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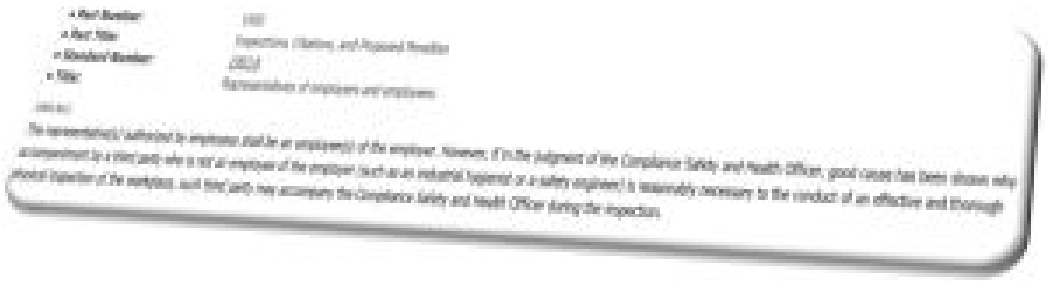
What Can Employers Do If OSHA Brings a Union Representative on an OSHA Inspection?

By Eric J. Conn

Employers need to be aware of a new possibility that union representatives may attempt to accompany OSHA compliance officers during workplace inspections, including at workplaces where the union has not been elected to represent the employees.

29 U.S.C. § 657(e) of the OSH Act authorizes a "representative of the employer and *a representative authorized by [the employer's] employees*" to accompany the OSHA agent during an inspection of the workplace. The OSH Act specifies that the purpose of including these representatives is to help OSHA conduct an effective workplace safety inspection. However, OSHA's implementing regulations, specifically 29 C.F.R. § 1903.8(c), require that the employees' representative must himself be an employee of the employer, unless the individual participation is "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." The regulation focuses on the third party's technical expertise by listing "industrial hygienist [and] a safety engineer" as examples of non-employee representatives who may qualify under 29 C.F.R. § 1903.8(c).



On April 5, 2013, OSHA published a formal Interpretation Letter (dated February 21, 2013) ignoring the language of 29 C.F.R. § 1903.8(c) and expressly permitting employees at a worksite without a collective bargaining agreement to designate a union representative as their personal representative during an OSHA inspection. The Interpretation Letter not only flies in the face of the plain meaning of 29 C.F.R. § 1903.8(c), but it also contradicts:

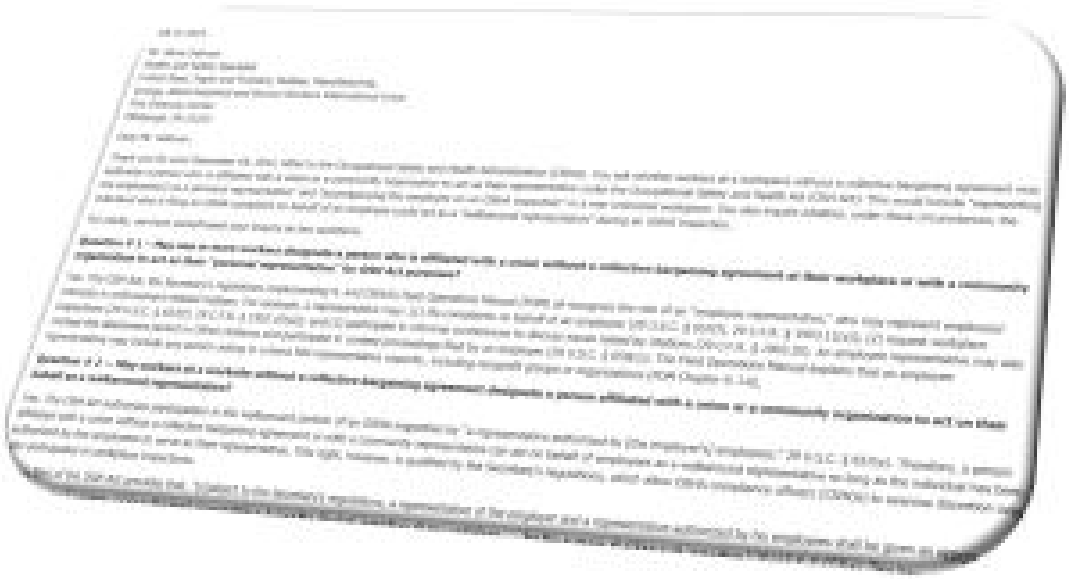
- The OSH Review Commission's Rules of Procedure;
- the National Labor Relation Act (NLRA); and
- OSHA's Field Operations Manual (FOM).

