Lawyer Insights

OSHA Walk-Around Proposal Opens Inspection To Outsiders

OSHA recently announced a proposed rule that would give non-employees a path to participate in worksite investigations.

By Susan Wiltsie and Reilly Moore
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The Occupational Safety and Health Administration ("OSHA") recently announced a Notice of Proposed Rulemaking that would make it easier for non-employee representatives to participate in worksite inspections.

OSHA compliance safety and health officers (CSHOs) regularly conduct worksite inspections, colloquially known as "walk-arounds," as part of their investigation of safety complaints or pursuant to OSHA emphasis programs. Current regulations allow employees to select a representative of their choosing to accompany the CSHOs on such inspections, as long as the representative is also an employee of the relevant employer. If employees want to select a third-party to represent them on a walk-around, the regulations require that the person be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace" and gives the examples of an industrial hygienist or safety engineer. See 29 CFR 1903.8(c).

Under OSHA's new proposal, employees could select any third-party to represent them on a walk-around inspection, as long as the CSHO determines the "reasonably necessary" standard is met. The proposal would remove the limitation that third party representatives only should be those with skills and knowledge that are the same or similar to that of industrial hygienists and safety engineers. The proposed language would permit third-party representatives based on their relevant knowledge, skills or experience with hazards or conditions in the workplace or similar workplaces, or based on their language skills.

If adopted, the proposal will open the door for outside, non-employees without any safety expertise to access sensitive workplace inspections. For instance, the Notice of Proposed Rulemaking suggests employees at a workplace may designate a union official to serve as their walkaround representative, even if the union does not represent the relevant employees in collective bargaining. It further suggests that CSHOs may determine that bilingual community organizers or advocates with no relevant safety experience may access an employer's worksite during an inspection solely because of their language skills.

And while the current proposed regulation maintains the requirement that a CSHO determine the presence of a third-party is "reasonably necessary," OSHA's request for public comments suggests it may scrap that requirement completely. OSHA has specifically asked for feedback on whether it should "defer to the employees' selection of a representative" without consideration of whether that representative would actually aid in the conduct of the inspection. Alternatively, OSHA sought comments on whether it should establish a presumption in favor of the necessity of the third-party representative.

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If OSHA adopts the proposed rule, it presents several risks for employers. First, it could compel employers to allow non-employee third-parties into sensitive areas of their workplace. While employers can require OSHA to obtain a warrant to conduct an inspection, that process imposes additional costs on employers and may lead OSHA to view them as uncooperative. Thus, employers typically do not require a warrant and simply consent to inspection of the relevant areas of their establishment. Under the new rules, consenting to an inspection could open up an employer's worksite to scrutiny by not only OSHA, but also outsiders who would otherwise have no right to access the employer's property.

Second, the proposed rule provides a clear opportunity for union organizers to use OSHA inspections as a backdoor to campaign for employee support. Since the rule would apply to both union and non-union workplaces, it is reasonable to expect unions to maintain employee contacts at non-unionized sites who promise to request union organizer participation in the event of an inspection. Pro-union employees attempting to organize their co-workers even could file complaints of questionable merit to create the possibility of a site visit. This entire set-up would permit one or more employees and their chosen union organizer to use the OSH Act for reasons wholly unrelated to safety.

Of course, the keyway to avoid any of this even if this proposed rule becomes final is to have a safe workplace which mitigates the risk of an OSHA on-site inspection. Employers should review their workplace safety policies and conduct regular audits or self-checks of their safety programs to reduce the risk of employee complaints and decrease the likelihood that OSHA has reason to show up with an undesired tag-along to explore their workplace.

Further, the best way to avoid union organizing efforts if an employer does not welcome unionization at their site is to conduct employee outreach and climate assessments of employee morale and workplace issues and take steps to improve any identified issues.

If OSHA adopts the proposed rule, then employers should keep other ideas in mind:

- Carefully consider the pros and cons of requiring a warrant in each instance. The risk calculus for employers under the proposed rule will vary greatly depending on circumstances. If employers are not subject to union organizing, or if employees select a non-controversial third-party representative, then employers may not change their existing OSHA protocols. On the other hand, employers facing active or potential union organizing, or litigation risk, may determine these non-OSHA concerns justify a "hard ball" approach to an OSHA inspection. Before taking the step of requesting a warrant, though, an employer should explore in the opening conference whether the CSHO is willing to refuse a third-party with an obvious organizing agenda.

- All employers should have a clear understanding of which parts of the facility contain trade secrets. If a third party is participating, employers must make it clear in the opening conference which areas of the site the third party may not access.

The Department of Labor will receive comments from stakeholders on the proposed regulation until October 30, 2023. It is likely that a revised rule will be released sometime in 2024. Manufacturing employers may want to submit comments on the record by the deadline to document their objections to the proposal.

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