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OSHA Finalizes Rule Clarifying “Employee Representative” Designation Process for Walkaround Inspections

The Occupational Safety and Health Administration (OSHA) has issued a [final rule](#) amending its employee representative regulation to clarify who may be authorized to accompany OSHA compliance safety and health officers during a physical workplace inspection. The regulation allows both a representative of the employer and a representative of the employee to accompany the inspector. The new rule clarifies that the representative authorized by employees may be an employee of the employer **or** a third party who is not employed by the employer. The rule goes into effect May 31, 2024, and will likely be challenged in court.

Two Changes to the Current Employee Representative Regulation

Although Section 8(e) of the Occupational Safety and Health Act of 1970 (OSH Act) has always required that a representative of the employer and a representative authorized by employees each have the opportunity to accompany OSHA inspectors during the physical workplace inspection, employee representatives have almost always been an employee of the employer. This new rule will upend the status quo by making two changes to the employee representative regulation. First, it provides that employee representatives **can** be either an employee of the employer **or** a third-party non-employee, so long as the individual is “reasonably necessary” to conduct a thorough and effective inspection. Second, it states that third-party employee representatives may be appropriate if the third party possesses skills, knowledge, or experience that could aid the OSHA inspection (such as knowledge about **similar** workplaces) or has the ability to interpret a language commonly used on a particular worksite.

“Reasonably Necessary” Standard

The standard for when a third-party representative is “reasonably necessary” to conduct an inspection is relatively low. OSHA has taken the position that such representatives are considered reasonably necessary merely when they “will make a positive contribution to a thorough and effective inspection.” This rule effectively means that employees have the right to designate a non-employee to come onto the worksite to represent them during an OSHA inspection. Neither the OSH Act nor any OSHA regulations specify when or how employees may authorize their inspection representatives.

Under this new rule, the decision as to whether a third-party representative is “reasonably necessary” rests with the inspector, so long as the inspector believes that good cause has been shown as to why the third party’s accompaniment is reasonably necessary to conduct an effective and thorough inspection.

Practical Implications of the Final Rule

This rule has many practical implications. For example, it effectively allows employees to select a representative who has never visited the employer’s premises and who has knowledge relevant only to “similar” workplaces. The rule also appears to allow representatives who have **no** relevant experience or knowledge about the workplace if the representative may somehow facilitate communication between employees and the inspector. Another concern is that the rule effectively authorizes non-unionized employees to designate a person affiliated with a union to act as their walkaround representative, which may lead to an increase in labor actions and union organizing.

Employer Response to Non-Employee Representatives

There are a few ways that employers can respond if a non-employee is selected to be the employee representative during an inspection. The employer can ask the inspector if the representative

was designated by the workers. Employers can also ask what skills the representative possesses that would make the representative reasonably necessary to conduct a thorough and effective inspection. In appropriate circumstances, an employer could refuse to consent to the entry of the third party or withdraw consent that has previously been provided. Practically speaking, withholding or withdrawing consent might only delay the inspection, as OSHA would likely view this as a denial of entry and could seek a warrant permitting entry with the third party. Therefore, special consideration should be given, with the assistance of counsel, before this approach is utilized.

Even though the final rule will likely be challenged, employers should be aware of the rule's potential ramifications and have a plan in place for all OSHA inspections. That plan may include establishing a safety committee made up of the company's own employees. Doing so may increase the likelihood that employees will select a walkaround representative from among the employer's own workforce rather than turning outside to third parties.

Frost Brown Todd has a team standing ready to help you strategically implement procedures so that you can be prepared if and when a non-employee third-party representative is present during an OSHA inspection. If you have any questions about these changes and how it may impact your business, please contact the authors or any attorney with Frost Brown Todd's [Labor and Employment](#) practice group or [Employee Safety and OSHA](#) team.

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