identify a problem that this rulemaking would solve.
2. The Proposal conflicts with the OSH Act by improperly retaining language allowing more than one inspection representative (which is all the OSH act permits); and changing the role of a representative from "accompaniment" to "participation" implies that authorized representatives will take a more active role in the inspection process, which the OSH Act does not authorize.
3. The Proposal conflicts with OSHA's long-standing regulations and interpretations because it baselessly revises the meaning of "authorized employee representative" from what it has meant for five decades, "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees" or "an authorized collective bargaining agent of employees," to mean "any third party with relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills."
4. The Proposal undermines the National Labor Relation Act's ("NLRA") principle of majority support by allowing a walkaround representative (or, in contradiction with the OSH Act, more than one such representative) to be "authorized" or "designated" by less than a majority of the employer's employees.
5. The Proposal conflicts with the NLRA's central premise that certified representatives are "the *exclusive* representatives of all the employees in such unit." Under the Proposal, it is still being determined whether that remains the same during inspections, and as a result, the Proposal would create uncertainty and chaos, placing CSHOs squarely in the middle of labor-management disputes, contrary to long-standing OSHA policy.
6. The Proposal is administratively unworkable as significantly expanding who can be designated as third-party representatives creates practical challenges for employers. For instance, by shifting away from emphasizing that an authorized representative should bring some technical expertise, there could be substantial consequences to employers who could be subject to unauthorized third parties trouncing across their property. Potential concerns we explained were union representatives at non-union workplaces, Plaintiffs' attorneys (or their selected "experts") attempting to conduct pre-litigation discovery, worker advocacy groups, and community organizations without applicable safety expertise could similarly use it to organize employees in a non-union workplace or scrounge up potential litigation for plaintiff's attorneys, and competitors or security threats could gain access to proprietary or security information and cause significant

economic or physical harm.

7. Despite the Proposal being titled "Worker Walkaround Representative Designation Process," neither the Proposal nor its brief preamble says anything about an actual process for selecting, designating, and implementing a third-party employee inspection representative. Defining the process is necessary to understand the many unanswered questions relating to that process and what a challenging position that puts CSHOs in.
8. The Proposal does not acknowledge or facilitate a solution for liability concerns that will undoubtedly arise when employers are compelled to allow non-governmental, non-employee third parties access to their workplaces. For instance, unless OSHA assumes responsibility for the liability actions of third parties, employers will be forced to take burdensome and costly steps to mitigate such risks. For example, many employers will be required to provide training and/or special protective equipment to third-party representatives.
9. The Proposal does not account for three fundamental constitutional concerns with the Proposal in that it delegates governmental authority to private individuals, results in a *per se* taking under the Fifth Amendment, and violates the Fourth Amendment.
10. The Proposal is fundamentally misguided as it: fails to acknowledge that introducing third parties who would usually be barred introduces substantial risks, burdens, and costs for employers; will reduce OSHA's effectiveness and credibility as a workplace safety agency; and will harm OSHA's enforcement program in individual inspections and the volume of inspections it conducts.

It seems clear that OSHA intends to forego much of the rest of what the regulated communicated expects from executive agencies in rulemaking – a hearing about the Proposal, EO 12866 stakeholder meetings with OIRA/OMB, small business review of the Proposal, etc. – we hope that our comments, and the other approx. 12,000 comments submitted to OSHA about this proposed rule, will push OSHA and the Administration to reconsider the proposal, or at least be more deliberate.