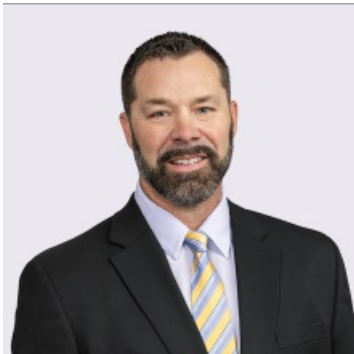


OSHA's New Walkaround Rule: A Game Changer for Workplace Safety and Compliance

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Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

Starting May 31, 2024, employers will have less control on who can access their workplace. Specifically, this new rule allows union organizers, community activists advocating for worker rights, industry competitors, and others with a vested interest in workplace safety to join OSHA compliance officers on their walkaround worksite inspections.

On this episode of We get work™, we discuss ramifications beyond OSHA compliance that employers should consider, why this new rule poses significant concerns for employers, and best practices for limiting potential risk.

Today's hosts are Courtney Malveaux, co-leader of the Workplace Safety group, and principal in the Richmond office, Catherine Cano, principal in the Omaha office, and Adam Hirtz, a principal in the St. Louis office of Jackson Lewis, and all members of the Workplace Safety group. They all serve all employers' needs regarding safety and health programs and compliance issues.

Courtney, Catherine, and Adam, the question on everyone's mind today is, does OSHA's new Walkaround Rule open Pandora's box, and how does that impact my business?

Alitia, thank you so much for that introduction. I'm Courtney Malveaux and I'm

with Adam Hirtz and Catherine Cano and they're with the Workplace Safety and Health Practice Group with me. And the really exciting thing about having the two of them involved with this podcast is that they bring a perspective from other areas of the law in addition to OSHA. And so their implications from other aspects of law that come into play here. And so their perspective is going to be really helpful in terms of seeing how this really plays out with worksites.

So just by way of quick background, OSHA has had a long-standing rule so that when OSHA shows up and they knock on the door and they're going to do an inspection, then they do a walkaround right after they open the inspection. Now they can have another individual, an employee representative to join the inspection as they walk around your workplace. And during the walkaround usually, well, it has been defined as someone who shall be an employee of the employer when they do the walkaround. And now there's some wiggle room there. And if the compliance officer for OSHA says they'd like to have an industrial hygienist or a safety engineer, an expert to come along the walkaround, then that person doesn't necessarily have to be an employee of the employer, but otherwise really does need to be. Well, there was some litigation in 2017 in which was clarified to OSHA that it must be an employee.

And now OSHA is coming out with this new rule that will be effective at the end of May, May 31st, that will say that OSHA may include a third party, doesn't necessarily have to be an industrial hygienist or a safety engineer. And it could be anyone who could be deemed reasonably necessary to aid in the inspection as selected by the employees and as approved by OSHA. So this is really interesting how this is going to play out in workplaces.

And so I'll just go ahead and start with you, Adam, and ask you, you've looked at this rule and you've been thinking about this with us. Are there issues in your opinion that concern you most about this new rule from an employer standpoint?

Yes, certainly. Thank you. Courtney, you know, the final rule, according to OSHA, is just a simple, you know, narrow purpose of the final rule and just some clarification. But I think in reality, it's opening Pandora's box with regard to the third parties that are permitted to come in. There's just no real limits on that. And so the concern is, you know, without any real barriers on to who can come in, you know, your imagination is as good as mine as who might be there. OSHA may bring in union representatives or community activists, other third parties who could be even competitors. So, it gets concerning. All of our clients are obviously particular about who's in their facilities and particularly when you have confidential information, trade secrets, the way you do things that it's not something you just want to advertise to folks. So now we're in a situation with this new final rule where a variety of different people can come in and as long as the compliance officer can suggest that it somehow aids in the process, it seems that under this rule, they're going to be let in.

So the next question is, how do we deal with that? And I think we'll talk about that today.

Sure. And when you say competitors, I take it you mean industry competitors who get to see your trade secrets or get to see behind the curtain what's happening at

your worksite so that those in the industry might be looking at your work site and bringing back information elsewhere.

Right, you can imagine that they may tap a third person being competitor because that person may have a lot of understanding of the industry and knowledge in the industry. And so, you know, the OSHA compliance officer can certainly make an argument, although it may be detrimental to have this person in your facility, they're certainly going to help the compliance officer in aid in the process of reviewing whatever it needs to be looked at in the inspection. And you mentioned that unions might be among those who might have an interest in a work site.

And Catherine, I'm glad that you come to us with a perspective from a labor law perspective in addition to OSHA. And so do you have any concerns about this walkaround rule that really raises a red flag for you from a labor perspective?

Yeah. So a significant concern I think that employers have is that the walkaround rule could facilitate union organizing and how that would essentially play out. It's providing a means of access to the union for the employer facility and employees that they may not otherwise have.

So the general rule, and there are some exceptions, but many employers have the right to prohibit unions from accessing their property. You're not necessarily going to see a union come into your workplace and try to organize people while they're working, right? A lot of that happens outside of work, away from the employer's worksite. But here you're giving essentially, bringing in somebody who could be a union organizer and could use that as an opportunity to interact with employees and try to use it for purposes of organizing. OSHA got comments about that when they put out the proposed rule and their response to it was really that that wasn't a valid concern by employers because the organizers, even if it's a union organizer, their role would be assisting OSHA, not interacting with employees. But I don't think that that necessarily quells anybody's concerns from a labor standpoint.

