



Department of Labor Proposes Rule Change Permitting Unions to Participate in OSHA Workplace Walk-Throughs

On August 29, 2023, the United States Department of Labor (DOL) published a Notice of Proposed Rulemaking that would permit union representatives and other nonemployees to participate in workplace inspections conducted by Occupational Safety and Health Act Compliance and Safety Officers (CSHOs).

Pursuant to the current law, Section 8(e) of the Occupational Safety and Health Act (OSHA) provides “a representative of the employer and a representative authorized by employees the opportunity to accompany CSHOs during the physical inspection of the workplace for the purpose of aiding the inspection.” The OSHA and 29 CFR part 1903 endow the CSHO with the authority to resolve any disputes about who the employer and employee representatives are and to deny any person from participating in the inspection whose conduct interferes with a fair and orderly investigation. The CSHO also has the authority to permit additional employer representatives and representative authorized by employees to participate in the workplace walk-throughs. See 29 CFR 1903.8(a).

Historically, OSHA mandated that the representative authorized by employees for worksite inspections be an actual employee. Over the years, OSHA has offered guidance on its interpretation of section 1903.8(c) and the definition of “representative authorized by employees” for OSHA walk-through inspections. In 2003, OSHA issued a letter of interpretation (Racic Letter) in response to the question of whether a union representative who files a complaint on behalf of a single worker could then act as a walk-through inspection representative in a workplace that had no labor agreement. OSHA determined that there was “no provision for a walkaround representative who has filed a complaint on behalf of an employee of the workplace.” See, ID OSHA – 2023-0008-0002. In 2013, OSHA issued a second letter of interpretation (Sallman Letter) stating that workers at a worksite without a collective bargaining agreement could designate a union or community organization for purposes of an OSHA walk-through inspection “as long as they had been authorized by employees to serve as their representative. OSHA then withdrew the Racic Letter as confusing.

OSHA updated its Field Operations Manual (FOM) in October 2015, incorporating its interpretation of 29 CFR 1903.8(c), stating that there may be instances where workers without a certified or recognized bargaining agent would benefit from a third party representing them at an OSHA inspection. However, in 2016, The National Federation of Independent Business (NFIB), filed suit in the Northern District of Texas, arguing that OSHA’s Sallman Letter interpretation was at odds with its regulations, should have been subject to notice and comment rulemaking, and that the Sallman Letter exceeded OSHA’s statutory authority. The district court concluded 1) that the Sallman Letter contradicted §1903.8(c) which clearly required that the employee representative be an employee himself, and 2) that a change to a regulation must be subject to notice and comment rulemaking. The court did reject the NFIB’s argument that the Sallman Letter conflicted with OSHA itself, concluding that OSHA requires the employee’s representative to be authorized by the employees, not necessarily that the representative be an employee himself. See, *Nat’l Fed’n of Indep. Bus. v. Dougherty*, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017). In the wake of that decision, OSHA rescinded the Sallman Letter and removed the language referencing it in the FOM.

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And now, engaged in the proper notice and comment rulemaking process, OSHA's proposed rule change seeks to broaden the types of individuals who may serve as a representative of the employees during OSHA's physical inspections of the workplace:

- The representative authorized by the employees may be an employee **OR** a third party (i.e., a union representative, a bilingual interpreter, an expert on a particular piece of equipment, occupational hygienist, etc.).
- A third-party representative authorized by employees may be reasonably necessary to conduct an effective and thorough physical workplace inspection by virtue of her knowledge, skills, or experience.

The proposed change would permit a union representative, even where employees are not represented by a union or in the absence of a collective bargaining agreement, to participate in an OSHA workplace inspection. The DOL and OSHA believe that the rule change strengthens OSHA's ability to obtain critical information regarding worksite conditions and hazards to ensure safer workplaces everywhere – not just in facilities where the employees are represented by unions. Critics of the proposed rule change argue that OSHA is promoting infiltration of private employer property for unionization efforts.

The DOL seeks written comments on the proposed rule change by all stakeholders by October 30, 2023. If you have any questions about the DOL's proposed rule change or OSHA workplace inspections, please contact John A. McCreary, Jr. at (412) 394-6695 or jmccreary@babstcalland.com or Janet K. Meub at (412) 394-6506 or jmeub@babstcalland.com.

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