Section 9 of the NLRA explains that only a union selected by a majority of employees for the purposes of

collective bargaining can be considered an authorized employee representative. OSHA's 2013 Interpretation Letter disregards this provision and purports to allow a union that has not been selected by a majority of employees, or even by more than one employee, to represent all of the employees during an OSHA inspection. Similarly, the OSH Review Commission's rules of procedure at 29 C.F.R. 2200.1(g) state:

"Authorized employee representative means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees."

Likewise, OSHA's own Field Operations Manual and its predecessor, the Field Inspection Reference Manual, include a section about inspection representatives, and refer to "Employees Represented by a Certified or Authorized Bargaining Agent" and "Employees Represented by a Certified or Recognized Bargaining Agent" respectively. The FOM also instructs OSHA inspectors what to do in situations where there is "No Certified or Recognized Bargaining Agent," and that is to determine whether other "employees" could represent the interests of their co-worker or to conduct interviews with a reasonable number of employees. Finally, OSHA's FOM instructs inspectors to avoid inserting themselves into labor-management relations. Through this Interpretation Letter, OSHA has created an environment where that restraint may not be possible, especially since the new policy provides unions with unprecedented access to new workplaces and employees, possibly during an organizing campaign or even before.



In addition to being a strained reading of the applicable regulation, and contradicting the NLRA, OSHRC regulations, and OSHA's operations manual, the 2013 Interpretation Letter also appears to violate the Administrative Procedure Act. The Administrative Procedure Act requires agencies that are planning to change a rule to provide the public with adequate notice and an opportunity to comment on the rule change. OSHA did not do that here. The Agency changed this substantive rule by way of an Interpretation Letter without providing the public with any notice or opportunity for comment.

After OSHA issued this interpretation, the employer community anxiously waited to see if and how OSHA and organized labor would change the landscape of OSHA inspections. The reality is, there have been very few attempts thus far by unions to join OSHA during inspections at non-union workplaces. We are aware, however, that in October and November of 2013, union representatives from Service Employees International Union

attempted to accompany OSHA inspectors during inspection at three facilities under contract with Professional Janitorial Services, a non-union employer. We understand that the employer successfully excluded the union representatives from those inspections, following some of the steps outlined below.

First, employers should have a written procedure in place that their local managers can follow. This procedure should include asking what prompted the inspection and whether anyone else will accompany the OSHA agent during the inspection. If anyone else is planning to accompany the OSHA agent, the local manager should:

- Obtain the third party's identity, his employer or organization affiliation, and his intentions or purpose for participating in the inspection.
- Ask if, how, and how many employees or set of employees requested or selected the third party to represent during the inspection.
- Inquire of OSHA whether the third party has some special skill or background required to assist the inspector and what that might be.

After getting this information, the local manager should ask the OSHA inspector to wait while the manager obtains direction from senior management or the company's OSHA counsel how to proceed.

Second, employers should consent to the OSHA inspection (unless there is some reason to refuse the inspection in general), but should decline to allow any non-OSHA representative, especially a union representative at a non-union site, from entering the premises and participating in the OSHA inspection. Make it clear that you are not refusing OSHA's request to inspect the workplace, but you are exercising your rights as property owners to exclude uninvited third parties with no governmental purpose. OSHA will then have to choose between: (a) proceeding with the inspection without the union representative; or (b) going to a federal district court to seek a warrant to proceed with the union representative in tow.

Finally, if OSHA decides to go to the district court to obtain a warrant, it will likely be successful because the warrant application process is *ex parte* (meaning, the employer will not be present to raise objections), and because judges are quite deferential to OSHA during warrant applications. If the OSHA agent returns to the facility with a warrant, the local manager should again consent to the inspection by OSHA, but also again deny entry to the union representative. In that circumstance, employers have two options:

- The employer can go proactively to the district court that issued the warrant, and file a motion to quash or amend the warrant based on the legal analysis summarized above; or
- The employer can wait to see whether OSHA initiates a contempt of warrant proceeding, a process by which OSHA tries to enforce the warrant by order (and possible sanctions) of the district court, and if OSHA does, then the employer appears to defend itself in that proceeding by arguing that the warrant is invalid for the reasons summarized above.

Since union representatives have started accompanying OSHA agents to inspections, employers need to make their managers aware of this possibility and prepare them how to respond. It is very important for employers to take control of the situation before the inspection begins.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Toolkit: Prepare for and Manage OSHA Inspections

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For more tips about preparing for and managing OSHA inspections, check out the OSHA Inspection Toolkit, prepared by Conn Maciel Carey's national OSHA Practice Group to help our clients and friends navigate through the OSHA inspection maze. Likewise, here is a link to a recording of a webinar we conducted about "Preparing for and Managing OSHA Inspections" as part of Conn Maciel Carey's 2015 OSHA Webinar Series.