So if you have someone who is that third party and they're not an employee and let's say there is no union at that work site and yet here's somebody with the logo on and they're able to insert themselves and ask questions, then it seems like that's a great way to kind of insert themselves a little bit into a workplace.

Yeah, definitely. And I think that they could also potentially have an interest in trying to expand the scope of the inspection.

If you think about a union's role, especially during organizing, they want to show employees why they think employees should have a union and why they need a union. And so if they are accompanying an employer in OSHA on a walkaround, they may be trying to point out things that OSHA may not have recognized or potentially expanding the scope to additional issues.

Sure. And so I wonder if you could just comment a little bit more in terms of how unions' involvement might impact the actual inspection. And I'm thinking, you know, if a union representative is there and they're doing the inspection and you said that they can ask more questions and I'm thinking, well, what can they ask? Okay, well, who else has been injured on this machine or what else has happened in

the past or whatever and kind of insert themselves a little bit to try to get a little bit more information. Is that what you have in mind?

Yeah, I think that unions could use it as a way to leverage additional information about the workplace and potential pressure points for the employer or ways to try to exert additional pressure on the employer or paint the employer in a certain way. And again, expanding the scope of the inspection. I think those are just a couple of ways that they could impact the actual inspection.

Well, this sounds like this could open up, as you said, Adam, a bit of a Pandora's box here. And it's coming real soon as of the day of the recording on May 20th. We are 11 days out from go time with this rule going live and active. So we have a very short window to try to develop some ways that we may cope and deal under this rule. Do you have any thoughts in terms of what some best practices might be in trying to limit these issues of concern?

Absolutely. With the potential of these third parties participating, it's more important than ever now to know your rights and the bounds of what OSHA says is permitted with regard to the third party.

The opening conference, I think, is going to take on even more importance now than it has in the past when the inspector shows up. Because if there are third parties with them, I think that's a good opportunity to ask questions and understand, first off, who is this person? Why are they with you? How will they aid in the inspection and challenge that to the extent appropriate? In addition to that, to the extent there are trade secrets or confidential information or processes involved in what you do at your facility, you can certainly consider the idea of a non-disclosure agreement, having the third party sign that, such that any information that they gather or learn from that inspection can't be used outside of that limited purpose of aiding the inspector. We can certainly help with drafting and creating those types of documents. Also, now you're introducing a third party to your facility who you didn't invite but they're there now. And the question is, you know, if something happens to them from an injury standpoint, what do you do about liability? So, you know, there's also, you should consider a liability waiver type of form that the individual signs.

In addition, although OSHA says, you know, it's not necessary to put this person through a full, you know, two-day safety class, you can and should, to the extent that you put visitors through a safety briefing, you should go ahead and do that with this individual. If PPE is required, that should also be worn by the third party and you don't have to provide that. It's incumbent upon a third party to have that with them and to bring that, use that with them.

And one of the last things I think that could be a very good, I don't wanna use the word weapon, but I guess a weapon for a facility and a client who has an inspector show up is the idea of requiring a search warrant. I know some clients shy away from that because they think it'll embolden or upset OSHA. But I think at the point where you've got a third party there that you just don't think it's a good idea to have them coming into your facility for a variety of reasons. And in particular, if you don't think they're going to aid in the process, you have every right and you've always had a right to ask that the government get a search warrant. So that's

certainly another option for you as well.

Absolutely. Thank you, Adam. And of course, in that context of requiring a search warrant, then, you know, they have an ex parte proceeding that would occur in front of a judge to have the warrant approved so that might open the window for an opportunity to have that conversation about the propriety of this third party person at your site. Catherine, let me wrap up with you. Do you have any other thoughts in terms of what employers should be thinking about?

I agree with Adam on the front end. Think through whether it does make sense to require a search warrant instead of just opening the doors and letting the third parties come right in. But if you are going to allow the inspection or if OSHA gets their search warrant and you have the third party present, particularly in the union organizing context, I think that you want to just keep in mind that according to OSHA, this party cannot be disruptive. They're only there to help and aid OSHA in their investigation. So keep that in mind. And if there are situations where you think the person is potentially going outside of those bounds, then speak up and make sure that you are keeping tabs on what's going on, that you're sticking with OSHA and that third party. We're not just letting them wander around your workplace unattended and keeping tabs on them and raising concerns as we feel appropriate.

Right. And I can't tell you many times, I'm sure you both see and I see where an employer tries this appeasement strategy with OSHA, which never seems to work. And it sounds like what I'm hearing from both of you is that, employers who may need to assert themselves a little bit more in a professional manner to ensure that their interests are being guarded during these inspections with a third party there.

Yeah, I agree with that. Well, good. Well, thank you both for your time. This is great. And again, this is going live and the rule will be in effect on May 31st unless something is enjoined. And so I'm sure the two of you and our practice group will be working diligently to develop best practices to help to safeguard the interests of employers as this rule goes forward. Thank you both so much and look forward to having you again.

Thanks, Courtney.

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