Legal Update Article

DOL Proposes Allowing Union Representatives, Others to Participate in OSHA Inspections: What It Means

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The U.S. Department of Labor (DOL) has[announced](#) a Notice of Proposed Rulemaking to amend its regulations to allow employee-authorized third-party representatives to accompany Occupational Safety and Health Administration (OSHA) officials during facility inspections. The proposed regulations would pave the way for union representatives and interest groups to join the inspection, provided the OSHA official determines participation of the third party is "reasonably necessary."

If approved, the rule would mark a return to the 2013 guidance rescinded under the Trump Administration after a federal judge told the agency it improperly circumvented notice-and-comment rulemaking by issuing a letter of interpretation on the issue.

Background

The Occupational Safety and Health Act (OSH Act) allows a representative of the employer and a representative authorized by employees to join OSHA officials during a workplace inspection. Section 1903.8(c) states that the employee-authorized representative "shall be" an employee of the employer. However, it provides a caveat that the compliance safety and health officer (CSHO) can allow a third-party representative "such as an industrial hygienist or a safety engineer" if they determine good cause is shown that the third party is reasonably necessary.

The question has arisen whether third parties are limited to*only* industrial hygienists and safety engineers or, and to what extent, it included others, such as union representatives. This is a particular concern for employers who are not unionized or have a location undergoing an OSHA inspection that is not unionized, especially given the increased organizing activity around the country in recent years.

OSHA has provided guidance periodically; most recently, in 2013, the agency issued a letter of interpretation stating that a union representative could serve as the employee representative. It also expressed that the CSHO had authority to determine who can join the inspection.

Following a 2016 lawsuit challenging the letter on statutory and promulgation grounds, OSHA rescinded the guidance and "is now engaging in notice and comment rulemaking to clarify who may serve as a representative authorized by employees for the purpose of walkaround inspections."

Summary of Proposed Rule

The proposed rule would amend the OSH Act to clarify that, "for the purpose of the walkaround inspection, the representative(s) authorized by employees may be an

employee of the employer, or, when they are reasonably necessary to aid in the inspection, a third party." The clarification will "ensure employees are able to select trusted and knowledgeable representatives of their choice, leading to more effective inspections," according to the proposed rule.

The proposed rule also seeks to clarify that the authorized third-party employee representatives "may have a variety of skills, knowledge, or experience that could aid the CSHO's inspection." This change would delete the industrial hygienists and safety engineer examples that caused the discrepancies in how the rule has been interpreted over time. As a result, the rule's goal is to focus on the "knowledge, skills, or experience of the individual, rather than their professional discipline." The proposed rule provided union representatives as one such example. Additional examples are translators or representatives of local safety councils or worker advocacy organizations.

Implications

The proposed rule faces sharp criticism from employers concerned with the broad range of third parties who might be allowed entry into their facilities during an OSHA inspection. The rule could provide an entry point for union representatives to organize workers or to further expand their footprint in a workplace. There are additional concerns over leaving the decision to the discretion of individual CSHOs in the field.

Despite the significant concerns, the proposed rule retains the condition that the CSHO "must determine that any third-party employee representative's participation is reasonably necessary" for the inspection. Employers are still entitled to request that certain areas of the facility containing trade secrets be off-limits to employee representatives who do not work in that specific area of the workplace.

While the proposed rule must undergo public comment before it is final, employers should speak with legal counsel to discuss how the proposed rule will affect them. Implementing a proactive strategy may better position employers for navigating third-party representatives during a workplace inspection.

Public comments on this proposed rule must be received by the DOL on or before October 30, 2023.

Please contact a Jackson Lewis attorney with any questions.